NORTH CAROLINA REPORTS

VOLUME 350

SUPREME COURT OF NORTH CAROLINA

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IN MEMORIAM

LOUIS B. MEYER, JR.

ASSOCIATE JUSTICE
9 JANUARY 1981 - 31 DECEMBER 1994

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THE SUPREME COURT
OF
NORTH CAROLINA

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FRANKLIN E. FREEMAN, JR.[2]

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JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.

Former Justices

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---

1. Appointed Chief Justice by Gov. James B. Hunt, Jr. and sworn in 1 November 1999 to replace Burley B. Mitchell, Jr. who retired 1 November 1999.
2. Appointed by Gov. James B. Hunt, Jr. and sworn in 9 November 1999 to replace Henry E. Frye who became Chief Justice.
3. Deceased 25 December 1999.
4. Appointed by the Supreme Court effective 1 December 1999 to replace Louise H. Stafford who retired 30 November 1999.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
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2	William C. Griffin, Jr.	Williamston
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	JACK A. THOMPSON	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
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	L. TODD BURKE	Winston-Salem
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SPECIAL EMERGENCY JUDGE

DONALD L. SMITH	Raleigh

1. Appointed to a new position and sworn in 16 April 1999.
2. Appointed and sworn in 20 December 1999 to replace George L. Wainwright, Jr. who was elected to the North Carolina Supreme Court.
3. Appointed and sworn in 17 December 1999 to replace James D. Llewellyn who retired 1 August 1999.
4. Appointed and sworn in 3 March 2000 to replace Jerry Cash Martin who retired 1 January 2000.
5. Appointed and sworn in 28 January 2000.
6. Appointed and sworn in 24 March 2000 to replace John Mull Gardner who retired 29 February 2000.
7. Appointed and sworn in 14 February 2000.
8. Appointed and sworn in 29 November 1999.
9. Appointed and sworn in 5 August 1999.
10. Appointed and sworn in 1 January 2000.

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	STANLEY PEELE	Chapel Hill
	MARGARET L. SHARPE	Winston-Salem
	KENNETH W. TURNER	Rose Hill

RETIRED/RECALLED JUDGES

ROBERT T. GASH	Brevard
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed Chief Judge effective 1 December 1999 to replace E. Burt Aycock, Jr. who retired 30 November 1999.
2. Appointed to a new position and sworn in 9 July 1999.
3. Appointed and sworn in 10 February 2000.
4. Appointed and sworn in as Chief Judge 1 October 1999 to replace Stephen M. Williamson who retired 30 September 1999.
5. Appointed to a new position and sworn in 1 July 1999.
6. Appointed and sworn in 17 December 1999.
7. Appointed and sworn in 27 August 1999 to replace M. Alexander Biggs, Jr. who retired 31 March 1999.
8. Appointed and sworn in 31 March 2000 to replace Paul L. Jones who was appointed and sworn in as Superior Court Judge 17 December 1999.
9. Appointed to a new position and sworn in 30 July 1999.
10. Appointed to a new position and sworn in 25 June 1999.
11. Appointed and sworn in 4 February 2000.
12. Appointed Chief Judge effective 1 April 2000.
13. Resigned as Chief Judge effective 31 March 2000.
14. Appointed and sworn in as Superior Court Judge 3 March 2000.
15. Appointed and sworn in 28 August 1999 to replace Charles L. White who resigned 30 June 1999.
16. Appointed to a new position and sworn in 3 January 2000.
17. Appointed to a new position and sworn in 2 July 1999.
18. Appointed to a new position and sworn in 6 August 1999.
19. Appointed and sworn in as Superior Court Judge 28 January 2000.
20. Appointed to a new position and sworn in 6 July 1999.
21. Appointed to a new position and sworn in 30 July 1999.
22. Appointed Chief Judge effective 29 March 2000 to replace James W. Morgan who was appointed and sworn in as Superior Court Judge 24 January 2000.
23. Appointed and sworn in 25 February 2000 to replace James Thomas Bowen III who retired 31 December 1999.
24. Appointed to a new position and sworn in 11 August 1999.
25. Appointed and sworn in 7 December 1999.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN W. RABON

Deputy Attorney General for Policy and Planning
HAMPTON DELLINGER, JR.

General Counsel
JOHN D. HOBART, JR.

Special Counsel
ELIZABETH P. YERXA

Chief Deputy Attorney General
EDWIN M. SPEAS, JR.

Senior Deputy Attorneys General

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JAMES COMAN
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Ann Cox Rowe ..... Winston-Salem
Clinton David Rowe ..... Havelock
Stacey Dawn Rubain ..... Winston-Salem
Clinton Louis Rudisill ..... Fayetteville
Brian Scott Rudolph ..... Charlotte
Krista Leigh Rush ..... Durham
Danielle Marie Salgat ..... Fairgrove, Michigan
Brunson M. Salley, III ..... Winston-Salem
J. Mark Sampson ..... Raleigh
Laura Alison Santangini ..... Southern Pines
Travis Philip Sasser ..... Cary
James Royal Saunders ..... Nashville
A. Gregory Schell ..... Winston-Salem
Michael Joseph Schepis ..... Charlotte
David G. Schiller ..... Raleigh
Walter A. Schmidlin, III ..... Raleigh
Jill Arlana Schnabel ..... Raleigh
Carolyn Widay Scogin ..... Raleigh
Christopher Martin Scott II ..... Fair Bluff
Sharon Lynne Setzer ..... Bristol, Rhode Island
Wendy Irene Sexton ..... Raleigh
Karen Geneva Misbach Shaich ..... Wilmington
Margaret Elizabeth Shankle ..... Rockingham
Kara Lynn Sheppard ..... Wendell
Ryan Michael Shuirman ..... Raleigh
Elizabeth Ann Sibley ..... Lawndale
Cynthia Marie Siemasko ..... Waxhaw
Kimberley Weber Silver ..... Durham
Cameron David Simmons ..... Rock Hill, South Carolina
Daniel Robert Simon ..... Hillsborough
Ryan James Smalley ..... Winston-Salem
Harriett Jean Twiggs Smalls ..... Greensboro
Ruth Campbell Smith ..... Raleigh

David Curtis Smith ..... Durham
Paul Jonathan Smith ..... Winston-Salem
Claudia Lynn Smith ..... Charlotte
Todd Allen Smith ..... Burlington
Roger William Smith, Jr. ..... Raleigh
Cynthia Claire Snyder ..... Durham
Paula Barnes Sours ..... Cary
Aaron G. Spencer ..... Raleigh
Matthew Philip Sperati ..... Rocky Mount
Roberta Stolpen Sperry ..... Wilmington
George Hicks Sperry, Jr ..... Wilmington
Kyle Micah Sprenger ..... Bradenton, Florida
James W. Sprouse, Jr. ..... Knightdale
Alexis N. Stackhouse ..... Chapel Hill
Stephanie Elaine Stark ..... Greensboro
Eva Frieda Stein ..... Cary
Ann Shaffer Stelts ..... Rock Hill, South Carolina
William Laurence Stevenson ..... Buies Creek
Rosalind Rushing Stewart ..... Greensboro
Sean Anthony Stoner ..... Charlotte
Marguerite Helene Eubanks Stricker ..... St. Augustine, Florida
J. Michael Strickland ..... Durham
Rick Ian Suberman ..... Chapel Hill
Andrew Kirk Susong ..... Greensboro
David Socrates Swerdlick ..... Chapel Hill
Nathan Jessee Taylor ..... Charlotte
Ritchie W. Taylor ..... Raleigh
Jason Napoleon Thelen ..... Batesville, Virginia
Mark Verbeck Thigpen ..... Charlotte
Tara Elizabeth Cannon Thomas ..... Greensboro
F. Scott Thomas ..... Winston-Salem
Bryan Carlton Thompson ..... Bermuda Run C/C
Kelly Raynetta Thompson ..... Durham
John L. Tidball, V ..... Raleigh
Linda Birkin Tigges ..... Raleigh
Jesse Melvin Tillman, III ..... Fuquay-Varina
Brenda Denise Toineeta ..... Arlington, Virginia
Karen M. Torre ..... Winston-Salem
Becki Lynn Truscott ..... Chapel Hill
James Michael Tucker ..... Charlotte
Robin M. Tuczak ..... Fayetteville
Suzanne Denise Vahdat ..... Bahama
Paul Vancil ..... Chapel Hill
Jonathan M. VandenBosch ..... Wilson
Jacalyn Nicole Vandiver ..... Davidson
Andrew Hastings Veach ..... Kernersville
Gregory Ronald Vetter ..... Apex
Kathryn Frances Voyer ..... Greensboro
Wyatt J. Wachtel ..... Charlotte
R. Brent Walker ..... Durham
Frank Marshall Wall ..... Raleigh

Kathleen C. Wallace ..... Durham
Terry LaMonte Wallace ..... Chapel Hill
Kathryn Cameron Walton ..... Chadbourn
Diane Esther Walton ..... Asheville
Benton H. Walton, IV ..... Chadbourn
Louis Arthur Waple II ..... Coats
Joseph Kellam Warren ..... Asheville
Yvonne V. Watford-McKinney ..... Knightdale
Charles Andrew Wattleworth ..... Winston-Salem
William Woodward Webb, Jr. ..... Raleigh
Brett Gailmard Weber ..... Raleigh
Dixie Thomas Wells ..... Greensboro
Patti Jo West ..... Raleigh
Harmony Whalen ..... Chapel Hill
Sonya Lakesha Whitaker ..... Durham
John Charles White ..... Pinehurst
Jacqueline Mary White ..... Raleigh
Harry Ramsey White, III ..... Charlotte
Robert E. Wick, III ..... Charlotte
Stacy C. Willard ..... Charlotte
Tonya Nicole Williams ..... Carrboro
Bradford Alan Williams ..... Cary
Stacy L. Williams ..... Cornelius
Brian Fred Williams ..... Mocksville
Chaton Turner Williams ..... Charlotte
Donald Robert Williams, Jr. ..... Durham
Holly N. Wilson ..... Fayetteville
William Gardner Winter ..... Winston-Salem
Matthew West Witsil ..... Chapel Hill
Rachel Doryce Worlds ..... Charlotte
William Grainger Wright ..... Raleigh
Alan Edward Wrobel ..... Raleigh
Linnie Lee Young, Jr. ..... Chapel Hill
Beth Ann Yount ..... Charlotte
Michael Andrew Zahn ..... Charlotte
Todd Patrick Zerega ..... Lebanon, New Hampshire

Given over my hand and seal of the Board of Law Examiners this the 1st day of September, 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 30th day of July, 1999, and said person has been issued a certificate of this Board:

Michael A. Dubin ..... Applied from the State of Missouri

Given over my hand and seal of the Board of Law Examiners this 1st day of September, 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 27th day of August, 1999, and said person has been issued a certificate of this Board:

Simon James Marle .....Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this 1st day of September, 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 21st day of August, 1999 and said person has been issued a license certificate.

JULY 1999 NORTH CAROLINA BAR EXAMINATION

Dorothy Hunt Wilson .....Charlotte

Given over my hand and seal of the Board of Law Examiners this the 8th day of September, 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 21st day of August, 1999 and said person has been issued a license certificate.

JULY 1999 NORTH CAROLINA BAR EXAMINATION

David P. Hathaway .....Raleigh

Given over my hand and seal of the Board of Law Examiners this the 13th day of September, 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 10th day of September, 1999 and said persons have been issued license certificates.

FEBRUARY 1999 NORTH CAROLINA BAR EXAMINATION

Todd David Anderson ..... Virginia Beach, Virginia
Marylin Elizabeth Culp ..... Largo, Florida
Jennifer Lynn Fox ..... Pinehurst
Joshua Matthew Henderson ..... Rock Hill, South Carolina
Chekesha Nataki Jones ..... Grifton
Sandra M. Lazorcheck ..... Charlotte
Jacqueline Marie Mraz ..... Charlotte
Heidi Hamby Stewart ..... Asheville

JULY 1999 NORTH CAROLINA BAR EXAMINATION

Gregory Paul Abaray ..... Kissimmee, Florida
W. Dan Bell ..... Carolina Beach
Tierney Lane Bianconi ..... Charlotte
Danny Neil Bowz ..... Metaine, Louisiana
Anne Rachel Brown ..... Wake Forest
Craig Smith Bulkeley ..... Asheville
George Vincent Burns ..... Raleigh
Michelle Leigh Carswell-Pritchard ..... Morganton
Wanda Carter ..... Charlotte
Mary Virginia Wheatley Cartner ..... Asheville
Avery Michelle Lowery Crump ..... Henderson
Lori S. D'Alessio ..... Winston-Salem
Theodore Olds Dardess ..... Chapel Hill
Brian Michael Davis ..... Charlotte
William Patrick Donahue ..... Sanford
Kerry Brindley Everett ..... Charlotte
Jonathan Marc Fine ..... Raleigh
Brian V. Fitzgerald ..... Raleigh
Timothy Gerald Fowler ..... Benson
Garland Virginia Gibbes ..... Greensboro
David Paul Gloekler ..... Durham
Cynthia Ann Gray ..... Charlotte
Robert Evans Harrington ..... Charlotte
Jennifer Took Harrod ..... Mebane
Edwin C. Hodge ..... Raleigh

Dennis Christopher Howard ..... Winston-Salem
Christopher John Corris Jones ..... Huntersville
Winnie Michelle Jordan ..... Irving, Texas
Christopher Pharis Justice ..... Greensboro
Tara Corlette Kenchen ..... Durham
Alana Grace Kriegsman ..... Greensboro
Ayn Muse Middleton ..... Durham
Steven William Miller ..... Raleigh
Matthew James Norris ..... Williamsville, New York
Jeffrey Blake Nowell ..... Winston-Salem
Charlotte Nancie Quick ..... Black Mountain
Bonnie Elizabeth Rossi ..... Greensboro
David Matthew Shub ..... Greensboro
William Stetzer ..... Dodge City, Kansas
Georgiana Jirakitti Wallace ..... Charlotte
Robert Ancil Whitlow ..... Charlotte
Gregory Aaron Zills ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 13th day of September, 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 17th day of September, 1999 and said persons have been issued a license certificate.

JULY 1999 NORTH CAROLINA BAR EXAMINATION

David Allen Bohm ..... Raleigh
Michael David Bradford ..... Durham
Jack Williams Daly ..... Raleigh
David M. Kern ..... Chapel Hill
Kenneth L. Poortvliet ..... Knightdale
Matthew Kyle Rogers ..... Winston-Salem
Neal Birnbach Wolgin ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 24th day of September, 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 17th day of September, 1999, and said persons have been issued a certificate of this Board:

RECENTLY ADMITTED COMITY APPLICANTS

Evan Greely Lewis ..... Applied from the State of Virginia
Tamara Jean Stringer ..... Applied from the District of Columbia
William Henry Finlay ..... Applied from the State of Pennsylvania
Terry Hunter Davis, Jr. ..... Applied from the State of Virginia
Neil Samuel Lowenstein ..... Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 24th day of September, 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 29th day of October, 1999 and said persons have been issued a license certificate.

FEBRUARY 1999 NORTH CAROLINA BAR EXAMINATION

Jeffrey Mitchell Wise ..... Oakahoma City, Oklahoma
Thomas V. Milo ..... Fort Lauderdale, Florida

JULY 1999 NORTH CAROLINA BAR EXAMINATION

Brian Patrick Hayes ..... Sherrills Falls

Given over my hand and seal of the Board of Law Examiners this the 2nd day of November, 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 19th day of November, 1999, and said persons have been issued a certificate of this Board:

Larry Wayne Johnson ..... Applied from the State of Oklahoma
John Power Reilly ..... Applied from the State of New York
Katherine Evans Lewis ..... Applied from the State of Tennessee
Robert Sidney Brewbaker, Jr. ..... Applied from the State of Virginia

Richard F. Aufenger III .....Applied from the State of Virginia
Trevor Michael Fuller .....Applied from the District of Columbia
Mayur H. Amin .....Applied from the State of Texas
William Daniel Carroll .....Applied from the State of Illinois
John G. Cameron, Jr. .....Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 29th day of November, 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 26th day of November, 1999 and said person has been issued a license certificate.

JULY 1999 RECENTLY ADMITTED APPLICANT

Jacob Christian Ehrmann .....Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 29th day of November, 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 3rd day of December, 1999, and said person has been issued a certificate of this Board:

Mark Vasco .....Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 3rd day of December, 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 17th day of December, 1999 and said persons have been issued a license certificate.

LICENSED ATTORNEYS

FEBRUARY 1999 RECENTLY ADMITTED APPLICANTS

Raymond Stephen Koloski ..... Charlotte
Michael B. Pross ..... Cornelious

JULY 1999 RECENTLY ADMITTED APPLICANTS

Matthew Gilmore Bibbens ..... Greensboro
Bernard P. Condlin ..... Fayetteville
Earl Todd Dempster ..... Greensboro
Deni Devine ..... Charlotte
Diane Lynn Williams Easley ..... North Garden, Virginia
Donald William Luther ..... Atlanta, Georgia
Carl Bruce Massey, Jr. ..... Clemmons
Linda Rosillo Mulligan ..... Tamarac, Florida
Thomas M. Tracy ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 20th day of December, 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 17th day of December, 1999, and said persons have been issued a certificate of this Board:

Edward Lee Pauley ..... Applied from the State of West Virginia
Isidore Timothy Zarsadias ..... Applied from the State of Pennsylvania
Patricia A. Pritchard ..... Applied from the State of Colorado
Lillian Gudzy Wilson ..... Applied from the State of New York
Patrick Francis Brown ..... Applied from the District of Columbia
Kurt T. Oosterhouse ..... Applied from the State of Wisconsin
Kelly Ann Stevens ..... Applied from the State of Missouri
Ronda C. Gunter ..... Applied from the State of West Virginia
Joseph B. Cagney ..... Applied from the State of Illinois
Brooke A. Adams ..... Applied from the State of Illinois
David Allen Hebner ..... Applied from the District of Columbia
Stephanie Kilpatrick Gudeman ..... Applied from the State of Indiana
Sharon Altman Hatton ..... Applied from the State of New York
Jeffrey Alan Hyman ..... Applied from the State of Colorado
Scott Brian Murray ..... Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 21st day of December, 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 person duly passed the examinations of the Board of Law Examiners as of the 24th day of December, 1999 and said person has been issued a license certificate.

JULY 1999 NORTH CAROLINA BAR EXAMINATION

Carol Jane Earp Ludwig ..... Rocky Mount

Given over my hand and seal of the Board of Law Examiners this the 28th day of December, 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 7th day of January, 2000, and said person has been issued a certificate of this Board:

Aleece M. Hiller ..... Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners this the 11th day of January, 2000.

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 7th day of January, 2000 and said person has been issued a license certificate.

JULY 1999 NORTH CAROLINA BAR EXAMINATION

Tonya M. Jesso ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 11th day of January, 2000.

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 21st day of January 2000, and said persons have been issued a certificate of this Board:

Patrick Edward Neighbors ..... Applied from the State of Virginia
William Robert Soukup ..... Applied from the State of Ohio
Claudia Lauren Reisch ..... Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 31st day of January, 2000.

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 18th day of February, 2000, and said person has been issued a certificate of this Board:

James Scott Bayne ..... Applied from the State of Iowa

Given over my hand and seal of the Board of Law Examiners this the 18th day of February, 2000.

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. DAVID KENT WILLIAMS

No. 389A96

(Filed 5 February 1999)

1. **Appeal and Error— assignments of error—multiple issues—argumentation**

Assignments of error violated Appellate Procedure Rule 10(c)(1) and are subject to dismissal where they raised multiple issues of law and include argumentation. N.C. R. App. P. 10(c)(1).

2. **Appeal and Error— brief—questions presented—reference to assignments of error**

Defendant violated the rule that a reference to the assignments of error pertinent to each question be referred to immediately following such question where defendant set forth several arguments in his brief with a cluster of assignments referred to after each such argument, but each of those arguments includes many subheadings in which separate questions are stated without reference to any assignment of error.

3. **Sentencing— capital sentencing—mitigating circumstance—no significant criminal history—State's rebuttal evidence—findings not required**

While the trial court was obligated to determine that a rational juror could find that defendant had no significant history

of criminal activity before submitting the (f)(1) mitigating circumstance to the jury, there is no requirement that the determination be made prior to the admission of the State's evidence rebutting defendant's evidence supporting this mitigator. Furthermore, the trial court was not required to make findings of fact to explain its decision to submit the (f)(1) mitigating circumstance. N.C.G.S. § 15A-2000(f)(1).

4. Sentencing— capital sentencing—mitigating circumstance—history of criminal activity—evidence of extent and significance

Once any evidence is introduced in a capital sentencing proceeding tending to show a history of prior criminal activity by defendant, defendant and the State are free to present all evidence available concerning the extent and significance of that history. Accordingly, where defendant testified that he had been convicted of misdemeanors for several assaults on his wife and his girlfriends, communicating threats, trespassing, possession of stolen property, and traffic offenses, and that he had a history of buying, possessing and selling drugs, the State was properly allowed to question defendant on cross-examination about the details of his criminal history and to question several witnesses, including his ex-wife and former and current girlfriends, about defendant's assaults and other criminal activity.

5. Sentencing— capital sentencing—history of criminal activity—cross-examination of defendant

In a capital sentencing proceeding wherein the no significant history of criminal activity mitigating circumstance was at issue, the State's cross-examination of defendant regarding the details of his criminal history was not limited to the name of each crime, the time and place of conviction, and the punishment imposed.

6. Sentencing— capital sentencing—mitigating circumstance—no significant criminal history—submission over defendant's objection

The trial court did not err by submitting the no significant history of prior criminal activity mitigating circumstance to the jury over defendant's objection where evidence tended to show that defendant had been convicted of numerous misdemeanor assaults on females and various other offenses, including com-

municating threats, trespass, possession of stolen property, and traffic offenses, and that the most serious of defendant's prior convictions were for assaults on his wife and girlfriends. A rational juror could find defendant's history of prior criminal activity, which consisted mostly of misdemeanors, to be insignificant with regard to the jury's capital sentencing recommendation.

7. Criminal Law— capital sentencing—prosecutor's closing argument—mitigating circumstances—request by defendant—(f)(1) circumstance submitted over objection

Defendant was not prejudiced by the prosecutor's closing argument in a capital sentencing proceeding that the mitigating circumstances had been requested by defendant when defendant had objected to submission of the (f)(1) mitigating circumstance of no significant history of criminal activity where that argument was not directed specifically toward the (f)(1) mitigator but to the mitigating circumstances in their totality; the prosecutor expressly told the jury that the (f)(1) mitigator was a statutory mitigating circumstance and was not submitted by counsel for defendant; and the trial court instructed the jury that defendant did not request the (f)(1) mitigating circumstance and that this circumstance must be submitted as a matter of law.

8. Constitutional Law— capital sentencing—mitigating circumstance—no significant criminal history—submission over defendant's objection—effective assistance of counsel

The trial court did not violate defendant's Sixth Amendment right to the effective assistance of counsel by submitting the (f)(1) no significant history of criminal activity mitigating circumstance to the jury over defendant's objection.

9. Discovery— intent to call psychiatrist—discovery of report—psychiatrist not called

Where counsel for defendant had indicated that they intended to call a psychiatrist to testify at defendant's capital sentencing proceeding at the time the trial court ordered defendant to provide a copy of the psychiatrist's report to the State, the State had a right to discover the report under N.C.G.S. § 15A-905(b) even though defense counsel ultimately decided not to call the psychiatrist to testify or to introduce his report into evidence.

10. Constitutional Law— effective assistance of counsel—failure to object—State's entitlement to report

Defense counsel's failure to object to the prosecutor's alleged misrepresentation of a pretrial order relating to a psychiatrist's report at the time the trial court ordered disclosure of the report to the State did not constitute ineffective assistance of counsel where the State was entitled to discover this report.

11. Evidence— competency evaluation—communications not privileged—access to complete Dix Hospital file—interviews with psychiatrist

Where the record shows that the objective of defendant's commitment to Dix Hospital was a competency evaluation and, although the court order committing defendant to Dix Hospital mentioned that defendant had expressed "suicidal thoughts," there was no indication in the record that a psychiatrist at Dix Hospital and his case analyst examined or communicated with defendant for any purpose other than determining defendant's competency, defendant's communications with the psychiatrist and his case analyst were not protected by physician-patient, psychologist-client, or attorney work product privileges, and the trial court did not err by granting the State access to defendant's complete Dix Hospital file and by allowing the prosecutor to conduct unrestricted interviews with the psychiatrist and his case analyst. Assuming arguendo that defendant's communications with the psychiatrist and his case analyst were privileged, the trial court had the discretion to compel disclosure of such communications as necessary to the proper administration of justice, and such a finding was implicit in the court's disclosure order.

12. Discovery— competency evaluation—improper discovery of complete file—altercation by defendant at Dix Hospital—use for rebuttal—proper administration of justice

Assuming arguendo that the prosecutor had no right to discover a copy of defendant's complete Dix Hospital file and learned of a verbal altercation defendant had with an attendant in the cafeteria at Dix Hospital by reading that file, the trial court properly allowed a health care technician at Dix Hospital to testify about his observation of the altercation to rebut testimony by a jail minister that defendant always treated her with respect and honor and to insure the proper administration of justice.

13. Criminal Law— capital sentencing—prosecutor's argument—future dangerousness

The prosecutor's use of a verbal altercation by defendant with an attendant at Dix Hospital shortly before his return to Central Prison as an example in arguing in this capital sentencing proceeding that defendant treats people with respect only when he needs something from them was a proper argument about the future dangerousness of defendant.

14. Criminal Law— capital sentencing—objections sustained—failure to give curative instructions

The trial court did not commit prejudicial error in a capital sentencing proceeding by failing to give curative instructions after sustaining defendant's objections to improper questions about defendant's conduct in jail and improper argumentative questions where defendant did not request curative instructions and failed to show that the mere asking of the questions prejudiced him.

15. Criminal Law— capital sentencing—prosecutor's closing argument—disregard of plea for mercy

The prosecutor's closing argument in a capital sentencing proceeding to the effect that the facts and the law justified the death penalty and that defendant's plea for mercy should be disregarded was not improper.

16. Criminal Law— capital sentencing—prosecutor's closing argument—Biblical references—no gross impropriety

It is not so grossly improper for a prosecutor to argue in a capital sentencing proceeding that the Bible does not prohibit the death penalty as to require intervention ex mero motu by the trial court, but such arguments are discouraged. All counsel should base their jury arguments solely upon the secular law and the facts.

17. Criminal Law— capital sentencing—prosecutor's closing argument—inability to adapt to prison life—future dangerousness

When read in context, the prosecutor's argument in a capital sentencing proceeding focused on defendant's inability to adapt to prison life if given a life sentence and did not improperly allude to the possibility of parole where the prosecutor never used the word "parole" and never mentioned the possibility that

a life sentence would mean that defendant would eventually be released. Furthermore, it was not improper for the prosecutor to urge the jury to recommend death out of concern for the future dangerousness of defendant.

18. Criminal Law— capital sentencing—prosecutor's closing argument—injection of personal beliefs—absence of prejudice

Although no evidence in the record supported the prosecutor's characterization of the effects of crack cocaine in his closing argument in a capital sentencing proceeding, defendant is not entitled to a new capital sentencing proceeding because this very brief argument did not so infect the trial with unfairness as to deny defendant due process of law, and the trial court's instructions on the duty of jurors to rely on their own recollection of the evidence and that they should disregard personal opinions stated in the arguments cured any prejudice from the prosecutor's improper injection of personal beliefs into his argument.

19. Jury— capital punishment views—excusal for cause without rehabilitation

The trial court did not err in allowing the State's motions to excuse prospective jurors for cause based on their opposition to capital punishment without giving defendant the opportunity to rehabilitate them where all of these prospective jurors stated with unmistakable clarity that their personal or religious beliefs would prevent them from voting to recommend the death penalty under any circumstances, and the trial court asked final questions to clarify each juror's inability to recommend the death penalty before dismissing such juror.

20. Sentencing— capital sentencing—mitigating circumstance—inability to appreciate criminality—peremptory instruction—controverted evidence

The trial court did not err by denying defendant's request for peremptory instructions in a capital sentencing proceeding on the statutory mitigating circumstance concerning his inability to appreciate the criminality of his conduct or to conform his conduct to the law where defendant contended that uncontroverted evidence at trial tended to show that defendant was on an uncontrollable crack binge on the night of the crime and could not possibly have conformed his behavior, but defendant's own testimony at trial indicated that he understood the wrongfulness of his conduct at the time of the killing. N.C.G.S. § 15A-2000(f)(6).

21. Sentencing— capital sentencing—mitigating circumstance—definition—instructions

The trial court's instructions defining the concept of a "mitigating circumstance" did not preclude the jury from considering any aspect of defendant's character or background or any of the circumstances of the killing that defendant may have presented as a basis for a sentence less than death; rather, the instructions were virtually identical to instructions approved by the N. C. Supreme Court in previous decisions.

22. Evidence— capital sentencing—crime scene, autopsy and other photographs

The trial court did not err in a capital sentencing proceeding by its admission of photographs of the murder victim's house and neighborhood to illustrate the testimony of the victim's neighbor and her nephew regarding what they saw on the night of the crime; a photograph of the victim on the night of the killing to illustrate testimony of the victim's nephew and brother-in-law about the injuries they observed following the killing; and five photographs of the victim taken by the forensic pathologist to illustrate his testimony about the injuries to the victim's head and vaginal area that he observed during his autopsy. Furthermore, photographs of the victim on the day after the killing were relevant to the issue of whether the murder was heinous, atrocious or cruel.

23. Evidence— capital sentencing—crime scene photograph—crucifix—photograph of victim when alive

The fact that a crime scene photograph depicted a crucifix over the murder victim's bed did not so infect the capital sentencing proceeding with unfairness as to violate defendant's due process rights. Furthermore, it was not error for the trial court to admit a photograph of the victim as she appeared when alive.

24. Sentencing— capital sentencing—death penalty statute—constitutionality

The North Carolina Death Penalty Statute, N.C.G.S. § 15A-2000, is constitutional.

25. Sentencing— capital sentencing—death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant pled guilty to first-degree murder under the theory of premedita-

tion and deliberation as well as the felony murder rule; the evidence tended to show that defendant brutally assaulted the victim in her own bedroom in the early morning hours; the twenty-nine-year-old defendant repeatedly and brutally beat and raped the eighty-three-old victim during an attempt to steal money to enable him to buy more crack cocaine; and the jury found as aggravating circumstances (1) that the murder was committed by defendant while he was engaged in committing first-degree burglary, (2) that the murder was committed by defendant while he was engaged in committing first-degree rape, and (3) 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.

Justices MARTIN and WAINWRIGHT 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 Manning, J., on 23 July 1996 in Superior Court, Bertie County, upon defendant's plea of guilty to 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 13 October 1997. Heard in the Supreme Court on 28 May 1998.

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

Marilyn G. Ozer and William F.W. Massengale for defendant-appellant.

MITCHELL, Chief Justice.

On 20 December 1995, defendant David Kent Williams was indicted for first-degree murder, first-degree rape, two counts of first-degree burglary, misdemeanor assault on a female, and assault with a deadly weapon inflicting serious injury. Defendant was tried capitally at the 24 June 1996 Criminal Session of Superior Court, Bertie County. Prior to the commencement of trial, defendant pled guilty to first-degree murder under the theory of premeditated and deliberate murder and the felony murder rule. Defendant also pled guilty to all of the other charges against him.

After a separate capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder of Etta

Plunkett, and the trial court sentenced defendant accordingly. In addition, the trial court imposed consecutive sentences of imprisonment for defendant's other convictions.

The State's evidence tended to show *inter alia* that around 4:30 a.m. on 28 October 1995, defendant broke into the Lewiston, North Carolina, home of Stella Whitney and went into the living room where Ms. Whitney; her grandson; and her sixteen-year-old daughter, Jereline, were sleeping. Defendant assaulted Jereline and Ms. Whitney and then fled after the Whitneys managed to escape to their landlord's home for help.

After fleeing the Whitney home, defendant broke into the home of Etta Plunkett, a neighbor of Ms. Whitney's. Defendant brutally beat Ms. Plunkett, an eighty-three-year-old woman, in the course of robbing and raping her. When police and family members entered Ms. Plunkett's home around 5:25 a.m., they found her in her bedroom, unconscious and struggling to breathe. Ms. Plunkett died four days later, without regaining consciousness, due to extensive blunt force injuries to her head which resulted in a large blood clot compressing her brain.

An autopsy revealed that Ms. Plunkett's face, neck, and chest had been severely beaten. She had suffered at least six severe blows to the head and four broken ribs. In addition, there were tears or cuts both to the vulva as well as deep within her vagina.

Defendant was arrested on the morning of 28 October 1995 and admitted breaking into the Whitney and Plunkett homes. Defendant said that he had consumed a lot of crack cocaine and alcohol during the preceding night and that while he remembered breaking into the Whitney and Plunkett homes, he did not remember the assaults which followed.

[1],[2] In reviewing this case on appeal, we note at the outset that many of defendant's assignments of error raise multiple issues of law and include argumentation. These assignments of error are subject to dismissal, as they violate the mandate of Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1). Further, the numbered arguments contained in defendant's brief fail to comply with the rules. Rule 28(b)(5) requires that each question raised by

the appellant "shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C. R. App. P. 28(b)(5). Defendant in the present case has set forth several arguments in his brief with a cluster of assignments referred to after each such argument. However, each of those arguments includes many subheadings in which separate questions are stated without reference to any assignment of error. This violates the rule that a reference to the assignments of error pertinent to each question be referred to immediately following such question. Therefore, these questions are not properly before this Court and are subject to dismissal. Nevertheless, because we are able with considerable difficulty to determine which assignments may be pertinent to most of the questions presented, and as this is a capital case, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review the questions raised.

Defendant first argues that in his capital sentencing proceeding, the trial court erroneously allowed into evidence details of his prior criminal activity. Defendant argues that the trial court erred in this regard because it believed that once evidence of prior criminal activity by defendant had been admitted into evidence, it had no choice but to submit to the jury for its consideration the (f)(1) mitigating circumstance that defendant had "no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1997).

The statute governing capital sentencing proceedings mandates that:

> In all cases in which the death penalty may be authorized, the judge *shall include* in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which *may be supported by the evidence* . . . .

N.C.G.S. § 15A-2000(b) (emphasis added). This Court has explained the law regarding submission of the (f)(1) mitigating circumstance as follows:

> "The trial court is required to determine whether the evidence will support a rational jury finding that a defendant has no significant history of prior criminal activity. *State v. Wilson*, 322 N.C.

> 117, 367 S.E.2d 589 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988)."

State v. Smith, 347 N.C. 453, 469, 496 S.E.2d 357, 366 (quoting *State v. Mahaley*, 332 N.C. 583, 597, 423 S.E.2d 58, 66 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995)), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3232 (1998). "Significant" means that the defendant's prior criminal activity is likely to influence the jury's sentencing recommendation. *State v. Williams*, 343 N.C. 345, 371, 471 S.E.2d 379, 393 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 618 (1997). The determination of whether a defendant's criminal history is or is not significant requires a quantitative as well as a qualitative analysis of his criminal activity. *State v. Maynard*, 311 N.C. 1, 27, 316 S.E.2d 197, 212, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). " '[I]t is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether . . . a rational juror could conclude that this mitigating circumstance exists.' " *State v. Ball*, 344 N.C. 290, 310, 474 S.E.2d 345, 357 (1996) (quoting *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 561 (1997).

Once a defendant introduces evidence which would support submission of the (f)(1) mitigator, the State is entitled to cross-examine defendant regarding the details of defendant's prior criminal activity and to introduce evidence to fully show the nature of defendant's history of prior criminal activity. *Maynard*, 311 N.C. at 27-31, 316 S.E.2d at 212-14. Defendant testified, in his case in chief, that he had been convicted of several assaults on his wife and girlfriends including two assaults with a deadly weapon (his fists), communicating threats, trespassing, possession of stolen property, and traffic offenses. Defendant testified that this criminal activity resulted in convictions for misdemeanors only. Defendant also admitted to a history of buying, possessing, and selling drugs and that his problems with drugs and alcohol were contributing factors to his past criminal activity. The trial court determined that defendant's testimony would support a rational juror's finding of no significant criminal history. The trial court stated, after reading *Maynard*, that it was clear that the prosecutor could delve into the details of defend-

ant's prior criminal history by cross-examination of defendant in order to rebut defendant's evidence which tended to support the (f)(1) mitigator.

[3] Defendant argues that before allowing the State to present its rebuttal evidence, the trial court was obligated to first determine that a rational juror could find from the evidence that defendant had no significant history of criminal activity. While the trial court is obligated to make this determination before submitting the (f)(1) mitigator, there is no requirement that it be made prior to admitting the State's rebuttal evidence. Defendant also complains that the trial court erred because it made no findings of fact to explain its decision to submit the (f)(1) mitigating circumstance. There is no such finding requirement.

[4] The State questioned defendant on cross-examination about the details of his criminal history. The State also questioned several witnesses, including defendant's ex-wife and her parents and defendant's former and current girlfriends, about defendant's assaults and his other criminal activity. Once any evidence is introduced in a capital sentencing proceeding tending to show a history of prior criminal activity by defendant, defendant and the State are free to present all evidence available concerning the extent and significance of that history. Accordingly, the trial court did not err by admitting the State's evidence.

[5] Defendant next argues that the State's cross-examination of defendant regarding the details of his criminal history should have been limited to the name of each crime, the time and place of the conviction, and the punishment imposed. Defendant cites *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993), and N.C.G.S. § 8C-1, Rule 609(a) in support of this contention. Defendant concedes that the Rules of Evidence do not apply to capital sentencing proceedings but notes that they may be relied upon for guidance on questions of reliability and relevance. *State v. Strickland*, 346 N.C. 443, 460, 488 S.E.2d 194, 204 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 757 (1998). Defendant argues that the due process considerations which underscore Rule 609 and preclude cross-examination beyond impeaching a defendant's credibility also apply to capital sentencing proceedings. Defendant contends that because the trial court had not discussed the possibility of submitting the (f)(1) mitigating circumstance when the prosecutor cross-examined defendant about the details of his criminal history, the scope of the

State's cross-examination should have been limited by generally applicable rules of evidence.

The issue in *Lynch* was the proper scope of cross-examination for purposes of impeaching a witness' credibility. In the present case, the State's purpose in cross-examining defendant about his criminal history was to rebut the evidence presented by defendant which might support the jury's finding of the (f)(1) mitigating circumstance. Thus, *Maynard*, rather than *Lynch* and Rule 609(a), controlled the permissible scope of the prosecutor's cross-examination. *Maynard*, 311 N.C. at 27-31, 316 S.E.2d at 212-14. Because *Maynard* permits the State to cross-examine a defendant regarding the details of his criminal history where the (f)(1) mitigator is at issue, the trial court did not err in permitting such cross-examination. Defendant's argument is without merit.

[6] Defendant next contends that the trial court erred by submitting the (f)(1) mitigating circumstance to the jury over defendant's objection. Defendant informed the trial court that he would not request submission of the (f)(1) mitigator because his history of beating women was closely related to the manner of death in Ms. Plunkett's murder. Thereafter, over defendant's objection, the trial court submitted the (f)(1) mitigating circumstance. The jury did not find the existence of the (f)(1) mitigator.

Defendant asserts that no reasonable juror could have found that defendant's criminal history was insignificant, and therefore, it was error for the trial court to submit the circumstance. Evidence in the present case tended to show that defendant had been convicted of numerous misdemeanor assaults on females, as well as various other offenses including communicating threats, trespass, and burglary. The most serious of defendant's prior convictions were for assaults on his wife and girlfriends. One of those assaults occurred in 1995, four in 1992, and one in 1989. The trial court concluded from the evidence that a reasonable juror could find that defendant had "no significant history of prior criminal activity," within the meaning of the statute, and that it was required to submit the (f)(1) statutory mitigating circumstance for the jury's consideration. We agree. A rational juror could have found defendant's history of prior criminal activity, which consisted mostly of misdemeanors, to be insignificant with regard to the jury's capital sentencing recommendation. After determining that a rational juror could find the evidence sufficient to support the (f)(1) mitigating circumstance, the trial court was required to submit it to the jury. This argument is without merit.

[7] Defendant further contends that several improper arguments made by the prosecutors may have misled the jury into thinking that defendant requested submission of the (f)(1) mitigating circumstance. Defendant did not object to any of those arguments. Where a defendant fails to object to an argument at trial, that defendant must establish that it was 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).

It is error for the State to argue to a jury that a defendant has requested that a particular mitigating circumstance be submitted when, in fact, the defendant has objected to the submission of that mitigating circumstance. *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 923, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 180 (1996). We also noted in *Walker* that where the defendant objects to the submission of a particular mitigating circumstance, the trial court should: (1) "instruct the jury that the defendant did not request that the mitigating circumstance be submitted"; and (2) "inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist." *Id.* at 223-24, 469 S.E.2d at 923.

In the present case, the assistant district attorney argued in her closing statement that due to defendant's pattern of criminal conduct, the jury should not find that defendant had no significant history of prior criminal activity. The State referred to all of the mitigating circumstances jointly at several points in the closing arguments, without always telling the jury that defendant did not request submission of the (f)(1) mitigator. Nevertheless, it is clear from the record that the argument that the mitigating circumstances had been requested by defendant was not directed specifically toward the (f)(1) mitigator, but to the mitigating circumstances in their totality. We have recently held that such an argument does not prejudice defendant. *State v. Billings*, 348 N.C. 169, 186, 500 S.E.2d 423, 433, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3336 (1998).

The State never specifically argued that defendant had requested the (f)(1) mitigating circumstance. In fact, in her first argument to the jury, the assistant district attorney expressly told the jury that the

(f)(1) mitigator was a statutory mitigating circumstance and was not submitted by counsel for defendant. Further, at the close of defendant's capital sentencing proceeding, the trial court quoted a passage from the *Walker* opinion verbatim, in instructing the jury that defendant did not request the (f)(1) mitigating circumstance, and informed the jury that this circumstance must be submitted as a matter of law. We conclude that the State's arguments cannot realistically be deemed to have misled the jury as to whether defendant requested the submission of the (f)(1) mitigating circumstance. Therefore, the trial court did not err in failing to intervene *ex mero motu*. Defendant's argument is without merit.

[8] Defendant also contends that the trial court violated his Sixth Amendment right to the effective assistance of counsel by submitting the (f)(1) mitigating circumstance over defendant's objection. We have previously considered and rejected this argument in *Smith*, 347 N.C. at 470, 496 S.E.2d at 367. This argument is without merit.

[9] Defendant next argues that the trial court erred in allowing the State to discover prejudicial information which was not within the scope of the State's discovery rights. First, defendant contends that the trial court erred in ordering defense counsel to provide the State with a copy of a report from Robert Brown, Jr., M.D. Dr. Brown was employed by the State, on behalf of defendant, to provide the defense with expert testimony regarding defendant's psychiatric condition. Defendant contends that the trial court's order was based on the State's misrepresentation that a judge had previously ordered defendant to turn over copies of Dr. Brown's report to the State.

After defendant pled guilty, the prosecutor explained the prior judge's order to the trial court as follows:

> The [pretrial] judge granted that motion [to produce Dr. Brown's report] and told [defense counsel] that if [defendant] pled guilty to furnish us a copy of Dr. Brown's report or any other doctor that is covered under the statute that we're entitled to . . . .
>
> And at this time I'm requesting that they furnish us a copy as has been directed by [the pretrial judge] of Dr. Brown's report, which was to be done today.

Defendant says, however, that the judge ruling on pretrial motions had ordered defense counsel only to have Dr. Brown's report in their possession, not to deliver a copy to the prosecutor.

At the hearing on the State's pretrial motion, the judge ruled orally from the bench that:

> The defendant must have in his possession a copy of the mitigation expert's report by July 1st unless the defendant pleads guilty to First Degree Murder at which time he must have it in his possession by June 24th.

Defendant's trial counsel responded, "Okay. That's fair enough." The written pretrial order states that "[the experts'] reports are to be completed by June 24, 1996 if the defendant pleads guilty to First Degree Murder and the only issue to be decided is sentencing."

At trial, defense counsel informed the trial court that they did not have the report because Dr. Brown was still working on it. The trial court instructed defense counsel to have the report finished no later than 27 June 1996 and to deliver a copy to the district attorney at that time. Defense counsel evidently complied with the trial court's instructions and delivered a copy of the report to the prosecutor.

Defendant contends that by misrepresenting the pretrial order, the State was able to persuade the trial court to grant it discovery rights beyond those granted by statute. He argues that because N.C.G.S. § 15A-905(b) is limited to reports from experts defendant intends to call to testify, Dr. Brown's report was not discoverable until defense counsel made the final decision to call him to testify. Thus, defendant concludes that the State was not entitled to a copy of Dr. Brown's report on the first day of the capital sentencing proceeding because defense counsel had not yet made a final decision to call Dr. Brown to testify. Ultimately, defendant decided not to call Dr. Brown to testify or to introduce his report into evidence.

At common law, neither the State nor a defendant enjoyed a right of discovery. *State v. Warren*, 347 N.C. 309, 324, 492 S.E.2d 609, 617 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998). However, limited rights of discovery for both the State and defendant exist under the Constitution of the United States, e.*g.*, *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) (constitutional requirement that the State disclose certain information favorable to defendant prior to trial), and by statute, *e.g.*, N.C.G.S. § 15A-901 to -910 (1997) (statutory rights of discovery for defendant and State).

By statute, the State is entitled to inspect:

> results of reports of physical or mental examinations . . . made in connection with the case . . . 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) (emphasis added). Once defendant is in possession of the results of an examination of an expert which defendant *intends* to present, the trial court may properly order that the expert reduce those results to writing and provide a copy of the written report to the State. *State v. East*, 345 N.C. 535, 545, 481 S.E.2d 652, 659, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 236 (1997).

At the time the trial court instructed defendant to provide the State a copy of Dr. Brown's report in the present case, all indications were that defendant intended to call Dr. Brown as an expert witness. At the pretrial hearing which resulted in the initial order, defense counsel told the judge that they "anticipate[d] at least one, and possibly two, experts being called to trial." Dr. Brown's name was included on defendant's witness list. Defendant neither stated nor implied that he did not intend to call Dr. Brown. Further, defendant did not object to the trial court's instruction to give the State a copy of the report by 27 June 1996. Because defendant had indicated his intent to call Dr. Brown as a defense witness at the time of both the pretrial order and the trial court's ruling, the State was entitled to a copy of Dr. Brown's report pursuant to N.C.G.S. § 15A-905(b).

We recently addressed a similar issue in *State v. Warren*. There, the question raised was whether the trial court had authority to compel disclosure of a nontestifying psychologist's report to the State after defendant admitted guilt and after the capital sentencing proceeding was in progress. *Warren*, 347 N.C. at 323-26, 492 S.E.2d at 616-18. As in the present case, at the beginning of the capital sentencing proceeding, the prosecutor in *Warren* requested a copy of the report by a clinical psychologist who had examined defendant, at defendant's request, in preparation for trial. The trial court in *Warren* refused the State's request for a copy of the psychologist's report because defendant had not yet decided whether he would call the psychologist to testify. However, the trial court ultimately ordered disclosure of the psychologist's report to the State on the ground that a forensic psychiatrist who was testifying had reviewed the report. The defendant in *Warren* argued that the State had no constitutional or statutory right to discover the psychologist's report and that the trial court erred in permitting discovery. This Court held that because defendant did not intend to introduce the expert psychologist's

report into evidence and did not call the psychologist to testify, the State had no right to discover the report under N.C.G.S. § 15A-905(b). *Id.* at 324, 492 S.E.2d at 617. However, we emphasized that the trial court retained its inherent power to order discovery, in its discretion, during the capital sentencing proceeding. *Id.* at 325-26, 492 S.E.2d at 617-18.

The present case is distinguishable from *Warren*. Throughout the pretrial hearings and much of the capital sentencing proceeding, counsel for defendant Williams indicated that they intended to call Dr. Brown to testify. By statute, defendant is required to provide the State with expert reports whenever defendant "intends" either calling the expert to testify or introducing the expert's report into evidence. As used in N.C.G.S. § 15A-905(b), "intends" means "[t]o design, resolve, propose" or "[t]o plan for and expect a certain result." *Black's Law Dictionary* 809 (6th ed. 1990). The term "intent" as used in the statute is not synonymous with a defendant's final decision to call an expert witness or present the expert's report.

We have previously noted that a court order enforcing N.C.G.S. § 15A-905(b) requires a defendant to disclose evidence which he "intends" to use as of the time of the ordered disclosure. *State v. Godwin*, 336 N.C. 499, 507, 444 S.E.2d 206, 211 (1994). After the ordered disclosure, however, defendant is free to change his trial strategy or alter the evidence he intends to use. *Id.* Thus, in the present case, the fact that defendant subsequently changed his mind and decided not to act on his original intent to call Dr. Brown is not controlling. Because at the time the trial court ordered discovery defendant intended to call Dr. Brown to testify at the capital sentencing proceeding, the State was entitled to a copy of Dr. Brown's report pursuant to N.C.G.S. § 15A-905(b). The statement by the prosecutor characterizing the order of the judge at the pretrial hearing was irrelevant to this right. This argument is feckless.

[10] Defendant also contends that he was deprived of his Sixth Amendment right to the effective assistance of counsel by his trial counsel's failure to object to the prosecutor's alleged misrepresentation of the pretrial order relating to Dr. Brown's report. We disagree.

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test which was promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). We recently explained the operation of this test in *State v. Lee*:

> [D]efendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. [*State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985).] . . . Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. [*Strickland*, 466 U.S. at 698, 80 L. Ed. 2d at 698.] Thus, defendant must show that the error committed was so grave that it deprived him of a fair trial because the result itself is considered unreliable. *Id.* at 687, 80 L. Ed. 2d at 693.

348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998). In the present case, the State was entitled to a copy of Dr. Brown's report, which defendant contends was disclosed as a result of his trial counsel's failure to object. Because we concluded that the State was entitled to this report, defense counsel's failure to object to it could not constitute ineffective assistance. *Id.* at 492, 501 S.E.2d at 345. The first prong of the *Strickland* test is not satisfied where, as here, defendant cannot establish that his counsel committed an error. *Id.* This argument is without merit.

[11] Defendant next argues that the trial court erred by allowing the State to discover and introduce certain evidence which was derived from Dr. Brown's report. Defendant first contends that the trial court's decision to provide the State a copy of defendant's complete Dorothea Dix Hospital file was error. The trial court ordered that defendant's Dix Hospital records, including his medical, psychiatric, and forensic case files, be produced to the trial court for its review. The trial court then reviewed the files and concluded that the State should have a copy of the complete file.

Defendant further contends that the trial court erred by ordering Dr. Robert Rollins and his case analyst, Dennis Meachum, both of whom participated in determining defendant's competence, to confer with the district attorney on the same basis as they had with defense counsel. Defendant argues that pursuant to N.C.G.S. § 15A-1002, the State was entitled only to a copy of Dr. Rollins' report to the trial court concerning defendant's competency. Defendant says that by granting the State access to defendant's complete Dix Hospital file and by allowing the prosecutor to conduct unrestricted interviews with Dr. Rollins and Mr. Meachum, the trial court exceeded the scope of N.C.G.S. § 15A-1002.

Defendant distinguishes the present case from others where defendants are sent to Dix Hospital solely for a competency evaluation and where the examining psychiatrist is a witness for the court. Defendant contends that he was sent to Dix Hospital in part for a competency evaluation, but also for possible treatment of suicidal thoughts and evaluation for possible defense and mitigation purposes. Thus, defendant argues that anything in the Dix Hospital records or known to Dr. Rollins or Mr. Meachum regarding defendant's treatment for suicidal tendencies would be protected by the psychologist-client privilege. Further, defendant argues that any information available for these purposes was privileged as attorney work product, until defendant decided to call a mental health expert to testify.

Defendant asserts that under N.C.G.S. § 8-53.3, a trial court may compel disclosure of psychologist-client privileged communications only if it is necessary to a proper administration of justice. Defendant says that in this case, there is no indication that the trial court understood that it was compelling disclosure of privileged communications or that the disclosure was necessary to a proper administration of justice. He says that because he had not yet decided whether to call a mental health expert, there was no reason necessary to a proper administration of justice to require disclosure of the communications in question. Defendant argues that by compelling the disclosure of privileged information, the trial court violated his federal and state constitutional rights.

This Court has held that no psychologist-client privilege is created when a defendant is examined by a psychologist appointed by the trial court, at the request of defendant, for purposes of evaluating defendant's mental status. *East*, 345 N.C. at 545, 481 S.E.2d at 659-60; *see also State v. Taylor*, 304 N.C. 249, 271, 283 S.E.2d 761, 776 (1981) (no physician-patient privilege where physician examines defendant in order to determine whether defendant is competent to stand trial), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). In the present case, Dr. Rollins and Mr. Meachum were appointed to determine defendant's competency. The court order committing defendant to Dix Hospital does mention that defendant had expressed "suicidal thoughts," but the record reveals that the objective of defendant's commitment was a competency and mental health evaluation. There is no indication in the record that Dr. Rollins and Mr. Meachum examined or communicated with defendant for any purpose other than determining defendant's competency. Therefore,

under *East*, defendant's communications with Dr. Rollins and Mr. Meachum were not protected by physician-patient, psychologist-client, or attorney work product privileges.

Assuming *arguendo* that defendant's communications with Dr. Rollins and Mr. Meachum were privileged, the trial court had authority to compel disclosure of such privileged communications if it was "necessary to the proper administration of justice." N.C.G.S. § 8-53.3 (1997). "The decision that disclosure is necessary to [assure] a proper administration of justice 'is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling.' " *Smith*, 347 N.C. at 461, 496 S.E.2d at 362 (quoting *State v. Drdak*, 330 N.C. 587, 592, 411 S.E.2d 604, 607 (1992)). Defendant has failed to show that the trial court abused its discretion in ordering Dr. Rollins and Mr. Meachum to confer with the prosecutor in this case. As defendant has noted, N.C.G.S. § 15A-1002(d) addresses only court-ordered evaluations of criminal defendants and the resulting reports. However, the limited scope of this statute does not preclude the trial court from exercising its discretion to compel discovery of other related documents when it is necessary to assure a proper administration of justice. Defendant says in the instant case that the trial court erred by failing to make findings and a conclusion that disclosure was necessary to a proper administration of justice. We held in *Smith*, however, that "N.C.G.S. § 8-53 does not require such an explicit finding" and that such a "finding is implicit in the admission of the evidence." *Smith*, 347 N.C. at 461, 496 S.E.2d at 362. These arguments are without merit.

[12] Defendant next contends that the trial court erred in allowing Cyril Jarrett, a health care technician supervisor at Dix Hospital, to testify regarding a verbal altercation which he observed between Dix Hospital personnel and defendant. The day before Mr. Jarrett was called to the stand, defense counsel announced that they had decided not to call Dr. Brown, the psychiatrist appointed by the trial court at the request of defense counsel. The trial court granted defendant's related motion to prohibit the State from using any and all records or information obtained from Dr. Brown, including the Dix Hospital records. The prosecutor stated that he had learned of the incident which Mr. Jarrett witnessed by reading defendant's Dix Hospital files. Nonetheless, the trial court allowed Mr. Jarrett to testify because the incident in question was simply an act observed by a "custodial keeper," not much different from an incident which might occur in any detention facility.

The altercation described by Mr. Jarrett was not directly related to defendant's treatment, evaluation, or any other private interviews with Dix Hospital staff. In his testimony, Mr. Jarrett described an incident which occurred when defendant took two cups of tea in the cafeteria line, rather than the one allotted him. Mr. Jarrett testified that when an attendant told defendant not to take two cups of tea, defendant used profanity and threatened to fight the attendant and Mr. Jarrett. Mr. Jarrett testified that defendant continued to act as if he wanted to start a fight with the attendant for some time after the altercation. This incident occurred on the day before defendant was to return from Dix Hospital to Central Prison.

Defendant argues that Mr. Jarrett's testimony should have been precluded as "fruit of the poisonous tree," because the State learned of Mr. Jarrett and his evidence by reading defendant's records from Dix Hospital. Defendant reasons that the trial court's order allowing the prosecutor to have a copy of defendant's complete Dix Hospital file violated defendant's constitutional rights, and therefore, any evidence derived from the records was not admissible. Defendant further contends that the prosecutor used the incident described by Mr. Jarrett to make improper closing arguments about defendant's bad behavior in jail and future dangerousness, and therefore, Mr. Jarrett's testimony cannot be found harmless.

Assuming *arguendo* that the prosecutor had no right to discover a copy of defendant's complete Dix Hospital file, the trial court nonetheless correctly allowed Mr. Jarrett to testify for the purpose of ensuring the proper administration of justice. This Court has held that evidence which might not otherwise be admissible against a defendant may be admissible tó explain or rebut other evidence introduced by the defendant himself. *Maynard*, 311 N.C. at 28, 316 S.E.2d at 212. In the present case, defendant introduced evidence through the testimony of Mary Whitaker, who conducted religious services at Bertie-Martin Regional Jail. Ms. Whitaker described defendant's participation in her ministry while he was in the jail and said that defendant treated her with respect and honor. The trial court properly allowed the State to rebut this evidence with Mr. Jarrett's testimony. *Maynard*, 311 N.C. at 25-26, 316 S.E.2d at 21-22; *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997). Had the trial court not allowed Mr. Jarrett to testify, defendant would have gained an unfair advantage by keeping relevant rebuttal evidence from the jury, and the State would have been denied

the proper administration of justice. *See East*, 345 N.C. at 545-46, 481 S.E.2d at 660.

[13] As to the closing arguments, the record indicates that the State used Mr. Jarrett's testimony only to rebut Ms. Whitaker's testimony that defendant was respectful. The essence of the State's argument was that defendant treats people honorably and with respect only when he needs something from them. The district attorney used as an example the incident described by Mr. Jarrett, arguing that when defendant was ready to be discharged from Dix Hospital, he began to curse and threaten the staff there. The district attorney suggested that defendant's seemingly remorseful performance on the witness stand was an attempt to manipulate the jury. We have previously held that a prosecutor may urge the jury to recommend death out of concern for the future dangerousness of the defendant. *State v. Conner*, 345 N.C. 319, 333, 480 S.E.2d 626, 632-33, *cert. denied*, — U.S. —, 139 L. Ed. 2d 134 (1997). There was nothing improper about the prosecutor's closing argument regarding the incident described by Mr. Jarrett.

Defendant next contends that the trial court erred when it failed to (1) rule on defendant's pretrial motions to limit the prosecutor's line of questioning, and (2) give curative instructions after the prosecutor asked improper questions about defendant's conduct in jail. Defendant asserts that these errors violated his constitutional due process rights. Defendant filed one pretrial motion to limit the State's sentencing evidence to matters relevant to aggravating circumstances, and another motion to limit the State's rebuttal to disproving any mitigating circumstances. The court did not rule on either motion prior to the capital sentencing proceeding. During defendant's capital sentencing proceeding, the prosecutor asked defendant and a jailer several questions about defendant's conduct in jail. The prosecutor asked defendant whether he "was selling dope down there" and "if he was running the jail down there." The prosecutor also asked defendant if he had assaulted people while he was in jail. The prosecutor asked similar questions of the jailer. The trial court sustained defendant's objections to all of these questions. After the trial court sustained defendant's objections, defendant did not request and the court did not give any additional curative instructions. Defendant now contends that the trial court's failure to act *ex mero motu* and give curative instructions was error.

[14] A defendant is entitled to a new trial on the basis of an improper question only if there is a reasonable possibility that the improper

question affected the outcome of his trial. N.C.G.S. § 15A-1443(a) (1997); *State v. Knight*, 340 N.C. 531, 564, 459 S.E.2d 481, 501 (1995). We have previously held that a trial court does not commit reversible error when it fails to give a curative jury instruction absent a request by defendant. *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); *State v. Rowsey*, 343 N.C. 603, 628, 472 S.E.2d 903, 916 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 221 (1997). Defendant has failed to show that the mere asking of these questions, to which objections were sustained, prejudiced him. *See Knight*, 340 N.C. at 564, 459 S.E.2d at 501. As in *Rowsey*, the trial court's action in the instant case of promptly sustaining defendant's objections was sufficient to cure any error. *Rowsey*, 343 N.C. at 628, 472 S.E.2d at 916.

In addition, at the opening of the capital sentencing proceeding, the trial court gave the jury general instructions regarding evidentiary rulings:

> Now, if there is an objection and you hear me say overruled, don't give the answer of that witness anymore weight simply because there was an objection to the question. . . . Likewise, if I sustain an objection and you don't hear the answer, don't speculate or guess what you think that witness was going to say.

Jurors are presumed to follow instructions given by the trial court. *State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 561 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). Defendant's argument is without merit.

Defendant next argues that the trial court erred when it failed to intervene *ex mero motu* to give curative instructions to the jury regarding certain argumentative questions posed by the prosecutor. Defendant contends that the prosecutor repeatedly asked rhetorical and argumentative questions which cast defendant in an unfavorable light. The questions complained of were raised during the State's cross-examination of defendant and defense witness Mary Whitaker as well as during the direct examination of several State's witnesses. The trial court sustained defendant's objections to these questions, but defendant argues that the court also should have given the jury curative instructions. As we have already stated, it is not error for the trial court to fail to give a curative jury instruction after sustaining an objection, when defendant does not request such an instruction. *E.g.*, *Norwood*, 344 N.C. at 537, 476 S.E.2d at 361. Accordingly, this argument has no merit.

Defendant next argues that the trial court erred in failing to intervene *ex mero motu* when the State made improper closing arguments. With one exception noted below, defendant did not object to these arguments at trial. We have held repeatedly that arguments to which defendant does not object at trial " 'must be gross indeed for this Court to hold that the trial court abused its discretion in not recognizing and correcting *ex mero motu* the comments regarded by defendant as offensive only on appeal.' " *E.g.*, *Conner*, 345 N.C. at 334, 480 S.E.2d at 633 (quoting *State v. Brown*, 327 N.C. 1, 19, 394 S.E.2d 434, 445 (1990)). Prosecutors have a duty to advocate zealously that the facts in evidence warrant imposition of the death penalty, and they are permitted wide latitude in their arguments. *Id.* Having examined the arguments complained of in light of these principles, we conclude that they were not so grossly improper that the trial court was required to intervene *ex mero motu*. We now address each argument in turn.

[15] Defendant first contends that the State argued to the jury that the capital sentencing proceeding was an unjust demand made by the defendant and that defendant was especially worthy of receiving the death sentence for having made this demand. Defendant points to the following rhetorical question posed by the assistant district attorney near the opening of her argument:

> How dare he take a life of an 80-year-old defenseless woman and sit in here and ask you not to do what you know is proper and just based upon the facts and the law in this particular case.

Defendant contends that because this argument blames him for the capital sentencing proceeding required by law, it was grossly improper and prejudicial. The State asserts, and we agree, that the gist of this argument was that the facts and law justified the death penalty and that defendant's plea for mercy should be disregarded. This argument was well within the wide latitude afforded prosecutors in arguing contested cases.

[16] Defendant next complains that the State improperly used biblical references in arguing its case to the jury. In her closing arguments, the assistant district attorney made the following argument:

> And I believe Mr. Warmack or Mr. Dixon [defense counsel] may stand up here and tell you . . . that they think capital punishment may be somehow contrary to Christian ethics. . . . And they may quote such chapters from the Bible as thou shall not kill and things like that, ladies and gentlemen.

> I want to quote a few things to you first of all. And right behind thou shall not kill in the book of Exodus in verse 21, chapter 21, verse 12, it says: He that smiteth a man, so that he die, shall be surely put to death. . . .
>
> And right behind that, ladies and gentlemen, in Numbers, chapter 35, verse 18, it states: Or if he smite him with a hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death. That's in the Book of Numbers. . . .
>
> So these things shall be a statute of judgment unto you throughout your generation and in all your dwellings. Whoever killeth any person, the murderer shall be put to death by the mouth of the witnesses. And moreover, you shall take no satisfaction for the life of a murderer which he is guilty of death but he shall surely be put to death.
>
> Ladies and gentlemen, none of us and none of you in this courtroom, . . . are going to be sitting on that jury taking joy in what you have to do today. . . . But that doesn't make it any less necessary, ladies and gentlemen, based on the facts and based on the law . . . .
>
> The statute of judgment. That's what this Bible—what this good book says, ladies and gentlemen, the statute of judgment. And we are trying this case under statute 15A-2000, ladies and gentlemen. That's the statute of judgment and that's what his honor is going to give.

Defendant contends that the prosecutor improperly equated the death penalty statute, N.C.G.S. § 15A-2000, with the biblical statute of judgment. Defendant acknowledges that this Court has held some religious arguments not to be so *grossly* improper as to mandate the trial court's intervention. *State v. Brown*, 320 N.C. 179, 206, 358 S.E.2d 1, 19, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). However, defendant asks this Court to reconsider its decisions regarding such theological arguments in light of the First Amendment's separation of church and state and defendant's right to due process. We have recently considered and rejected a similar argument regarding the prosecutor's use of biblical references in arguments to the jury. *State v. Walls*, 342 N.C. 1, 60-61, 463 S.E.2d 738, 770 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). We note that, as in *Walls*, the prosecutor in the present case clearly told the

jury that it should make its sentencing decision based on the law and the evidence presented in the case. We continue to hold that it is not so grossly improper for a prosecutor to argue that the Bible does not prohibit the death penalty as to require intervention *ex mero motu* by the trial court, *but we discourage such arguments. Brown*, 320 N.C. at 206, 358 S.E.2d at 19. We caution all counsel that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials. *See, e.g., State v. Ingle*, 336 N.C. 617, 648, 445 S.E.2d 880, 896-97 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995); *State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519-20 (1984); *State v. Oliver*, 309 N.C. 326, 359-60, 307 S.E.2d 304, 326 (1983). Although we may believe that parts of our law are divinely inspired, it is the secular law of North Carolina which is to be applied in our courtrooms. Our trial courts must vigilantly ensure that counsel for the State and for defendant do not distract the jury from their sole and exclusive duty to apply secular law. Nevertheless, particularly in light of the trial court's final instructions directing the jury in the present case to apply the law as given them by the trial court and not by counsel, we do not find the argument complained of here to be so grossly improper as to have required the trial court to intervene *ex mero motu*. This argument is without merit.

[17] Defendant next complains that the district attorney improperly alluded to defendant's future dangerousness and the possibility of parole in the following portion of his closing argument:

> You can go down that list of about 30 of them. He knew exactly what he was doing. They say that is a mitigating factor? And by God you ought to believe what this guy has told you, the biggest whoppers in the world, and turn him loose? I say turn him loose. Don't give him the death penalty. Don't give him the death penalty. And they think he's going to be an Angel. Think of Cyril Jarrett. As soon as he gets past whatever he got, then he changes.

Defendant contends that in this argument, the prosecutor improperly implied that defendant might get parole, even if he was sentenced to life without parole, and that when defendant was "loose," he would be dangerous.

This Court has consistently held that the possibility of parole is not a proper consideration in a capital sentencing proceeding. *See,*

e.g., *State v. Warren*, 348 N.C. 80, 122, 499 S.E.2d 431, 455, *cert. denied*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 3238 (1998); *State v. Conaway*, 339 N.C. 487, 520, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). However, we have considered and rejected an argument similar to that made here by defendant. *State v. Carter*, 342 N.C. 312, 324, 464 S.E.2d 272, 279-80 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996). Here, as in *Carter*, the prosecutor never used the word "parole" and never mentioned the possibility that a life sentence could mean that defendant would eventually be released. When read in context, the prosecutor's argument focused on defendant's inability to adapt to prison life if given a life sentence. The prosecutor's argument also suggested that the death penalty would specifically deter defendant from committing future crimes. We have previously held that it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of the defendant. *E.g.*, *State v. Locklear*, 349 N.C. 118, 164, 505 S.E.2d 277, 304 (1998); *State v. Larry*, 345 N.C. 497, 527-28, 481 S.E.2d 907, 925, *cert. denied*, — U.S. —, 139 L. Ed. 2d 234 (1997); *Conner*, 345 N.C. at 333, 480 S.E.2d at 632-33. Defendant's argument is without merit.

[18] Defendant next argues that the district attorney improperly based part of his closing argument on his personal knowledge and opinions, not supported by evidence. Defendant points to an argument in which the district attorney questioned defendant's claim that he did not remember attacking Ms. Plunkett because he had been using crack cocaine. The district attorney argued, "Crack is a stimulant. Crack is something that makes you aware of everything that is going on." The trial court overruled defendant's objection to this argument. Defendant contends that this statement reflected the district attorney's personal opinion and was not supported by any testimony or other evidence. Defendant further argues that this statement was inaccurate because (1) cocaine affects different people differently; and (2) defendant was mixing alcohol and cocaine, which could have altered the effect of each substance.

We have held that it is improper for counsel to inject their personal beliefs or facts outside the record into jury arguments. *East*, 345 N.C. at 555, 481 S.E.2d at 665. However, counsel may argue all the facts in evidence as well as any reasonable inferences drawn therefrom. *Id.* We agree with defendant that no evidence in the record supports the prosecutor's characterization of the effects of crack cocaine. However, even though the prosecutor's argument was

improper, defendant is entitled to a new capital sentencing proceeding only if the statement in question " 'so infected the trial with unfairness' " as to deny defendant due process of law. *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). We conclude that when considered in the context of the State's lengthy closing remarks, this very brief argument had no such effect.

In addition, prior to the beginning of closing arguments, the trial court instructed the jury that it was improper for lawyers to rely on personal experiences or beliefs in their arguments and that jurors should disregard any such personal opinions. The trial court also instructed the jury:

> If in the course of making a final argument a lawyer attempts to restate a portion of the evidence and your recollection of that evidence differs from that of counsel, then you are, in remembering and recalling that evidence, to be guided by your own recollection, not by that of counsel's.

These instructions were sufficient to cure any prejudice resulting from the district attorney's improper injection of personal beliefs into his argument. *State v. Small*, 328 N.C. 175, 186, 400 S.E.2d 413, 419 (1991). This argument is without merit.

[19] Defendant next argues that the trial court erred in allowing the State's motions to excuse prospective jurors for cause based on their opposition to capital punishment, without giving defendant the opportunity to rehabilitate them. Defendant concedes that the trial court excused many of these prospective jurors after they answered unequivocally that they could not vote to recommend a death penalty. Defendant acknowledges this Court's repeated holdings that the decision whether to allow rehabilitation of such a juror is in the sound discretion of the trial court. However, defendant contends that such "barebones acceptance" of a prospective juror's answer regarding the death penalty allows individuals so inclined to use death qualification questions as a means of escaping jury duty. Defendant also asserts that allowing him to examine prospective jurors only after death qualification violates his rights to a fair and impartial jury.

We recently summarized the law regarding the death qualification of jurors in *State v. Cummings*:

> Prospective jurors in a capital case must be able to state clearly that " 'they are willing to temporarily set aside their own beliefs [concerning the death penalty] in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986)). The standard for determining whether a prospective juror may properly be excused for cause for his views on capital punishment is whether those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The decision to excuse a juror is within the discretion of the trial court because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425-26, 83 L. Ed. 2d at 852.

346 N.C. 291, 312, 488 S.E.2d 550, 562-63 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998). In the present case, each of the twenty-eight prospective jurors who are the subject of this argument indicated that he or she could not vote to recommend the death penalty under any circumstances. These jurors' responses to a series of questions by the State concerning their views about the death penalty, as well as the clarifying questions by the trial court, clearly demonstrated their unequivocal opposition to capital punishment. Therefore, applying the *Wainwright* standard, the trial court properly excused these jurors for cause.

Defendant also argues that he should have been allowed to rehabilitate other prospective jurors excused for cause who he contends did not unequivocally state their opposition to the death penalty. Defendant contends that prospective jurors Grandy, Parker, Cherry and Winston were dismissed after they stated that they were unable to judge others, not that they would not be able to vote for the death penalty. Contrary to defendant's contentions, a review of the record reveals that each of these jurors clearly stated that their strong personal beliefs would prevent them from voting to recommend the death penalty.

Defendant further complains that a metaphor of boxes representing people who support the death penalty and those opposed to it, was improperly used by the trial court and the prosecutor to trap

prospective jurors Ethel Bound Outlaw and William Outlaw into stating that they could not vote for the death penalty because of their personal or religious beliefs. This argument is feckless.

The extent and manner of jury *voir dire* rests within the sound discretion of the trial court, and the trial court's rulings will not be overturned absent a showing of an abuse of discretion. *State v. Hipps*, 348 N.C. 377, 390, 501 S.E.2d 625, 633 (1998); *State v. Richardson*, 346 N.C. 520, 529, 488 S.E.2d 148, 153 (1997), *cert. denied*, —— U.S. ——, 239 L. Ed. 2d 652 (1998). It is well established that a trial court does not abuse its discretion by denying defendant an attempt to rehabilitate a juror unless defendant can show that further questions would have produced different answers by the juror. *State v. Alston*, 341 N.C. 198, 222-23, 461 S.E.2d 687, 699-700 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). After carefully reviewing the record, we conclude that all of the prospective jurors in question stated with unmistakable clarity that their personal or religious beliefs would prevent them from voting to recommend the death penalty under any circumstances. Before dismissing each of these prospective jurors, the trial court asked final questions to clarify the juror's inability to recommend the death penalty. Thus, the trial court did not abuse its discretion when it granted the State's motions to excuse these prospective jurors for cause without offering defendant an opportunity to rehabilitate them.

[20] Defendant next argues that the trial court erred by denying his request for peremptory instructions on the statutory mitigating circumstance concerning his inability to appreciate the criminality of his conduct or to conform his conduct to the law, N.C.G.S. § 15A-2000(f)(6). We disagree. Defendant contends that uncontroverted evidence at trial tended to show that defendant was "on an uncontrollable crack binge on the night of the crime and could not have possibly conformed his behavior or understood what terrible things he was capable of doing." Defendant argues that, given this evidence, the trial court was required to give a peremptory instruction on the (f)(6) mitigating circumstance.

A trial court is required to give a peremptory instruction regarding a statutory mitigating circumstance only when all evidence supports that circumstance. *Warren*, 347 N.C. at 320, 492 S.E.2d at 615. Defendant is not entitled to a peremptory instruction on a statutory mitigating circumstance if the evidence of that 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). In the

instant case, the evidence of the existence of the statutory mitigating circumstance regarding defendant's capacity to appreciate the criminality of his conduct and conform his conduct to the law was controverted. Defendant's own testimony at trial indicated that he understood the wrongfulness of his conduct at the time of the killing. Defendant testified that he went to Ms. Plunkett's home with the intent to rob her because he remembered that she had money and that she lived alone. Defendant also testified that throughout the early evening of 27 October 1995, he had begged his family and friends to give him money and had stolen or attempted to steal items so that he could sell them for money to buy cocaine. These incidents occurred only a few hours before defendant killed Ms. Plunkett.

Defendant described his efforts to steal something from his mother's home on that evening:

> So my mind told me, something told me, it said you ought to just rob your mama. But then I didn't do it. But I was really trying to find something that I could get to sell like a VCR or something like that. You know, she was up there in the room so there wasn't no way I could take it out without her seeing me. So I just left.

This testimony tends to show that defendant knew it was wrong to steal and that he needed to avoid being seen and apprehended. It also tends to show defendant's ability to conform his conduct to the law, because he left his mother's home without stealing anything.

Defendant's ability to understand the criminality of his conduct is further supported by evidence tending to show that after he assaulted Ms. Plunkett and saw people and lights outside her home, he escaped by jumping out of a side window and running into the woods. The State's evidence tended to show that after he escaped into the woods, defendant discarded the shirt he had been wearing during the break-ins and assaults at the Whitney and Plunkett homes. Defendant also stated that he and others had previously discussed breaking into the Whitney and Plunkett homes because they had seen Ms. Whitney and Ms. Plunkett shopping with cash. The foregoing evidence is inconsistent with the (f)(6) mitigating circumstance. Therefore, the trial court did not err in denying defendant's request for a peremptory instruction. This argument is without merit.

[21] Defendant next argues that the trial court erroneously defined the concept of a "mitigating circumstance" in its instructions to the jury. Defendant argues that the trial court improperly refused to give

the jury an instruction he requested which he contends better defined the meaning of mitigation than that given by the trial court. The trial court defined a "mitigating circumstance" as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.

This instruction is virtually identical to one which was approved by this Court in *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), and is part of the North Carolina pattern jury instructions, N.C.P.J.I. Crim. 150.10 (1997). *State v. Harden*, 344 N.C. 542, 564, 476 S.E.2d 658, 669-70 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 483 (1997). It was correct.

Immediately following the above definition, the trial court further instructed the jury:

> Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstance arising from the evidence which you deem to have mitigating value.
>
> Put another way, in addition to factors extenuating the gravity of the offense, you may also consider any aspect of the defendant's character or background as a factor having mitigating value.

Defendant argues that the trial court's instructions defined "mitigation" too narrowly and limited the jury's consideration of defendant's character and background as a basis for a sentence of life in prison without parole. This court has consistently rejected defendant's contention. *See, e.g., Conaway*, 339 N.C. at 534, 453 S.E.2d at 854; *State v. Keel*, 337 N.C. 469, 493, 447 S.E.2d 748, 763 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). The trial court's instructions in the instant case are virtually identical to instructions which this Court has held to be "a correct statement of the law of mitigation." *Conaway*, 339 N.C. at 534, 453 S.E.2d at 854. We conclude that the trial court's instructions did not preclude the jury from con-

sidering any aspect of defendant's character or background or any of the circumstances of the killing that defendant may have presented as a basis for a sentence less than death. In addition, we have previously held that a trial court's refusal to give a defendant's proffered definition of mitigating circumstances is not error when the trial court gives a proper instruction defining that term. *State v. Jones*, 336 N.C. 229, 259-60, 443 S.E.2d 48, 63-64, *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994). This argument is without merit.

Defendant next argues that the trial court erred by denying his motions *in limine* to limit the use of photographs which depicted the crime scene and the victim when she was alive as well as after the attack by defendant. Defendant contends that these photographs were inflammatory and that their probative value was greatly outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992). We disagree.

The Rules of Evidence do not apply in capital sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any evidence "relevant to sentence" may be introduced at this stage. *State v. Holden*, 346 N.C. 404, 418, 488 S.E.2d 514, 521 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 132 (1998); *accord* N.C.G.S. § 15A-2000(a)(3). During a capital sentencing proceeding, the State may present any competent evidence which supports the imposition of the death penalty, including photographs of the victim. *Warren*, 347 N.C. at 316, 492 S.E.2d at 612. Photographs which depict the circumstances of the murder, the condition of the body, or the location of the body when found are relevant and admissible at sentencing, even when the victim's identity and the cause of death are not in dispute at trial. *Conaway*, 339 N.C. at 525, 453 S.E.2d at 848. This is true even if the photographs are gory or gruesome. *Id.*

[22] In the present case, the prosecutor introduced eighteen photographs of the victim's house and neighborhood to illustrate the testimony of one of Ms. Plunkett's neighbors, Marilyn Gilliam, and Ms. Plunkett's nephew, Norman Cherry, Sr., regarding what they saw on the night of the crime. Mr. Cherry also referred to one photograph of the victim on the night of the assault which was admitted to illustrate his testimony regarding the injuries he observed. Two photographs of the victim in the hospital on the day after the assault were admitted to illustrate the testimony of the victim's nephew, William Peele, and brother-in-law, Clarence McGlohon, about the injuries they observed following the assault. The trial court also admitted five photographs

of the victim taken by the forensic pathologist who performed the autopsy. The pathologist referred to these photographs in testifying about the injuries to the victim's head and vaginal area that he observed during his autopsy. All of these photographs were properly admitted to illustrate witnesses' testimony. The photographs of Ms. Plunkett on the day after the assault were also properly admitted to describe the injuries she suffered. *State v. Lynch*, 340 N.C. 435, 461, 459 S.E.2d 679, 691 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996). Further, these photographs were relevant to the issue of whether the murder was heinous, atrocious or cruel. *Id.*

[23] In addition to the photographs described above, defendant complains that the trial court erroneously admitted a particular photograph of the crime scene, Ms. Plunkett's bedroom, which showed a crucifix over Ms. Plunkett's bed. The district attorney referred to this photograph in making a closing argument that Ms. Plunkett believed in the sanctity of her home and that the law should protect her in her home. Defendant contends that the prosecutor was improperly allowed to misuse this photograph to establish a prejudicial "religious overlay" in his closing statement. The prosecutor's argument relating to this photograph did not refer to religion. Nor did the fact that the crime scene photograph showed the cross over Ms. Plunkett's bed so infect the trial with unfairness as to violate defendant's due process rights. Defendant also complains of a single photograph of the victim as she appeared before the murder. It is not error during a capital sentencing proceeding to admit a photograph of the victim as she appeared when she was alive. *Harden*, 344 N.C. at 559, 476 S.E.2d at 667. The State may use such photographs of the victim to emphasize to the jury that she was once alive, that she is now dead, and that defendant was the person responsible for her death. *See Payne v. Tennessee*, 501 U.S. 808, 823-24, 115 L. Ed. 2d 720, 735 (1991). Whether photographic evidence is more probative than prejudicial is a matter within the trial court's discretion. *Warren*, 347 N.C. at 316, 492 S.E.2d at 612. Here, defendant has failed to show that the trial court abused its discretion by admitting the photographs in question. Accordingly, this argument is without merit.

[24] Defendant next argues that North Carolina's death penalty is unconstitutional. Defendant acknowledges this Court's repeated holdings that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is constitutional. *State v. Stephens*, 347 N.C. 352, 368, 493 S.E.2d 435, 445 (1997), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3231 (1998); *State v. Garner*, 340 N.C. 573, 605, 459 S.E.2d

718, 735 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996); *Jones*, 336 N.C. at 261, 443 S.E.2d at 64. However, defendant asks this Court to reconsider its position in light of Justice Blackmun's dissenting opinion in *Callins v. Collins*, 510 U.S. 1141, 127 L. Ed. 2d 435 (1994). This Court has specifically rejected this argument as without merit. *E.g.*, *Norwood*, 344 N.C. at 530, 476 S.E.2d at 357; *State v. Powell*, 340 N.C. 674, 695, 459 S.E.2d 219, 230 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996). Having fully considered defendant's arguments on this issue, we decline to change our position.

PRESERVATION ISSUES

Defendant makes five additional arguments which he concedes this Court has previously found to be without merit in other cases. Defendant makes these arguments for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review of this case. Specifically, defendant argues that: (1) the trial court erred by instructing the jury using pattern instructions for capital sentencing; (2) the trial court erred by instructing the jury that if it answered "Yes" to sentencing Issue Four on the verdict form used in capital sentencing proceedings, it would be the jury's duty to recommend a sentence of death; (3) the trial court erred in denying defendant's motions to increase the number of peremptory challenges prior to jury selection; (4) the trial court erred when submitting aggravating circumstances by refusing to give defendant's requested instructions on aggravating circumstances, and by imposing sentences in the felonies used as aggravators; and (5) the trial court erred in denying defendant's motions for a bill of particulars regarding what the aggravating circumstances would be and denying defendant's motion to reveal the evidence of the aggravating circumstances. We have carefully considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings.

PROPORTIONALITY REVIEW

Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, it is our duty to ascertain: (1) whether the evidence supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the sentence of death was entered under the influence of passion, prejudice, or any other arbitrary consideration; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the

defendant. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. We also find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn then to our final statutory duty of proportionality review.

[25] In the present case, defendant pled guilty to first-degree murder based on the theory of premeditation and deliberation and under the felony murder rule. Defendant also pled guilty to first-degree rape, assault with a deadly weapon inflicting serious injury, misdemeanor assault on a female, and two counts of first-degree burglary. The jury found as aggravating circumstances: (1) that the murder was committed by defendant while he was engaged in committing first-degree burglary, N.C.G.S. § 15A-2000(e)(5); (2) that the murder was committed by defendant while he was engaged in committing first-degree rape, N.C.G.S. § 15A-2000(e)(5); and (3) 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).

Of the fourteen mitigating circumstances submitted, one or more jurors found the following non-statutory mitigators: (1) at the time defendant committed the crime, he was under the influence of crack cocaine and/or alcohol; and (2) under oath, defendant expressed remorse for his actions and apologized to the victim's family.

In conducting our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. We 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); *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 distinguishing features which we find significant in determining defendant's death sentence to be proportionate. First, defendant pled guilty to first degree murder under the theory of premeditation and deliberation as well as the felony murder rule. We have previously noted that a conviction upon both theories of premeditation and deliberation and felony murder is significant in finding a death sentence proportionate. *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). Second, evidence tended to show that defendant brutally assaulted the victim in her own bedroom in the early morning hours. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997) (quoting *Brown*, 320 N.C. at 231, 358 S.E.2d at 34), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 878 (1998). Further, the evidence tended to show that defendant repeatedly and brutally beat and raped the victim during an attempt to steal money to enable him to buy more crack cocaine. The victim was an eighty-three-year-old woman who was no match for defendant, a twenty-nine-year-old man. These features distinguish this case from those in which we have held the death penalty disproportionate.

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we reemphasize here, that we will not undertake to discuss or cite all of those 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 that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

After comparing this case to "similar cases" as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders in which we have previously held the death penalty proportionate. For the foregoing reasons, we conclude that the death sentence entered in the present case is not disproportionate. The judgments and sentences entered by the trial court, including the sentence of death for first-degree murder, were without error and must be left undisturbed.

NO ERROR.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

FRYE REGIONAL MEDICAL CENTER, INC., PLAINTIFF v. JAMES B. HUNT, JR., H. DAVID BRUTON, M.D., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DEFENDANTS, AND CATAWBA MEMORIAL HOSPITAL, INTERVENOR-DEFENDANT

No. 613PA97

(Filed 5 February 1999)

Hospitals— State Medical Facilities Plan—amendment by Governor

The Governor's power to "approve" the State Medical Facilities Plan (SMFP) is not limited to acceptance or rejection of the SMFP submitted by the Department of Human Resources and the State Health Coordinating Council but includes the power to make substantive amendments to the plan. Therefore, the Governor had the power to amend the open-heart surgery needs determination in the 1997 SMFP. N.C.G.S. §§ 131E-176(25), 131E-177.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order for preliminary injunction entered by Manning J., on 5 September 1997 in Superior Court, Wake County. Heard in the Supreme Court 1 October 1998.

Bode, Call & Stroupe, L.L.P., by Robert V. Bode and Diana E. Ricketts, for plaintiff-appellee.

Michael F. Easley, Attorney General, by James A. Wellons, Special Deputy Attorney General, for defendant-appellants; and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., and Jim W. Phillips, Jr., for intervenor-defendant-appellant.

FRYE, Justice.

The controlling question in this case is whether the Governor's power to approve the State Medical Facilities Plan (SMFP) includes the power to make substantive amendments to it. For the reasons stated in this opinion, we conclude that the Governor does have such authority. Accordingly, we must reverse the superior court's decision to the contrary.

The controversy arises out of the attempts by Catawba Memorial Hospital, located in Hickory, to start an open-heart surgery program. These efforts were opposed by Frye Regional Medical Center, Inc., which had already applied for and received a Certificate of Need (CON) to initiate an open-heart surgery program at its hospital in Hickory. After several years of legal proceedings between the two hospitals, the Department of Human Resources (Department), and others, the State Health Coordinating Council (Council) recommended, and the SMFP contained findings, that there was no need for any new open-heart surgery programs in 1997. On 16 September 1996, the 1997 SMFP was submitted to the Governor for his approval. On 26 November 1996, the Governor approved the 1997 recommended SMFP after amending it to provide additional nursing beds for several counties.

The 1997 SMFP was presented to the Rules Review Commission for approval as a permanent rule. The Rules Review Commission objected, and in response to the objections, the Department and the Council recommended additional amendments to the Governor. These amendments modified the open-heart surgery and other cardiac-need determinations in the plan. On 23 July 1997, the Governor approved the recommended amendments, except for the amendment to the open-heart need determination. The Governor's memorandum included the following:

> I concur with and approve all the proposed amendments with one exception. I do not approve the amendment to the need determination for open heart surgery services as proposed by the Council. Instead, I direct that the need determination be amended to reflect a need for open heart surgery services from any hospital which acquired a heart-lung bypass machine prior to March 18, 1993 and which, nevertheless, is unable to use such a machine in the provision of open heart surgery services because the hospital does not have a certificate of need authorizing it to provide them. I find that it is in the best interest of our citizens if

valuable assets be used and not remain idle. I also believe that we should provide care close to home whenever we can.

Your Department has informed me that this situation exists only in the Catawba County area. Catawba County is located in the Hickory-Morganton MSA, which is the fourth largest MSA in the State. However, the three larger MSAs have two to four times the number of heart-lung bypass machines available for the provision of open heart surgery services per 100,000-person population. In addition, Catawba County is located in HSA I. HSA I is the only HSA (other than HSA VI) which has only two facilities located within it which provide open heart surgery services. In light of all of the foregoing, I find that the citizens residing in the Catawba County area have a need for such additional open heart surgery services.

On 22 August 1997, Frye Regional instituted the present action challenging the Governor's authority to amend the SMFP. On 5 September 1997, the superior court granted Frye Regional's motion for a preliminary injunction, suspending the 23 July 1997 amendment to the 1997 SMFP and reinstating the provisions of the pre-existing 1997 SMFP. Judge Manning certified the order for immediate appeal.

Defendants and Catawba Memorial Hospital gave notice of appeal, and on 5 March 1998, this Court allowed defendants' and Catawba's petition for discretionary review of the following question prior to determination by the Court of Appeals:

> Does the Governor of North Carolina, as Chief Executive of the State and head of the Executive Branch of State Government, have the power and authority, under the North Carolina General Statutes and the North Carolina Constitution, to make and execute policy decisions in the area of health care facilities' needs, including the power to amend the State's annual SMFP, a draft of which is prepared for him by the SHCC and presented to him by the Secretary of the Department of Human Resources?

In the preliminary injunction order, the judge explained: "The sole basis of my determination is my conclusion that the Governor has no authority, as a matter of law, to amend the SMFP. I specifically do not reach the other factual and legal issues raised by the parties." Thus, the narrow issue before us is the correctness of the superior court's conclusion.

In the preliminary injunction order, the judge explained his conclusion as follows:

> I specifically conclude as a matter of law that the Governor of the State of North Carolina has no authority to amend the SMFP. Under the law,
>
> > "State Medical Facilities Plan" means the plan prepared by the Department of Human Resources and the North Carolina State Health Coordinating Council, and approved by the Governor.
>
> G.S. 131E-176(25)[(1997)].
>
> > "North Carolina State Health Coordinating Council" means the Council that prepares, with the Department of Human Resources, the State Medical Facilities Plan.
>
> G.S. 131E-176(17).
>
> In the section outlining the Department's specific powers and duties, the Department is empowered to:
>
> > develop policy, criteria, and standards for health facilities planning; conduct statewide registration and inventories of and make determinations of need for health service facilities, health services as specified in G.S. 131E-176(16)f., and equipment as specified in G.S. 131E-176(16)f1., which shall include consideration of adequate geographic location of equipment and services; *and develop a State Medical Facilities Plan.* G.S. 131E-177(4).
>
> G.S. 131E-177(4)[(1997)].
>
> The statute further provides that:
>
> > The Secretary of the Department of Human Resources shall have final decision-making authority with respect to all functions described in this section [G.S. 131E-177].
>
> G.S. 131E-177.

Read *in pari materia*, these sections contemplate that the SMFP is to be prepared by the SHCC acting with the Department, and then approved by the Governor. The Governor may approve or disapprove the SMFP as submitted by the SHCC and the Department but may not unilaterally develop ***or amend it.***

The power is similar to that exercised by him in reviewing legislation: he can approve or veto, but he cannot rewrite the bill.

For the same reasons noted above, it is also clear that ***the Governor does not have the power to amend the open heart review schedules in 1997, because the SHCC did not prepare and develop any such amendments.***

The entire statutory and regulatory process for health planning in North Carolina contemplates that the SMFP shall be developed by the SHCC and the Department in an orderly and logical fashion, with numerous checks and balances along the way. ***The Governor's sole function in that process is to accept or reject the SMFP as submitted to him. The Governor's amendment of the SMFP in this case completely circumvents that process. Because the authority to develop, prepare or amend the SMFP is solely vested by statute in the SHCC and the Department, the Governor has no authority to amend the SMFP.***

(Emphasis added.)

We do not agree with the above-emphasized portions of the preliminary injunction order. We specifically reject analogizing the Governor's power to amend the State Medical Facilities Plan to the Governor's authority under the Constitution to veto legislation enacted by the General Assembly. Furthermore, as explained below, the statutes give the Council and the Department specific authority to develop or prepare the SMFP, without specific reference to amending it. *See* N.C.G.S. §§ 131E-176(17), (25), 131E-177(4). We conclude that the Governor's power to amend in this case facilitates his role in bringing closure to the statutory and regulatory process and does not suggest a circumvention of the process.

Plaintiff argues that under N.C.G.S. § 131E-177, the final decision-making power rests with the head of the Department of Human Resources. While the Secretary of the Department does have the final decision-making power with regard to all functions under N.C.G.S. § 131E-177, the Secretary's powers are separate and distinct from those of the Governor. While the Secretary must develop or prepare the SMFP to effectuate the legislative purpose, the Governor must, as a part of the approval process, ensure that the SMFP comports with the general health policies and goals of the state. To this

end, the Governor has the authority to make substantive changes by amending the SMFP to ensure that its provisions are properly executed under the statutes. If the provisions of the SMFP, after review, are approved by the Rules Review Commission, they will become permanent rules. N.C.G.S. § 150B-21.3 (1995).

The Department of Human Resources is a department of the Executive Branch of state government, with its Secretary reporting directly to the Governor as chief executive officer of the state. Although there is statutory recognition of the State Health Coordinating Council, it is essentially an advisory body created by executive order. Exec. Order No. 43 (1994). The Governor appoints its twenty-seven members, designates its chair and vice chair, and sets out its duties and responsibilities. *Id.* at §§ 2, 3, 7. Under the statutes, the role of the Council and the Department is to "prepare" or "develop" the SMFP. N.C.G.S. §§ 131E-176(25), 131E-177(4). The Governor's role is to "approve" the SMFP. N.C.G.S. § 131E-176(25). Read in context, these statutes suggest that the Governor's role is to make the final decision concerning the SMFP's contents after it has been developed and prepared by the Department and the Council.

The need for such authority is clearly shown in this case. On at least two occasions, the Rules Review Commission objected to specific provisions of the 1997 SMFP relating to the need determinations for open-heart surgery services. Although the Governor had previously approved the 1997 SMFP after amending it, it could not become effective over the objections of the Rules Review Commission. The Council and the Department proposed additional amendments, most of which, but not all, met the Governor's approval.

In this context, the Governor's power to approve carries little meaning without the power to modify or amend as a part of the approval process. We reject plaintiff's contention that the Governor's power to approve is purely ministerial. Such a view is inconsistent with the statutory scheme and the executive powers of the Governor.

The operative statute provides as follows:

> "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor.

N.C.G.S. § 131E-176(25).

In interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990). However, " 'where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)). The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight. *See High Rock Lake Ass'n v. N.C. Envtl. Mgmt. Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981).

With these principles of construction in mind, we must determine the meaning of the word "approved" as used in N.C.G.S. § 131E-176(25). The meaning is not clear from the literal language of the statute. To "approve," as defined by *Black's Law Dictionary*, means "[t]o be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another." *Black's Law Dictionary* 102 (6th ed. 1990). Plaintiff argues that the Governor is limited by such a definition in making an approval and that the power to modify is not included. The Department of Human Resourses, as the agency charged with implementing the SMFP, interprets the word "approved" more broadly, asserting that the Governor did have the authority to amend the SMFP in the instant case.

We note that the Governor has amended State Medical Facilities Plans in the past. While both parties acknowledge that the present and former governors have amended SMFPs, plaintiff contends that such amendments have occurred only in very limited circumstances because of a judicial decree, error, change in appropriations, or change in inventories, and that the present amendment goes beyond that exercised by previous Governors. Plaintiff further argues that the SMFP itself provides that it may be changed post-approval only under these limited circumstances. However, in the instant case, we note that the Governor had given previous approval to the 1997 SMFP only after amending it. We also note that the present amendment by the Governor came only after the Council and the Secretary had recommended additional amendments in response to a refusal by the

legislatively established Rules Review Commission to approve the former plan. Thus, the amendments here also occurred in very limited circumstances.

Moreover, while the legislature has amended various related statutes on many occasions, it has in no way limited the Governor's ability to amend the SMFP. *See* Act of July 15, 1983, ch. 775, sec. 1, 1983 N.C. Sess. Laws 896, 896 (recodifying the public-hospital laws in portions of the General Statutes); Act of June 27, 1984, ch. 1000, 1984 N.C. Sess. Laws 95 (making final agency decisions on CONs appealable to the North Carolina Court of Appeals; Act of June 27, 1984, ch. 1001, 1984 N.C. Sess. Laws 95 (ending the moratorium on nursing-home construction); Act of June 27, 1984, ch. 1002, 1984 N.C. Sess. Laws 95 (making technical and clarifying changes to the CON law); Act of June 30, 1987, ch. 511, 1987 N.C. Sess. Laws 795 (amending CON law); Act of July 15, 1991, ch. 692, 1991 N.C. Sess. Laws 2215 (making technical and clarifying amendments to the CON statutes); Act of March 18, 1993, ch. 7, 1993 N.C. Sess. Laws 5 (modifying the CON law). While this legislative inaction is not conclusive, at best, it does not support a prohibition on the Governor's power to make substantive amendments. Finally, an interpretation of the word "approved" as including the power to modify is not unprecedented. *See, e.g., State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 385-87, 239 S.E.2d 48, 61-62 (1977) (concluding that Commissioner may alter plan following approval in part of a proposed plan); *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 291 N.C. 55, 65, 229 S.E.2d 268, 274 (1976) (concluding that Commissioner need not approve or disapprove in full but may allow part of a proposed increase or decrease); *In re N.C. Fire Ins. Rating Bureau*, 275 N.C. 15, 40, 165 S.E.2d 207, 224 (1969) (rejecting position that Commissioner must approve or disapprove filing in its entirety; rather, Commissioner may modify proposal to allow part of proposed increase).

In the instant case, there are no statutorily prescribed methods for the Governor to exercise the power of approval of the proposal. In the absence of statutorily detailed limits on the Governor's power to approve, we cannot conclude that his means of approval may be constrained only to acceptance or rejection of the plan in total. One can easily envision a situation where the Governor disapproves a part of the SMFP and continuously sends it back to the Council, and the Council continuously makes amendments that the Governor disapproves, resulting in either no State Medical Facilities Plan or a com-

plete stalemate. We believe the better interpretation of the statute is that the Governor has the final authority to make substantive amendments as a part of the approval process.

Based on the foregoing, we hold that the Governor's power to approve the State Medical Facilities Plan includes the power to amend it. Therefore, the order of the superior court is reversed.

REVERSED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

CHARLES VERNON FLOYD, JR. AND SONS, INC.; MARY ANN FLOYD, INDIVIDUALLY; AND MARY ANN FLOYD, EXECUTRIX OF THE ESTATE OF CHARLES VERNON FLOYD, JR. v. CAPE FEAR FARM CREDIT, ACA

No. 27A98

(Filed 5 February 1999)

Appeal and Error— notice of appeal—reference only to judgment—review of interlocutory order

Although plaintiff's notice of appeal referred only to the judgment entered by the trial court and not to an earlier order entered by the trial court during the trial requiring an election of remedies by plaintiffs between an unfair or deceptive practices claim and a contract claim, the interlocutory order compelling election of remedies was reviewable on appeal along with the final judgment pursuant to N.C.G.S. § 1-278 since plaintiffs' objection at trial to this order properly preserved the question for appellate review, and the order involved the merits and affected the judgment because it deprived plaintiffs of one of their claims.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

Appeal by plaintiffs 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. 753, 493 S.E.2d 499 (1997), affirming a judgment entered by Herring, J., on 19 May 1995 in Superior Court, Robeson County. Heard in the Supreme Court 30 September 1998.

Stubbs & Perdue, P.A., by Trawick H. Stubbs, Jr., for plaintiffs-appellants.

Everett, Warren, Harper & Swindell, by Edward J. Harper, II, and Lewis H. Swindell, IV, for defendant-appellee.

MITCHELL, Chief Justice.

The sole question presented for review is whether the Court of Appeals had jurisdiction to decide whether the trial court erred when it granted defendant's motion to compel election, forcing plaintiffs to choose between their claims for breach of contract and unfair or deceptive practices[1] during the trial of this case. The Court of Appeals held it was without jurisdiction to determine this issue. For the reasons that follow, we reverse the decision of the Court of Appeals.

The record reveals that the following evidence was before the trial court. Charles Vernon Floyd, Jr., had been a prominent farmer in Robeson County for more than thirty years. Together with his wife, Mary Ann Floyd, he ran a hog production business, Charles Vernon Floyd, Jr. and Sons, Inc. The Floyds had a business relationship with defendant, Cape Fear Farm Credit, ACA (hereinafter "Farm Credit"), or its predecessors in interest dating from the mid 1970s. The Floyds obtained a line of credit from defendant's predecessor in interest which was originally secured by a deed of trust on the corporate property. Through the years, the hog business struggled, and the Floyds were forced to borrow more and more money just to stay in business. Consequently, liens were placed on the Floyds' personal residence and a beach condominium to secure the additional debt. In 1986, the Floyds assumed substantial debts of their son, James Leroy Floyd, adding to their extreme financial difficulties.

In December of 1991, the Floyds defaulted on the Farm Credit loan. In March of 1992, Farm Credit sent a letter to the Floyds announcing its intention to foreclose on their farm and personal res-

1. Although the record on appeal refers to this claim alternately as "unfair or deceptive trade practices" and "unfair trade practices," we note here that the 1977 amendment to N.C.G.S. § 75-1.1 deleted the term "trade" from the phrase "trade or commerce" and rewrote subsection (b) to read: "For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b) (1994). This revision was intended to expand the potential liability for certain proscribed acts. *See Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986). In this opinion, we will refer to this claim as "unfair or deceptive practices."

idence if the total indebtedness was not paid in full within five days. After an attempt to pay their arrearages failed, the Floyds received a "Notice of Sale" informing them that their property was to be sold on 16 June 1992.

The Floyds met with an agent of Farm Credit on 3 June 1992 and negotiated a forbearance agreement whereby, in exchange for additional security, Farm Credit would postpone the foreclosures of the Floyds' property and postpone publication of the newspaper advertisements of the notice of sale. However, despite this agreement, a single advertisement of the foreclosure sale of the Floyd home appeared in *The Robesonian* on 5 June 1992.

Following this turn of events, on 13 June 1992, Charles Vernon Floyd, Jr., committed suicide. Subsequently, Mary Ann Floyd was appointed executrix of the estate of her husband and together with her son, James Leroy Floyd, initiated this action against defendant, Farm Credit, on 12 October 1992. The complaint asserted several causes of action against defendant including wrongful death, intentional and negligent infliction of emotional distress, loss of consortium, unfair or deceptive practices, breach of the duty of good faith, and breach of contract. By order dated 6 January 1995, the trial court granted summary judgment for defendant upon all claims except the wrongful death, unfair or deceptive practices, and contract claims.

During a trial by jury at the 17 April 1995 session of Superior Court, Robeson County, defendant filed a motion to compel election, seeking to require plaintiff Mary Ann Floyd, individually and in her representative capacity, to elect whether she would seek recovery for mental anguish damages arising from breach of contract or seek recovery for alleged unfair or deceptive practices.[2] On 1 May 1995, the trial court granted defendant's motion, and plaintiffs were forced to make an election to pursue one or the other of their claims. As a result, plaintiffs abandoned their breach of contract claim and elected to proceed instead on their claim for unfair or deceptive practices. At the close of the evidence, the trial court granted defendant's motion for directed verdict as to plaintiffs' wrongful death claim. The jury returned a verdict for defendant on the unfair or deceptive practices claim, and on 19 May 1995, the trial court entered judgment accordingly.

2. We note that although the motion to compel election referred solely to Mary Ann Floyd as *plaintiff*, the trial court's order simply required *all plaintiffs* to make their elections.

On 25 October 1995, plaintiffs filed a notice of appeal from the trial court's judgment based upon the jury verdict. The Court of Appeals affirmed the trial court, holding that the trial court did not err when it failed to submit to the jury material factual issues related to defendant's breach of the forbearance agreement. *Floyd v. Cape Fear Farm Credit*, 127 N.C. App. 753, 493 S.E.2d 499 (1997). Plaintiffs also sought appellate review by the Court of Appeals of various orders entered by the trial court. The majority in the Court of Appeals concluded that it did not have jurisdiction on appeal to review the issues raised concerning such orders. The Court of Appeals concluded that it lacked such jurisdiction because the notice of appeal referred solely to the trial court's final judgment entered after the jury's verdict and made no reference to other orders entered at trial which plaintiffs sought to appeal. The dissent concluded that the Court of Appeals did not lack jurisdiction and that the trial court's order requiring an election should be addressed on appeal. On 8 July 1998, this Court denied plaintiffs' and defendant's petitions for discretionary review. Thus, the only issue before us is the one brought forth by virtue of plaintiffs' appeal as of right based upon the dissent.

In reaching its decision, the majority in the Court of Appeals concluded that it lacked jurisdiction to review the trial court's order requiring plaintiffs to elect whether to proceed on their unfair or deceptive practices claim or their breach of contract claim. The Court of Appeals relied on Rule 3 of the North Carolina Rules of Appellate Procedure which provides in pertinent part: "The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d). Plaintiffs gave notice of appeal from the judgment entered by the trial court on 19 May 1995 but made no specific reference to the earlier order compelling an election which had been filed on 1 May 1995. Because plaintiffs' notice of appeal referred only to the judgment entered by the trial court on 19 May 1995 and not to the earlier order compelling election, the Court of Appeals determined that it did not have jurisdiction to review the earlier order. We disagree.

While Rule 3(d) of the North Carolina Rules of Appellate Procedure is applicable, we do not find that it is controlling here. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377,

381 (1950). An order requiring an election of remedies is such an order. Ordinarily, an interlocutory order is not immediately appealable unless the order deprives the appellant of a substantial right which he will lose if the order is not reviewed before the final judgment. *See* N.C.G.S. § 1-277(a) (1996); *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E.2d 162 (1983). Thus, a party seeking to appeal from a nonappealable interlocutory order must wait until final judgment is rendered and may then proceed as designated in Rule 3(d).

There is, however, another avenue by which an appellate court may obtain jurisdiction to review an interlocutory order. N.C.G.S. § 1-278 provides: "Upon an appeal from a *judgment*, the court may review any *intermediate order* involving the merits and necessarily affecting the judgment." N.C.G.S. § 1-278 (1996) (emphasis added). However, N.C.G.S. § 1-278 applies only to those interlocutory orders which are not immediately appealable. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 382; *Gualtieri v. Burleson*, 84 N.C. App. 650, 655, 353 S.E.2d 652, 656, *disc. rev. denied*, 320 N.C. 168, 358 S.E.2d 50 (1987).

In the instant case, the order compelling election of remedies was entered on 1 May 1995, two days before the end of the trial. The record on appeal reflects that plaintiffs' timely objection to the order was overruled. Further, we find that the order did not deprive plaintiffs of any substantial right which would be lost absent immediate appellate review. Therefore, the order compelling plaintiffs to elect remedies was interlocutory and not immediately appealable. *See Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992); *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 425, 444 S.E.2d 694, 696 (1994); *Pitt v. Williams*, 101 N.C. App. 402, 405, 399 S.E.2d 366, 368 (1991); *Walleshauser v. Walleshauser*, 100 N.C. App. 594, 595-96, 397 S.E.2d 371, 372 (1990). Because the election of remedies order deprived plaintiffs of one of their claims, it involved the merits and affected the judgment. "A nonappealable interlocutory order . . . which involves the merits and necessarily affects the judgment, is reviewable . . . on appropriate exception upon an appeal from the final judgment in the cause." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 382; *see Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980); *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 364 S.E.2d 723, *disc. rev. denied*, 322 N.C. 480, 370 S.E.2d 222 (1988); *Shaw v. Pedersen*, 53 N.C. App. 796, 281 S.E.2d 700 (1981).

As noted, plaintiffs duly objected to the election of remedies order at trial and gave timely notice of appeal from the 19 May 1995 final judgment entered by the trial court. Accordingly, pursuant to N.C.G.S. § 1-278, we find that the interlocutory order compelling election of remedies entered on 1 May 1995 was reviewable on appeal along with the final judgment of 19 May 1995. Furthermore, we note that it is quite clear from the record that plaintiffs sought appeal of the election order. The objection at trial to the election order properly preserved the question for appellate review. *See* N.C. R. App. P. 10(b)(1). The challenge to the trial court's order requiring plaintiffs to make an election is designated in plaintiffs' brief to the Court of Appeals as assignment of error seven. Although the election of remedies order was not specifically mentioned in the notice of appeal, we conclude that plaintiffs were entitled to appellate review of this order.

For the foregoing reasons, we conclude that the Court of Appeals had proper jurisdiction to review the order compelling election of remedies. We therefore reverse the decision of the Court of Appeals and remand to that court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DERRICK MALETTE

No. 79PA98

(Filed 5 February 1999)

Bail and Pretrial Release— domestic violence—pretrial detention and release—due process, double jeopardy rights of defendant

The statute setting forth the conditions of bail and pretrial release for individuals accused of crimes of domestic violence, N.C.G.S. § 15A-534.1(b), did not violate due process or double jeopardy as applied to defendant where defendant was arrested and taken before a magistrate who ordered that he be brought

before a judge pursuant to the statute on the very next day; defendant was in fact brought before a district court judge the following day, and she set a secured bond of $10,000, which was subsequently reduced to $1,000; and there is no evidence that the magistrate arbitrarily set a forty-eight-hour limit or that the State did not move expeditiously in bringing defendant before a judge.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

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 per curiam, unpublished decision of the Court of Appeals, 128 N.C. App. 749, 496 S.E.2d 850 (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.

ORR, Justice.

The issue in this case is whether N.C.G.S. § 15A-534.1(b), which sets forth the conditions of bail and pretrial release for individuals accused of crimes of domestic violence, is unconstitutional, on its face and as applied to defendant, under the Due Process and Double Jeopardy Clauses of the United States Constitution. In *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998), we held that N.C.G.S. § 15A-534.1(b), while unconstitutionally applied to the defendant in that case, is facially constitutional for the reasons set forth therein. Thus, we turn our attention to whether N.C.G.S. § 15A-534.1(b) has been applied constitutionally to defendant in this case.

On 28 October 1995, a warrant was issued for defendant's arrest for assault inflicting serious injury on Dorian Jones by hitting and kicking her, causing internal bleeding necessitating medical attention. Defendant was served with the warrant and arrested on 3 December 1995. He was taken before a magistrate on that date. The magistrate marked the release order form, "Your release is not authorized." The magistrate then indicated under the "Order for

Commitment" to "Hold for District Court Judge 12-4-95 for domestic violence 15A-534.1."

On 4 December 1995, defendant was taken before District Court Judge Carolyn Johnson, who set a secured bond of $10,000. On 7 December 1995, the State and defendant's counsel agreed to a secured bond in the amount of $1,000 on the condition that defendant have no contact with the victim. District Court Judge Kenneth Titus signed the order, and defendant was released that day after posting bond.

When defendant's case was called on 11 December 1995, he moved to dismiss the charge pursuant to N.C.G.S. § 15A-954(5), arguing that prosecution of the case violated the Double Jeopardy Clause of the United States Constitution. On 11 December 1995, after a hearing, District Court Judge William Y. Manson entered an order dismissing the charge against defendant on the constitutional grounds of double jeopardy and due process. The State appealed to the Superior Court.

The matter was heard by Judge Orlando F. Hudson, Jr., at the 18 March 1996 Criminal Session of Superior Court, Durham County. On 26 April 1996, *nunc pro tunc* 21 March 1996, Judge Hudson entered an order finding that N.C.G.S. § 15A-534.1 is regulatory rather than punitive in nature, concluded that the statute is constitutional, reinstated the charges against defendant, and remanded the case to the District Court for trial.

On 29 April 1996, Judge Hudson entered a supplemental order, adding to the findings of the 26 April 1996 order. Defendant appealed both orders to the Court of Appeals.

For the reasons it stated in *State v. Thompson*, 128 N.C. App. 547, 496 S.E.2d 597 (1998), the Court of Appeals in this case affirmed the Superior Court in a per curiam, unpublished opinion. On 7 May 1998, this Court allowed defendant's petition for discretionary review and retained his notice of appeal of a constitutional question.

In our review of *Thompson*, we stated 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.' " *Thompson*, 349 N.C. 497, 508 S.E.2d at 285 (quoting *Schall v. Martin*, 467 U.S. 253, 269 n.18, 81 L. Ed. 2d 207, 220 n.18 (1984)). In determining that N.C.G.S.

§ 15A-534.1(b) as applied to the defendant in *State v. Thompson* was unconstitutional, we noted:

> 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.

Id. at 497, 508 S.E.2d at 285-86. In *Thompson*, we concluded "that the application of N.C.G.S. § 15A-534.1(b) . . . 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." *Id.* at 502, 508 S.E.2d at 289.

In the case *sub judice*, the record does not indicate that there was unreasonable delay in holding the post-detention hearing. On Sunday, 3 December 1995, defendant was arrested and taken before a magistrate who ordered that he be brought before a judge pursuant to N.C.G.S. § 15A-534.1(b) on the very next day, Monday, 4 December 1995. Defendant was in fact brought before District Court Judge Carolyn Johnson on Monday, 4 December 1995, and she set a secured bond of $10,000, which subsequently was reduced to $1,000. There is no evidence here that the magistrate arbitrarily set a forty-eight-hour limit as in *Thompson* or that the State did not move expeditiously in bringing defendant before a judge.

Therefore, we conclude that N.C.G.S. § 15A-534.1(b) is constitutional as applied to this defendant. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. SHERALD BERNIE QUALLS

No. 331A98

(Filed 5 February 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 1, 502 S.E.2d 31 (1998), finding no error in the judgment entered by Weeks, J., on 27 September 1996 in Superior Court, Cumberland County, sentencing defendant to twenty-five years' imprisonment for second-degree murder and felonious child abuse. Heard in the Supreme Court 13 January 1999.

Michael F. Easley, Attorney General, by Elizabeth Leonard McKay, Special Deputy Attorney General, for the State.

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

PER CURIAM.

The Court voted unanimously to affirm the decision of the Court of Appeals as to defendant's conviction for second-degree murder.

Justice Frye voted to reverse the decision of the Court of Appeals as to defendant's conviction for felonious child abuse for the reasons stated in the dissenting opinion by Greene, J. The remaining members of the Court voted to affirm the Court of Appeals for the reasons stated in the majority opinion by Walker, J. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

STATE EX REL. LONG v. PETREE STOCKTON, L.L.P.

[350 N.C. 57 (1999)]

STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE INVESTMENT LIFE INSURANCE COMPANY OF AMERICA v. PETREE STOCKTON, L.L.P., A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP; AND JAMES M. ISEMAN

No. 246PA98

(Filed 5 February 1999)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of the Court of Appeals, 129 N.C. App. 432, 499 S.E.2d 790 (1998), affirming the judgment entered 29 August 1996 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 12 January 1999.

Bode, Call & Stroupe, L.L.P., by V. Lane Wharton, Jr., for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis and Stephen M. Russell, for defendant-appellee Petree Stockton, L.L.P.

Bailey & Dixon, L.L.P., by Gary S. Parsons, Patricia P. Kerner, and Dayatra T. King, for defendant-appellee Iseman.

PER CURIAM.

This Court allowed plaintiff's petition for writ of certiorari to review the decision of the Court of Appeals only as to the issue of constructive fraud.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

C. TODD WILLIFORD, AND WIFE, RITA C. WILLIFORD v. ATLANTIC AMERICAN PROPERTIES, INC., A CORPORATION

No. 222A98

(Filed 5 February 1999)

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. 409, 498 S.E.2d 852 (1998), reversing an order granting summary judgment in favor of defendant entered by Morton, J., on 31 March 1997 in District Court, Cabarrus County. Heard in the Supreme Court 12 January 1999.

Hartsell Hartsell & White, P.A., by J. Merritt White, III, for plaintiff-appellees.

Rayburn, Moon & Smith, P.A., by James C. Smith, for defendant-appellant.

PER CURIAM.

Chief Justice Mitchell and Justices Parker, Martin and Wainwright voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by Greene, J. Justices Frye, Lake and Orr voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Walker, J. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the District Court, Cabarrus County, for reinstatement of its summary judgment in favor of defendant.

REVERSED AND REMANDED.

STATE v. GREEN

[350 N.C. 59 (1999)]

STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN, A.K.A. AS-SADDIQ AL-AMIN SALLAM U'ALLAH

No. 256A98

(Filed 5 February 1999)

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. 539, 500 S.E.2d 452 (1998), finding no prejudicial error in a judgment entered by Weeks, J., on 12 March 1996, in Superior Court, Robeson County. Heard in the Supreme Court 11 January 1999.

Michael F. Easley, Attorney General, by Gail E. Weis, Assistant Attorney General, and William P. Hart, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine Crawley Fodor, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

PORTIA REESE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CARLO REESE
v. LEE TODD BARBEE

No. 269PA98

(Filed 5 February 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 to review a unanimous decision of the Court of Appeals, 129 N.C. App. 823, 501 S.E.2d 698 (1998), affirming an order entered on 17 June 1997 by Bullock, J., in Superior Court, Wake County. Heard in the Supreme Court 13 January 1999.

Pipkin, Knott, Clark & Berger, L.L.P., by Michael W. Clark and Ashmead P. Pipkin; and Currie, Becton & Stewart, by Elwood Becton, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Kenyann Brown Stanford, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

Cranfill, Sumner & Hartzog, L.L.P., by Stephanie Hutchins Autry, for unnamed defendant-appellee North Carolina Farm Bureau Insurance Company, Inc.

PER CURIAM.

Chief Justice Mitchell and Associate Justices Parker and Wainwright voted to affirm and Associate Justices Frye, Lake and Orr voted 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); *Kempson v. N.C. Dep't of Human Resources*, 328 N.C. 722, 403 S.E.2d 279 (1991).

AFFIRMED.

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

MICHAEL L. SWEENEY v. WAKE COUNTY

No. 277PA98

(Filed 5 February 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 129 N.C. App. 846, 504 S.E.2d 821 (1998), affirming an order of dismissal entered 25 August 1997 by LaBarre, J., in Superior Court, Wake County. Heard in the Supreme Court 13 January 1999.

Brady, Schilawski & Ingram, P.L.L.C., by John Randolph Ingram, II, for plaintiff-appellant.

Wake County Attorney's Office, by Michael R. Ferrell and Corinne G. Russell, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CORENA HONEYCUTT KIRKLAND v. MATTHEW DARREN ELLIS AND CHARLES ELLIS

No. 351PA98

(Filed 5 February 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished opinion of the Court of Appeals, 130 N.C. App. 341, 505 S.E.2d 923 (1998), affirming an order entered by Caviness, J., on 6 January 1998 in Superior Court, McDowell County. Heard in the Supreme Court 13 January 1999.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert C. Ervin, for plaintiff-appellee.

Cogburn, Goosmann, Brazil & Rose, P.A., by Steven D. Cogburn, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JUANITA NEAL, EMPLOYEE v. CAROLINA MANAGEMENT, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER

No. 310A98

(Filed 5 February 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 228, 502 S.E.2d 424 (1998), affirming the opinion and award of the North Carolina Industrial Commission entered on 2 December 1996. Heard in the Supreme Court 13 January 1999.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Brady W. Wells, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion of Timmons-Goodson, J., the decision of the Court of Appeals, which affirmed the opinion and award of the Industrial Commission, is reversed. This case is remanded to the Court of Appeals for further remand to the Industrial Commission for entry of an opinion and award in favor of the plaintiff consistent with this opinion.

REVERSED AND REMANDED.

ROBERT A. STEINGRESS v. THERESA D. STEINGRESS

No. 199A98

(Filed 4 March 1999)

Appeal and Error— brief violating appellate rules—dismissal of appeal

The Court of Appeals did not err by dismissing an appeal because of defendant-appellant's failure to double space the text of her brief in violation of Appellate Procedure Rule 26(g) and her failure to set out in her brief references to the assignments of error upon which her presented issues and arguments were based in violation of Appellate Procedure Rule 28(b)(5). The Court of Appeals did not abuse its discretion by failing to apply Appellate Procedure Rule 2 in this case to allow the appeal to be determined on the merits notwithstanding these violations of the rules. N.C. R. App. P. 2, 26(g), and 28(b)(5).

Justice FRYE dissenting

Justices PARKER and ORR join in this dissenting opinion.

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, 129 N.C. App. 430, 500 S.E.2d 777 (1998), dismissing defendant's appeal of a judgment entered on 15 January 1997 by Fowler, J., in District Court, Buncombe County. Heard in the Supreme Court 14 October 1998.

Robert E. Riddle, P.A., by Robert E. Riddle, for plaintiff-appellee.

Mary Elizabeth Arrowood for defendant-appellant.

LAKE, Justice.

The sole issue presented in this case, by virtue of the notice of appeal based upon the dissenting opinion in the Court of Appeals, is whether the Court of Appeals should have allowed the appeal to go forward for determination on the merits even though defendant-appellant, in her brief, failed to follow the Rules of Appellate Procedure. The Court of Appeals dismissed defendant's appeal for failure to file a brief in compliance with Rules 26(g) and 28(b). For the reasons stated below, we affirm the Court of Appeals' decision to dismiss defendant's appeal.

The facts in this case are not in dispute. On 9 August 1994, plaintiff filed a complaint seeking, *inter alia*, an equitable distribution of marital property. Defendant filed her answer and counterclaim on 14 September 1994, also seeking, *inter alia*, an equitable distribution of marital property. The equitable-distribution claim was heard by Judge Earl J. Fowler, Jr., on 23 October 1996 in District Court, Buncombe County. On 15 January 1997, the trial court entered an equitable distribution judgment. Defendant appealed to the Court of Appeals. In an unpublished, split decision, the Court of Appeals dismissed the appeal because of defendant-appellant's failure to double space the text of her brief and her failure to set out in her brief references to the assignments of error upon which her presented issues and arguments were based.

The Rules of Appellate Procedure require that, as to content, an appellant's brief *shall* be "in the form prescribed by Rule 26(g)." N.C. R. App. P. 28(b). Appellate Rule 26(g) provides that, with respect to all papers filed, "[t]he body of text shall be presented with double spacing between each line of text." N.C. R. App. P. 26(g). Additionally, Rule 28(b) requires that an appellant's brief must contain an argument stating

> the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. 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).

The appellate courts of this state have long and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure, are mandatory and that failure to follow these rules will subject an appeal to dismissal. *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963); *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E.2d 566 (1984). In *Bradshaw v. Stansberry*, 164 N.C. 356, 356, 79 S.E. 302, 302 (1913), Chief Justice Clark, speaking for this Court and addressing the increasing number of appeals, stated: "It is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them." The Court there held: "The motion of the appellee to

dismiss the appeal for failure to print the record and briefs in accordance with the rules of this Court is allowed." *Id.* This Court has noted that when the appellant's brief does not comply with the rules by properly setting forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, it is difficult if not impossible to properly determine the appeal. *State v. Newton*, 207 N.C. 323, 329, 177 S.E. 184, 187 (1934). More recently, in *State v. Glenn*, 333 N.C. 296, 425 S.E.2d 688 (1993), a first-degree murder case, this Court dismissed a portion of a defendant's assignments of error for his failure to comply with Rule 28 by not identifying the specific questions or answers he wanted reviewed, by not including portions of the transcript containing those questions or answers in the appendix and by not including a verbatim recitation of those questions or answers in his brief.

In the instant case, it is clear that defendant's brief is not in the form prescribed by Rule 26(g) and further does not comport to Rule 28(b) in that her brief does not contain references to the assignments of error upon which her asserted issues and arguments with respect thereto are based. These deficiencies are readily acknowledged by defendant in her brief to this Court. However, defendant calls our attention to Rule 2 of the Rules of Appellate Procedure, which provides that the courts of the appellate division may suspend or vary the requirements of the provisions of any of the rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2. Defendant now contends that Rule 2 should be applied, in the discretion of the Court, to allow this appeal to go forward on its merits notwithstanding these violations of the rules. In support of her argument, defendant cites a number of cases in which Rule 2 has been so applied. While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances. *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986). In this regard, we note that while defendant states that this rule should now be applied "to prevent manifest injustice," she merely reasserts the issues that were presented to and reviewed by the Court of Appeals.

Further, defendant is now before this Court pursuant to an appeal of right under Rule 14 of the Rules of Appellate Procedure, from the

dissenting opinion in the Court of Appeals, and to the extent the dissenting opinion presents an issue on appeal, it appears to relate to whether the Court of Appeals abused its discretion in failing to apply Rule 2 in this case. The dissenting opinion states in its entirety that although defendant's assignments of error do not comply with the rules, the dissenting judge is able to determine which assignments are argued in the brief and for that reason, "I vote to hear the appeal and tax each attorney with some appropriate costs for violating the Appellate Rules." Thus, it appears the dissenting opinion in this case presents no dividing issue and is merely a vote in favor of the exercise of discretion to suspend the rules. "When an appeal is taken pursuant to [N.C.G.S. § 7A-30(2)], the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984).

Considering the matter of discretion, we note that the Court of Appeals in its majority opinion concluded that while defendant did relate the first part of her first question presented to the "first assignment of error in the record," she failed to do so with respect to the balance of that issue and in the third issue presented. In light of this thorough review and consideration by the Court of Appeals, we cannot say that there was any abuse of discretion with respect to the application of Rule 2, and we therefore conclude that the opinion of the Court of Appeals should be and that the same is affirmed.

AFFIRMED.

Justice FRYE dissenting.

In an unpublished decision, the Court of Appeals dismissed defendant's appeal for failure to file a brief in compliance with Rules 26(g) and 28(b) of the Rules of Appellate Procedure. Judge Walker dissented, voting instead to hear the appeal and tax appropriate costs for violating the appellate rules. Thus, the question raised is whether dismissal of the appeal was proper.

Appellate Rule 26(g) provides the required form of papers to be filed with an appellate court, such as the proper point type, size of paper, and line spacing. N.C. R. App. P. 26(g). Appellate Rule 28(b)(5) provides that each question presented in a brief must be followed by the pertinent assignments of error along with the corresponding numbers and pages at which they appear in the printed record on appeal. N.C. R. App. P. 28(b)(5). Appellate Rule 25 details penalties

for failure to comply with the appellate rules. N.C. R. App. P. 25. Rule 25(a) specifically authorizes dismissal of an appeal for failure of the appellant to take timely action. Rule 25(a) is not at issue in this case.

Rule 25(b), added to the rules by amendment 8 December 1988—effective 1 July 1989, provides:

> A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

N.C. R. App. P. 25(b). Hence, if an appellate court seeks to impose sanctions for a substantial failure to comply with the appellate rules, Rule 25(b) provides that the court may impose sanctions "of the type and in the manner prescribed by Rule 34 for frivolous appeals." The sanctions listed under Rule 34 include dismissal of the appeal; monetary damages "including, but not limited to, single or double costs, damages occasioned by delay, and reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding"; and any other sanction deemed just and proper. N.C. R. App. P. 34(b). Rule 34(d), added by amendment 8 December 1988—effective 1 July 1989, further provides:

> If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed.

N.C. R. App. P. 34(d).

Rule 34(d) does not require an appellate court to hold a special hearing to show cause why a sanction should not be imposed. Rather, under Rule 34(d) an appellant can be required to show cause in writing as enumerated in the rule, or the appellate court can simply demonstrate on the record that during oral arguments, it asked the appellant to show cause why it should not be sanctioned. This inquiry can consist wholly of this one question and need not consume more than a brief part of the oral argument.

In the instant case, defendant's brief was single-spaced, violating Rule 26(g), which requires double-spacing between each line of text in the brief. As Judge Walker noted in his dissenting opinion, neither

appellant's nor appellee's brief complied with Rule 26(g). Defendant also violated Rule 28(b)(5) by failing to properly designate the assignments of error in her brief. Based on these violations, the Court of Appeals dismissed defendant's appeal. However, the Court of Appeals did so without considering Rule 25(b), which governs imposition of sanctions for substantial failure to comply with the appellate rules.

This case is distinguishable from *Bustle v. Rice*, 116 N.C. App. 658, 449 S.E.2d 10 (1994), in which the Court of Appeals emphasized that the appellants' numerous rules violations rendered it "virtually impossible for us to discern to which assignment of error appellants direct their argument; accordingly, we decline to address the merits of the argument." *Id.* at 659, 449 S.E.2d at 11. Here, two members of the Court of Appeals' panel determined that at least one assignment of error was discernible, and Judge Walker was able to identify the assignments of error argued in defendant's brief. Therefore, under Rule 34(d), this defendant should have been afforded the opportunity to show cause why her appeal should not be dismissed.

We recognize that appellate courts have the power to dismiss an appeal under the appellate rules. The Court of Appeals has addressed this issue in several cases. In a case involving the appellees' failure to comply with Rule 26, the Court of Appeals, citing Rules 25(b) and 34(b), stated that while it could elect not to, it chose to consider the brief since Rule 26 had not previously been construed. *Lewis v. Craven Reg'l Med. Ctr.*, 122 N.C. App. 143, 147-48, 468 S.E.2d 269, 273 (1996); *see also Paris v. Woolard*, 128 N.C. App. 416, 419, 497 S.E.2d 283, 285 (noting that a violation of Rule 26 could result in the imposition of sanctions pursuant to Rules 25(b) and 34(b)), *disc. rev. denied*, 348 N.C. 283, 502 S.E.2d 843 (1998). Moreover, in *Weatherford v. Glassman*, 129 N.C. App. 618, 620, 500 S.E.2d 466, 468 (1998), the Court of Appeals acknowledged that a failure to comply with Rule 26(g) could result in the imposition of appropriate sanctions, "*including dismissal of the appeal, in accordance with Rules 25(b) and 34(b) of the Rules of Appellate Procedure.*" (Emphasis added.) However, in both *Weatherford* and *Lewis*, the Court of Appeals refers to dismissal of appeals under Rules 25(b) and 34(b), without reference to the Rule 34(d) requirement of ordering the party subject to the sanction to show cause. *Id.; Lewis*, 122 N.C. App. at 147-48, 468 S.E.2d at 273.

Citing a number of cases, the majority states that failure to follow the appellate rules has consistently subjected an appeal to dismissal.

However, these cases show that this Court has been slow to dismiss an entire appeal, as distinguished from dismissing specific issues, on procedural grounds. *See State v. Glenn*, 333 N.C. 296, 306, 425 S.E.2d 688, 695 (1993) (holding that certain assignments of error were deemed waived for failure to comply with Rule 28(d), but not dismissing the appeal); *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 213, 132 S.E.2d 313, 315 (1963) (reviewing the record despite numerous violations of the General Statutes and Rules of Practice in the Supreme Court, but affirming the trial court's dismissal of the appeal for failure to timely serve the case on appeal); *State v. Newton*, 207 N.C. 323, 329, 177 S.E. 184, 187 (1934) (reviewing the record despite defendant's violation of Rule 28 and finding no prejudicial or reversible error); *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913) (examining the record to ensure that no error was committed in the trial and then dismissing for failure to print the record and briefs in accordance with the rules of this Court). In addition, the Court of Appeals, in *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984), considered the appeal, concluding that the appellant's rule violations did not increase the difficulty of evaluating the appeal due to the record's brevity and the nature of the issue presented.

Furthermore, these cases must be considered in light of the 1989 amendments to the appellate rules which added, *inter alia*, subsection (b) to Rule 25 and subsection (d) to Rule 34. While these amendments do not prohibit an appellate court from dismissing an appeal for substantial violation of the appellate rules, they do provide a procedure whereby the offending party is afforded the opportunity to show cause why this most drastic sanction should not be imposed.

In conclusion, the appellate rules prescribe both the type of sanctions and the manner in which they may be imposed. Therefore, I would remand the case to the Court of Appeals for further proceedings not inconsistent with Appellate Rules 25(b) and 34(d).

Justices PARKER and ORR join in this dissenting opinion.

CARRIKER v. CARRIKER

[350 N.C. 71 (1999)]

WILLIAM W. CARRIKER, JR., ELIZABETH C. CARRIKER, THOMAS E. CARRIKER, JR., AND ROBERT T. CARRIKER v. CASPER O. CARRIKER, JR., NANCY CARRIKER BLACKWELDER, SAMUEL L. CARRIKER, BETTY JO CARRIKER EARLY, JANE CARRIKER FURR, JAMES EDWARD CARRIKER, JERRY L. CARRIKER, KENNETH CARRIKER, AND RENA CARRIKER O'DANIEL

No. 312PA98

(Filed 4 March 1999)

1. **Appeal and Error— appealability—denial of summary judgment—summary judgment granted for opposing parties**

Plaintiffs had a right to appeal the trial court's denial of their motion for summary judgment where the trial court also granted summary judgment in favor of the nonmovant defendants. The denial of plaintiffs' summary judgment motion and the grant of summary judgment in favor of defendants disposed of the cause as to all parties and was a final judgment on the merits of the case.

2. **Wills— contingent remainder to grandchildren—per stirpes distribution**

The language of testator's will required a per stirpes distribution on a representative basis to testator's grandchildren rather than a per capita distribution where the will gave testator's three daughters a life estate in his property, provided that upon the death of his three daughters the property should be equally divided among his "then surviving children," and further provided that "if any child or children shall have died leaving legitimate child or children, then such child or children to take the share that their deceased parent would have taken had he or she been living"; none of testator's five sons were living when testator's last daughter died; and at the time of death of the last daughter, the living legitimate children of the testator's children were the two children of one son, two children of a second son, and the nine children of a third son.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished, per curiam decision of the Court of Appeals, 130 N.C. App. 149, 505 S.E.2d 185 (1998), affirming an order granting summary judgment for defendants by Davis (James C.), J., on 23 September 1997 in Superior Court, Cabarrus County, and dismissing

the appeal of the denial of plaintiffs' summary judgment motion. Heard in the Supreme Court 14 January 1999.

Mitchell, Rallings, Singer, McGirt & Tissue, PLLC, by Allan W. Singer and Sherri L. McGirt, for plaintiff-appellants.

Hartsell Hartsell & White, P.A., by Fletcher L. Hartsell, Jr., for defendant-appellees.

WAINWRIGHT, Justice.

North Carolina resident James Edward Carriker ("testator") died on 2 January 1935. At the time of testator's death, he was survived by his wife, three daughters, and five sons.

Testator owned two parcels of land, both located in Cabarrus County (collectively, "property"). Upon his death, testator bequeathed a life estate in the property to his wife, who died on 1 April 1951. Upon his wife's death, testator's will gave his three daughters a life estate in the property for as long as they lived and maintained a home on the property.

On 6 February 1996, the last of testator's three daughters died. Testator's will provided that upon the death of his three daughters, the property shall be equally divided among his "then surviving children." When testator's last daughter died, none of testator's five sons were living.

Testator's will further provided that "if any child or children shall have died leaving legitimate child or children, then such child or children to take the share that their deceased parent would have taken had he or she been living."

At the time of the death of the last daughter, the living legitimate children of testator's children were the following: two of testator's sons had two children each, who are the four plaintiffs in the instant action; and another of testator's sons had nine children, who are the defendants.

Plaintiffs filed this action and sought a declaratory judgment to construe the language of testator's will that provided for distribution of the property after the death of testator's last daughter. Plaintiffs claim the language in the will provides for a *per stirpes* distribution to testator's grandchildren on a representative basis. This distribution would mean that two plaintiffs would split a 1/3 share of the property, the other two plaintiffs would split a 1/3 share, and the nine defend-

ants would split a 1/3 share. In contrast, defendants claim the language provides for a *per capita* distribution, meaning plaintiffs and defendants would share equally and would each get a 1/13 undivided interest.

On 3 July 1997, plaintiffs filed a summary judgment motion. The trial court denied plaintiffs' motion for summary judgment and rendered summary judgment *sua sponte* in favor of defendants. Plaintiffs claim the trial court committed reversible error by not giving effect to testator's direction for distribution of the property. The Court of Appeals affirmed the trial court's grant of summary judgment to defendants and dismissed plaintiffs' appeal as to the denial of its summary judgment motion, claiming the appeal was interlocutory.

[1] On appeal to this Court, the first issue presented is whether the Court of Appeals erred in concluding that the denial of plaintiffs' motion for summary judgment was interlocutory and thus not appealable. Ordinarily, appellate courts do not review the denial of a motion for summary judgment because of its interlocutory nature. *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 153, 334 S.E.2d 499, 502 (1985), *disc. rev. denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy. *Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950).

In most cases, the denial of a motion for summary judgment establishes only that there is a genuine issue of material fact, and the ruling does not dispose of the case. However, in the instant case, the denial of plaintiffs' summary judgment motion and the grant of summary judgment in favor of nonmovant defendants disposed of the cause as to all parties and left nothing to be judicially determined by the trial court. Therefore, plaintiffs' appeal of the denial of its summary judgment motion and the grant of summary judgment in favor of defendants was a final judgment on the merits of the case, instead of being an interlocutory appeal. *N.C. Coastal Motor Line, Inc.*, 77 N.C. App. at 153, 334 S.E.2d at 502. As this Court has previously stated, "[t]he final dismissal of a claim under summary judgment involves a substantial right from which a plaintiff has an immediate right of appeal." *Tinch v. Video Indus. Servs.*, 347 N.C. 380, 382, 493 S.E.2d 426, 428 (1997). Thus, the Court of Appeals erred when it summarily disposed of plaintiffs' appeal.

[2] Because the Court of Appeals concluded plaintiffs' appeal was interlocutory, it did not address the merits of this case. We now address the merits and discuss the second issue of whether the language of the will provides for a *per stirpes* or a *per capita* distribution of the property.

Per stirpes distribution "denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living." *Wachovia Bank & Trust Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E.2d 758, 761 (1963). In contrast, *per capita* distribution is where beneficiaries "take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions." *Wooten v. Outland*, 226 N.C. 245, 248, 37 S.E.2d 682, 684 (1946). Although *per capita* distribution is generally favored over *per stirpes*, *per capita* will not be presumed to be the distributive plan if there is explicit *per stirpes* direction or intent. *Dew v. Shockley*, 36 N.C. App. 87, 89, 243 S.E.2d 177, 180, *disc. rev. denied*, 295 N.C. 465, 246 S.E.2d 9 (1978).

In the instant case, the pertinent language of the will provides:

> [A]t the death of the last of the three [daughters], then it is [testator's] will and desire that [his] property, real, personal or mixed, shall be equally divided among [his] then surviving children; and if any child or children shall have died leaving legitimate child or children, then such child or children to take the share that their deceased parent would have taken had he or she been living.

The trial court analyzed the will's language and concluded that the property should be distributed *per capita*. Thus, the trial court on its own motion granted summary judgment in favor of defendants. Although a party does not have to move for summary judgment to be entitled to it, the nonmovant must be entitled to the judgment as a matter of law. *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447-48 (1979). We conclude that defendants are not entitled to summary judgment as a matter of law.

The language of the will provides that testator's daughters had only life estates, while testator's sons had the remainder interests. When testator's last daughter died, none of testator's five sons were living. However, the will provides that if any of testator's deceased children has legitimate children, then those children take the

share that their deceased parent would have taken. This language in the will gives testator's potential grandchildren a contingent remainder.

Only three of testator's sons had children, who are the plaintiffs and defendants in this case. These children satisfied the contingent remainder provided for in the will by being legitimate and by surviving their deceased parent. Therefore, their interests vested and they are entitled to a share of the property.

The words of the will instruct that plaintiffs and defendants will receive the share their deceased parents would have received if their parents had been living. Thus, each of the parties is taking as representatives of their father. As the Court of Appeals has already noted, taking as a representative of an ancestor infers a *per stirpes* distribution. *See Jamin v. Williamson*, 94 N.C. App. 699, 701, 381 S.E.2d 345, 346 (1989).

Contrary to defendants' assertion, *Haywood v. Rigsbee*, 207 N.C. 684, 692, 178 S.E. 102, 106 (1935), is not controlling because its language "*among* my children and their issue" (emphasis added) is not the same language as provided in the instant case. Instead, the language of testator's will in the instant case is similar to the language in *Jamin*, 94 N.C. App. 699, 381 S.E.2d 345. Therefore, the property should be distributed *per stirpes*.

Because the will provided for a *per stirpes* distribution, the trial court incorrectly concluded that the property should be distributed *per capita*. The parties should actually receive what their own father would have received. Thus, two plaintiffs share a 1/3 interest in the property (1/6 each), the other two plaintiffs share a 1/3 interest (1/6 each), and defendants share a 1/3 interest (1/27 each).

Accordingly, we reverse the decision of the Court of Appeals dismissing the appeal and remand to that court for further remand to the trial court for an order consistent with this opinion.

REVERSED AND REMANDED.

WILLIAM MICHAEL STEM AND EDWARD N. KEETON v. GILL RICHARDSON, INDIVIDUALLY AND AS THE AGENT FOR NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY; AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 153PA98

(Filed 4 March 1999)

Appeal and Error— service of judgment by mail—motion for new trial—time for service—tolling of time for serving notice of appeal

Under Appellate Procedure Rule 58, the moving party is entitled to three additional days to file a motion for a new trial pursuant to Rule of Civil Procedure 59 if service of the judgment was made by mail, thus allowing the moving party a total of thirteen days from the date that the judgment was entered to serve by mail a motion for a new trial rather than the ten-day period provided in Rule 59(b). Where the judgment prepared by plaintiffs was entered without a certificate of service attached, defendants received the judgment by mail, and defendants served their Rule 59 motion for a new trial nine days after receiving the judgment in the mail and twelve days after the judgment was entered, the Rule 59 motion was timely served and tolled the running of the time for filing and serving a notice of appeal. N.C. R. App. P. 58; N.C.G.S. § 1A-1, Rule 59(b).

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a per curiam, unpublished decision of the Court of Appeals, 128 N.C. App. 754, 498 S.E.2d 209 (1998), dismissing defendants' appeal of a 26 July 1996 judgment and a 13 November 1996 order entered by Stephens (Donald W.), J., in Superior Court, Granville County. Heard in the Supreme Court 14 January 1999.

Everett, Gaskins, Hancock & Stevens, L.L.P., by Hugh Stevens, for plaintiff-appellees.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr., and John R. Kincaid, for defendant-appellants.

ORR, Justice.

The underlying matter was tried before a jury at the 22 April 1996 session of Superior Court, Granville County. On 26 April 1996, the

jury returned a verdict for plaintiffs, and on 27 June 1996, the trial court entered an order awarding plaintiffs costs and attorney's fees. Plaintiffs' counsel subsequently prepared a judgment incorporating the jury verdict and the trial judge's award of costs and attorney's fees. This judgment was delivered to the trial judge and was signed out of session, out of term, and out of county. The signature on the judgment is not dated; thus, we cannot discern when the judgment was signed by the trial judge.

The judgment was mailed to the Clerk of Superior Court for Granville County, without a certificate of service attached, and was entered on 26 July 1996. A copy of the signed and date-stamped judgment was delivered by United States mail to defendants' counsel's office on 29 July 1996, again without certificate of service attached.

On 7 August 1996, defendants served plaintiffs with a motion for new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. This motion was denied by order dated 13 November 1996. The defendants subsequently filed a notice of appeal, which the parties stipulated in the record on appeal was timely filed, and on 2 June 1997, defendants filed their record on appeal in the Court of Appeals. The Court of Appeals, on 3 March 1998, in a per curiam, unpublished decision, dismissed defendants' appeal on its own motion. The Court of Appeals reasoned that because the trial court entered its judgment on 26 July 1996, and defendants served a motion for a new trial on 7 August 1996, defendants failed to serve the motion within the ten-day requirement of Rule 59(b). Therefore, the Court of Appeals concluded defendants did not toll the running of the time for filing and serving a notice of appeal and the notice of appeal was therefore not timely filed pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure.

Defendants filed a petition for writ of certiorari on 16 April 1998, and this Court allowed the petition on 8 October 1998.

Specifically, defendants argue that the Court of Appeals failed to properly apply Rule 58 of the North Carolina Rules of Civil Procedure as it interacts with Rule 59 and Rule 3 of the North Carolina Rules of Appellate Procedure.

Rule 58 provides, in pertinent part:

> Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the

> judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered.

N.C.G.S. § 1A-1, Rule 58, para. 1 (Supp. 1997).

Rule 59(b) provides that "[a] motion for a new trial shall be served not later than 10 days after entry of the judgment." N.C.G.S. § 1A-1, Rule 59(b) (1990). According to the clear language of Rule 58, the moving party is entitled to three additional days to file a motion for a new trial pursuant to Rule 59 if service of the judgment was made by mail. Therefore, the moving party is allowed a total of thirteen days from the date that the judgment is entered to serve by mail a motion for a new trial, rather than the ten-day period provided in Rule 59(b).

Applying this rule to the case at bar, the judgment was entered on 26 July 1996 without a certificate of service attached. Defendants received the judgment by mail on 29 July 1996, still lacking an attached certificate of service. Defendants served their Rule 59 motion for new trial on 7 August 1996, nine days after receiving the judgment in the mail and twelve days after the judgment was entered. Thus, we find that the Rule 59 motion was timely served when the three days are added to the ten days allowed by Rule 59.

Therefore, we conclude that the Court of Appeals erred in dismissing defendants' appeal. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. JOHN FRANCES HAYES

No. 311PA98

(Filed 4 March 1999)

Appeal and Error— preservation of issues—denial of motion in limine—admissibility of evidence—objection at trial

Defendant failed to preserve for appeal the question of the admissibility of evidence that had been the subject of a motion in limine where he objected to the denial of the motion but failed to object to that evidence at the time it was offered at trial. The four-part test set forth in the opinion of the Court of Appeals in this case is disavowed.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 154, 502 S.E.2d 853 (1998), finding no error in the jury trial resulting in a judgment entered by Saunders, J., on 26 November 1996 in Superior Court, Mecklenburg County. Heard in the Supreme Court 14 January 1999.

Michael F. Easley, Attorney General, by William P. Hart and Alexander McC. Peters, Special Deputy Attorneys General, for the State-appellant and -appellee.

Rudolf & Maher, P.A., by M. Gordon Widenhouse, Jr.; Smith, Helms, Mulliss & Moore, L.L.P., by James G. Exum, Jr.; and The Exum Law Office, by Mary March Exum, for defendant-appellant and -appellee.

PER CURIAM.

In this case, the Court of Appeals concluded

that if: (1) there has been a full evidentiary hearing where the substance of the objection(s) raised by the motion *in limine* has been thoroughly explored; (2) the order denying the motion is explicit and definitive; (3) the evidence actually offered at trial is substantially consistent with the evidence explored at the hearing on the motion; and (4) there is no suggestion that the trial court would reconsider the matter at trial, an objection to the denial of the motion *in limine* is alone sufficient to preserve the evidentiary issues which were the subject of the motion *in limine* for review by the appellate court.

State v. Hayes, 130 N.C. App. 154, —, 502 S.E.2d 853, 865 (1998) (footnote omitted).

The Court of Appeals applied its four-part test and concluded defendant had preserved for appeal his challenge to the admissibility of evidence that had been the subject of a motion *in limine*. The Court of Appeals reviewed the merits and found no error in the trial court's admission of the challenged evidence. We allowed the State's petition for discretionary review to address the new four-part test articulated by the Court of Appeals.

This Court has consistently held that " '[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial.' " *State v. Bonnett*, 348 N.C. 417, 437, 502 S.E.2d 563, 576 (1998) (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d. 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)), *cert. denied*, — U.S. —, — L. Ed. 2d —, 1999 WL 24797 (Jan. 25, 1999) (No. 98-6972); *see also Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998). Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and "thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (quoting *Conaway*, 339 N.C. at 521, 453 S.E.2d at 845), *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). To the extent such cases as *State v. Moore*, 107 N.C. App. 388, 420 S.E.2d 691, *disc. rev. denied*, 332 N.C. 670, 424 S.E.2d 414 (1992), differ, they are overruled.

In the present case, defendant failed to object when the evidence that was the subject of the motion *in limine* was offered at trial, and therefore, he failed to preserve for appeal the question of the admissibility of such evidence. We therefore disavow the four-part test set forth in the opinion of the Court of Appeals in the instant case. Accordingly, the opinion of the Court of Appeals, as modified herein, is affirmed.

Defendant also petitioned this Court for discretionary review as to additional issues pursuant to N.C.G.S. § 7A-31 (1995). We allowed review but now conclude review was improvidently allowed.

MODIFIED AND AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

HAYES v. TOWN OF FAIRMONT

[350 N.C. 81 (1999)]

WILLIAM A. HAYES, ROBERT O. FLOYD, ROBERT O. FLOYD, III, JIMMY DANE AMMONS, TERESA TURNER AMMONS, GLENN S. McPHATTER, JO ANN SMITH, JIMMY BAIN SMITH, RUBY NORRIS SMITH, AMY S. BASS, ELLA MAE WALLACE, FRANCES JOHNSON CLONCH, CONNIE WHEELER BROOKS, JAMES C. CAPPS, JR., WENDY LOU CAPPS, ROBERT L. CAPPS, BEVERLY MARKS CAPPS, THOMAS M. LEWIS, SHIRLEY R. LEWIS, C.M. IVEY, GLADYS S. IVEY, D. JEFFREY ROGERS, KAY ROGERS, CAROLYN BRITT, BOBBY BRITT, A. ALLEN FOWLER, III, CARL SCOTT, MYRTLE ROSE SCOTT, RITA SCOTT PRIDGEN, RICHARD PRIDGEN, NANCY DICKENS, NANCY IVEY MARKS, BELINDA SMITH, ROBBIE LYNN SMITH, CHANDOS SMITH, KATHRYN BASSETT, WAYNE FLOYD, CHARLES CALLAHAN, A.B. STUBBS, REBECCA M. STUBBS, ALEX B. STUBBS, III, SHIRLEY F. JENKINS, PETITIONERS v. TOWN OF FAIRMONT, RESPONDENT

No. 338PA98

(Filed 4 March 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 125, 502 S.E.2d 380 (1998), reversing and remanding an order entered on 9 October 1997 by Ellis, J., in Superior Court, Robeson County. On 5 November 1998, this Court allowed respondent's petition for discretionary review and petitioners' petition for discretionary review as to additional issues. Heard in the Supreme Court 9 February 1999.

Shipman & Associates, L.L.P., by C. Wes Hodges, III, for petitioner-appellants and -appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis, for respondent-appellant and -appellee.

PER CURIAM.

Justice Martin recused and 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, e.g., Shackelford v. City of Wilmington*, 349 N.C. 222, 505 S.E.2d 80 (1998).

AFFIRMED.

STATE OF NORTH CAROLINA v. RICKY BRIGHT

No. 440PA98

(Filed 4 March 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 131 N.C. App. 57, 505 S.E.2d 317 (1998), finding no error as to defendant's convictions for first-degree burglary and first-degree kidnapping, but vacating judgments entered upon defendant's convictions for first-degree rape and first-degree sexual offense entered 7 November 1996 by Rousseau, J., in Superior Court, Wilkes County, and remanding for a new trial on those charges. Heard in the Supreme Court 12 February 1999.

Michael F. Easley, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State-appellant and -appellee.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant and -appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

IN THE MATTER OF THE LICENSE OF DARRYL BURKE CHEVROLET, INC., SAFETY EMISSION INSPECTION STATION, LICENSE NO. 20749, DARRYL BURKE CHEVROLET, INC., PETITIONER v. FREDERICK AIKENS, ACTING COMMISSIONER OF MOTOR VEHICLES, RESPONDENT

No. 471A98

(Filed 4 March 1999)

Appeal by petitioner pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 31, 505 S.E.2d 581 (1998), affirming the judgment entered by LaBarre, J., on 4 September 1997, in Superior Court, Wake County. Heard in the Supreme Court 11 February 1999.

Clifton & Singer, L.L.P., by Benjamin F. Clifton, Jr., and C.D. Heidgerd, for petitioner-appellant.

Michael F. Easley, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and Jeffrey R. Edwards, Associate Attorney General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM GENERAL INSURANCE COMPANY v. JAMES E. LONG, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND MURIEL K. OFFERMAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF REVENUE

No. 192A98

(Filed 4 March 1999)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(1) and N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 129 N.C. App. 164, 497 S.E.2d 451 (1998), affirming summary judgment for defendants entered 17 April 1997 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 12 February 1999.

Young Moore and Henderson P.A., by William M. Trott and Dawn M. Dillon; and Walter Hellerstein, pro hac vice, for plaintiff-appellants.

Michael F. Easley, Attorney General, by Sue Y. Little, Assistant Attorney General, and George W. Boylan, Special Deputy Attorney General, for defendant-appellees.

PER CURIAM.

AFFIRMED.

IN THE MATTER OF THE LICENSE OF ROYAL PONTIAC GMC TRUCK, INC., SAFETY EMISSION INSPECTION STATION, LICENSE NO. 20462 AND INSPECTOR/MECHANIC ROBERT DENBLEYKER, LICENSE NO. 6189955, PETITIONERS v. FREDERICK AIKENS, ACTING COMMISSIONER OF MOTOR VEHICLES, RESPONDENT

No. 472A98

(Filed 4 March 1999)

Appeal by petitioners pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 131 N.C. App. 154, — S.E.2d — (1998), affirming a judgment entered by LaBarre, J., on 4 September 1997 in Superior Court, Wake County. Heard in the Supreme Court 11 February 1999.

Clifton & Singer, L.L.P., by Benjamin F. Clifton, Jr., and C.D. Heidgerd, for petitioner-appellants.

Michael F. Easley, Attorney General, by Jeffrey R. Edwards, Associate Attorney General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MARK LAQUOIR HOLMAN

No. 388PA98

(Filed 4 March 1999)

On appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous, unpublished decision of the Court of Appeals, 130 N.C. App. 486, 506 S.E.2d 298 (1998), finding no error in the denial of a motion to suppress certain physical evidence entered by Stephens (Ronald L.), J., at the 30 September 1996 Criminal Session of Superior Court, Durham County. Heard in the Supreme Court 11 February 1999.

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

Daniel Shatz for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. FRANCIS M. KENNEDY

No. 387A98

(Filed 4 March 1999)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 399, 503 S.E.2d 133 (1998), finding no error in a judgment entered by Cashwell, J., on 24 October 1996 in Superior Court, Wake County. Heard in the Supreme Court 9 February 1999.

Michael F. Easley, Attorney General, by Anne M. Middleton, Associate Attorney General, for the State.

Tharrington Smith, L.L.P., by Roger W. Smith and E. Hardy Lewis, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. KENNETH WAYNE VAUGHN

No. 332PA98

(Filed 4 March 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 456, 503 S.E.2d 110 (1998), finding no error in defendant's trial and conviction but vacating the judgment entered by Smith (W. Osmond, III), J., on 20 March 1997 in Superior Court, Guilford County and remanding for resentencing. Heard in the Supreme Court 9 February 1999.

Michael F. Easley, Attorney General, by H. Alan Pell, Special Deputy Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

AFFIRMED.

SHANNON CAUDILL v. JAMES L. DELLINGER, C. RICKY BOWMAN, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF JUDICIAL DISTRICT 17-B, AND THE ADMINISTRATIVE OFFICE OF THE COURTS

No. 270A98

(Filed 4 March 1999)

Appeal by defendant James L. Dellinger 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. 649, 501 S.E.2d 99 (1998), reversing and remanding a judgment entered by Cornelius, J., on 3 June 1997 in Superior Court, Surry County. On 5 November 1998 this Court allowed defendant Dellinger's petition for discretionary review as to additional issues. Heard in the Supreme Court 12 February 1999.

Elliot, Pishko, Gelbin & Morgan, P.A., by David C. Pishko, for plaintiff-appellee.

White & Crumpler, by H.W. Zimmerman, Jr., and Dudley A. Witt, for defendant-appellant Dellinger.

PER CURIAM.

On defendant Dellinger's appeal, the decision of the Court of Appeals is affirmed for the reasons stated in the majority opinion by Judge Horton. Defendant's petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

WAYNE JACK BOYD AND LINDA BOYD v. EZRA B. DRUM, JESSIE S. DRUM, BALLS CREEK SALVAGE CO., INC., JAMES G. READ AND BALLS CREEK SALVAGE CO. AUTO DISMANTLERS & RECYCLERS, INC.

No. 261A98

(Filed 4 March 1999)

Appeal by plaintiffs 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. 586, 501 S.E.2d 91 (1998), affirming a judgment entered by Baker, J., on 11 March 1997 in Superior Court, Catawba County. Heard in the Supreme Court 8 February 1999.

Ruff, Bond, Cobb, Wake & Bethune, L.L.P., by Robert S. Adden, Jr., for plaintiff-appellants.

Waddell, Mullinax & Williams, L.L.P., by Lewis E. Waddell, Jr., for defendant-appellees Ezra and Jessie Drum and Balls Creek Salvage Co., Inc.

PER CURIAM.

AFFIRMED.

AYCOCK v. HOOKS

No. 48P99

Case below: 131 N.C.App. 878

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

BOWERS v. CITY OF THOMASVILLE

No. 555P98

Case below: 131 N.C.App. 556

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

BREWER v. CABBARUS PLASTICS, INC.

No. 465P98

Case below: 130 N.C.App. 681

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

BROCKERS v. PERDUE FARMS, INC.

No. 450P98

Case below: 130 N.C.App. 759

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

BROWN v. RENAISSANCE MEDIA, INC.

No. 449A98

Case below: 131 N.C.App. 152

Motion by defendant to dismiss appeal allowed 4 February 1999. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

This Court Ex mero moto grants a writ of certiorari for one issue based on the dissenting opinion in the Court of Appeals: Whether the

Court of Appeals erred by affirming the trial court's dismissal of plaintiffs' claim in view of the trial court's failure to address whether George W. Brown, Jr. acted within the scope of his authority when he executed the two notes.

By order of the Court in Conference, this 4th day of February, 1999.

BROWN v. WEAVER-ROGERS ASSOC.

No. 487P98

Case below: 131 N.C.App. 120

Petition by defendants (Paul Pickering and Allison Pickering) for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

CALHOUN v. WAYNE DENNIS HEATING & AIR COND.

No. 341PA98

Case below: 129 N.C.App. 794

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 4 February 1999. Petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed ex mero motu 3 March 1999. Justice Martin recused.

COUNTY OF DURHAM v. N.C. DEP'T OF ENV'T & NATURAL RESOURCES

No. 548P98

Case below: 131 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

D. G. MATTHEWS & SON v. STATE ex rel. McDEVITT

No. 560P98

Case below: 131 N.C.App. 520

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

DEESE v. CHAMPION INT'L CORP.

No. 500P98

Case below: Wake County Superior Court

This petition is allowed 3 March 1999 for the limited purpose of remanding the case to the Court of Appeals for reconsideration in light of Adams v. AVX Corp. (filed 31 December 1998).

DEP'T OF TRANSP. v. ROWE

No. 506PA98

Case below: 131 N.C.App. 206

Petition by defendants (Rowe and Pruitt) for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1999.

ESTATES, INC. v. TOWN OF CHAPEL HILL

No. 432P98

Case below: 130 N.C.App. 664

Petition by intervenor for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Conditional petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Martin recused.

EVERETT v. SARA LEE CORP.

No. 488P98

Case below: 131 N.C.App. 152

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

FALLS v. NOAH

No. 482P98

Case below: 131 N.C.App. 152

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

FELMET v. DUKE POWER CO.

No. 459P98

Case below: 131 N.C.App. 87

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

FENDER v. DEATON

No. 458P98

Case below: 130 N.C.App. 657

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Parker recused.

FORDHAM v. EASON

No. 509PA98

Case below: 131 N.C.App. 226

Petition by defendant (American Woodland) for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1999. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

FURR v. FONVILLE MORISEY REALTY, INC.

No. 425PA98

Case below: 130 N.C.App. 541

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1999.

GILL v. PHIFER

No. 543P98

Case below: 131 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Motion by plaintiff to strike defendant-appellees' responses to petition denied 3 March 1999. Justice Martin recused.

GREGORY v. CITY OF KINGS MOUNTAIN

No. 52P99

Case below: 131 N.C.App. 878

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

HANCOCK v. TENERY

No. 512P98

Case below: 131 N.C.App. 149

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1999.

HIATT v. CITY OF WINSTON-SALEM

No. 17P99

Case below: 131 N.C.App. 700

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

HOOTS v. LOKEY

No. 451P98

Case below: 131 N.C.App. 153

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

IN RE ESTATE OF ROBINSON

No. 526P98

Case below: 131 N.C.App. 335

Petition by caveator (William Franklin Robinson) for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

IN RE HARGROVE

No. 18A99

Case below: 131 N.C.App. 700

Motion by Attorney General to dismiss appeal allowed 3 March 1999.

IN RE WILL OF BUCK

No. 428PA98

Case below: 130 N.C.App. 408

Petition by caveator for discretionary review pursuant to G.S. 7A-31 allowed 4 February 1999.

JIMENEZ v. BROWN

No. 56P99

Case below: 131 N.C.App. 818

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

JUSTICE v. WHALEY

No. 1P99

Case below: 131 N.C.App. 556

Petition by respondents (Linda and Benjamin Willis, Jr.) for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

KIOUSIS v. KIOUSIS

No. 416P98

Case below: 130 N.C.App. 569

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

LEONARD v. LOWE'S HOME CTRS.

No. 527P98

Case below: 131 N.C.App. 304

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

LIN v. LIN

No. 511P98

Case below: 128 N.C.App. 533

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

MITCHELL v. TAYLOR

No. 415P98

Case below: 130 N.C.App. 484

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

MORRIS v. COBLE

No. 515P98

Case below: 131 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

MOSELEY v. BLYTHE EQUIP. CO.

No. 542P98

Case below: 131 N.C.App. 554

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

MUSE v. BRITT

No. 381P98-2

Case below: 123 N.C.App. 357

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1999.

O'BRIEN v. O'BRIEN

No. 7P99

Case below: 131 N.C.App. 411

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

OPENSHAW v. BUXTON CHIROPRACTIC CLINIC

No. 494P98

Case below: 131 N.C.App. 154

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

PERFORMANCE FRICTION CORP. v. LAMBA

No. 11P99

Case below: 131 N.C.App. 878

Motion by plaintiff (Performance) for temporary stay allowed 15 January 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Petition by plaintiff for writ of supersedeas dismissed as moot 3 March 1999. Conditional petition filed by defendant (Jens Lamba) for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Justice Martin recused.

RICHARDSON v. MILLER

No. 376P98

Case below: 130 N.C.App. 612

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Martin recused.

SANDERS v. BROYHILL FURNITURE INDUS.

No. 544P98

Case below: 131 N.C.App. 383

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

SCOTT v. UNITED CAROLINA BANK

No. 399P98

Case below: 130 N.C.App. 426

Petition by defendant (UCB) for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

SHARPE v. WORLAND

No. 55P99

Case below: 132 N.C.App. 223

Motion by defendant (Wesley Long Community Hospital) for temporary stay allowed 12 February 1999. Motion by defendants (Dr. Worland and Greensboro Anesthesia) for temporary stay allowed 17 February 1999.

SMITH v. PRINCIPAL MUT. LIFE INS. CO.

No. 495P98

Case below: 131 N.C.App. 138

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1999. Justice Martin recused.

STAMEY v. N.C. SELF-INSURANCE GUAR. ASS'N

No. 556P98

Case below: 131 N.C.App. 662

Joint motion to withdraw petition for discretionary review pursuant to G.S. 7A-31 allowed 25 January 1999.

STATE v. ABERCROMBIE

No. 31P99

Case below: 131 N.C.App. 878

Motion by Attorney General to dismiss appeal allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. ANDREWS

No. 546P98

Case below: 131 N.C.App. 370

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. BARRETT

No. 14P99

Case below: 131 N.C.App. 879

Motion by Attorney General for temporary stay denied 20 January 1999. Petition by Attorney General for writ of supersedeas denied 3 March 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. BEDDINGFIELD

No. 452P98

Case below: 129 N.C.App. 424

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

STATE v. BOYKIN

No. 406P98

Case below: 130 N.C.App. 485

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

STATE v. BROWN

No. 30A81-3

Case below: Moore County Superior Court

Motion by Attorney General to vacate stay of execution denied 15 January 1999. Petition by plaintiff for writ of supersedeas denied 19 January 1999. Petition by Attorney General for writ of prohibition denied 19 January 1999. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Moore County denied 19 January 1999. Motion by Attorney General for reconsideration of orders denying State's petition for writs of supersedeas, prohibition, stay dismissed 25 January 1999.

STATE v. CHANEY

No. 558P98

Case below: Surry County Superior Court

Motion by defendant (Chaney) to dismiss petition for writ of certiorari allowed 25 February 1999.

STATE v. CHATHAM

No. 491P98

Case below: 131 N.C.App. 154

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

STATE v. CHERRY

No. 550PA98

Case below: 131 N.C.App. 555

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of appeals allowed 4 February 1999.

STATE v. DAIL

No. 44P99

Case below: 131 N.C.App. 879

Motion by Attorney General to dismiss appeal allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. DOVE

No. 442P98

Case below: 130 N.C.App. 758

Motion by Attorney General to withdraw petition for discretionary review allowed 7 January 1999.

STATE v. FEIMSTER

No. 417P98

Case below: 130 N.C.App. 613

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Martin recused.

STATE v. GORDON

No. 6P99

Case below: 131 N.C.App. 557

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. GRICE

No. 493P98

Case below: 131 N.C.App. 48

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. HAZEL

No. 35P99

Case below: 131 N.C.App. 702

Motion by defendant (Hazel) to proceed in forma pauperis allowed 3 March 1999. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1999.

STATE v. JORDAN

No. 365P98

Case below: 130 N.C.App. 236

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

STATE v. LOMICK

No. 447P98

Case below: 130 N.C.App. 760

Motion by Attorney General to dismiss appeal allowed 4 February 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

STATE v. MATTHEWS

No. 524P98

Case below: 130 N.C.App. 342

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1999.

STATE v. MOORE

No. 77P99

Case below: 132 N.C.App. 197

Motion by defendant (Moore) for temporary stay allowed 18 February 1999. Petition by defendant for writ of supersedeas denied 3 March 1999. Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Motion by Attorney General to dismiss appeal allowed 3 March 1999.

STATE v. ROSE

No. 182A92-2

Case below: Haywood County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Haywood County, denied 4 February 1999.

STATE v. ROUSE

No. 120A92-3

Case below: Randolph County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Randolph County, denied 4 February 1999.

STATE v. SPOONER

No. 23P99

Case below: 131 N.C.App. 703

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. THOMPSON

No. 43P99

Case below: 132 N.C.App. 135

Motion by Attorney General to dismiss appeal allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. VANHOOK

No. 547P98

Case below: 131 N.C.App. 703

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. WADDELL

No. 418A98

Case below: 130 N.C.App. 488

Motions by Attorney General to dismiss appeal of right and appeal based on constitutional question denied 4 February 1999.

STATE v. WAGONER

No. 528P98

Case below: 131 N.C.App. 285

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. WALKER

No. 28A99

Case below: 132 N.C.App. 133

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 March 1999.

STATE v. WASHINGTON

No. 507P98

Case below: 131 N.C.App. 156

Motion by Attorney General to dismiss appeal allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Justice Martin recused.

STATE v. WHITE

No. 15P99

Case below: 131 N.C.App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Justice Martin recused.

STATE v. WILEY

No. 499P98

Case below: 131 N.C.App. 335

Motion by Attorney General to dismiss appeal allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. WILLIAMS

No. 378P98

Case below: 120 N.C.App. 649

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 February 1999.

STATE v. WILLIAMS

No. 33P99

Case below: 131 N.C.App. 703

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1999.

STATE v. WILLIAMS

No. 24P99

Case below: 131 N.C.App. 703

Motion by Attorney General to dismiss appeal allowed 3 March 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

STATE v. WORNEY

No. 545P98

Case below: 131 N.C.App. 555

Motion by Attorney General to dismiss appeal allowed 4 February 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Martin recused.

STATE v. WRIGHT

No. 460P98

Case below: 131 N.C.App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

STROUD v. HARRISON

No. 536P98

Case below: 131 N.C.App. 480

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999.

THORN v. SCHERRER

No. 557P98

Case below: 131 N.C.App. 704

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Martin recused.

TIMOUR v. PITT COUNTY MEM. HOSP.

No. 3PA99

Case below: 131 N.C.App. 548

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1999.

VILLAGE OF RAINTREE HOMEOWNERS, INC. v.
RAINTREE COUNTRY CLUB, INC.

No. 51P99

Case below: 131 N.C.App. 880

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 March 1999. Justice Martin recused.

WEBB v. BERRYMAN

No. 514P98

Case below: 131 N.C.App. 555

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

WHITLEY v. WHITLEY

No. 503P98

Case below: 131 N.C.App. 335

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999.

WILSON v. DONAYRE

No. 473P98

Case below: 131 N.C.App. 155

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 February 1999. Justice Martin recused.

PETITIONS TO REHEAR

ADAMS v. AVX CORP.

No. 151PA98

Case below: 349 N.C. 676

Petition by defendants to rehear pursuant to Rule 31 denied 3 March 1999. Justice Martin recused.

NELSON v. FREELAND

No. 216A98

Case below: 349 N.C. 615

Petition by defendants to rehear pursuant to Rule 31 denied 3 March 1999.

STATE OF NORTH CAROLINA v. JOHN HENRY FLEMING

No. 175A97

(Filed 9 April 1999)

1. **Sentencing— capital sentencing—aggravating circumstance—heinous, atrocious, or cruel murder—constitutionality—sufficiency of evidence**

The (e)(9) especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague and overbroad. Furthermore, the evidence was sufficient to support submission of this aggravating circumstance to the jury where the State's evidence tended to show that the murder victim was repeatedly assaulted with a blunt object in his own home; as the victim struggled to defend himself, defendant continued to hit him on the head as the victim moved from the den, through the kitchen, and into the main hallway; the victim had multiple cuts and bruises on his head, arms, and right leg; the repeated blows to the victim's head did not render the victim unconscious; defendant then manually strangled the victim to the point where his hyoid bone was fractured; it took two minutes or more for the victim to loose consciousness when he was strangled; and the victim suffered great physical pain and torture as, already bloodied and bruised from the beatings, he was strangled so forcefully that his neck was repeatedly scratched.

2. **Jury— denial of motion for individual voir dire and sequestration**

The trial court did not abuse its discretion in the denial of defendant's motion for individual voir dire and sequestration of jurors during voir dire in a capital trial where the record did not support defendant's contention that prospective jurors who were unwilling to serve as jurors did not truthfully answer questions during voir dire.

3. **Jury— statutory selection process—prospective juror called to occupied seat—nonmember polled—absence of prejudice**

The defendant in a capital trial was not prejudiced by the jury selection process set forth in N.C.G.S. § 15A-1214(d) through (f) because a prospective juror was called to juror seat number ten which was already occupied by another juror where the person

called was never seated as a prospective juror, or because a person who was not a jury member was polled as a juror at the conclusion of the guilt-innocence phase of the trial.

4. Appeal and Error— preservation of issues—constitutionality of statute—lack of oath at voir dire

Defendant failed to preserve for appeal the issue of the constitutionality of the jury selection process set forth in N.C.G.S. § 15A-1214(d) through (f) where he did not raise this constitutional issue at trial. Likewise, defendant failed to preserve for appellate review the trial court's failure to require prospective jurors to swear to tell the truth during voir dire where he did not object to any lack of oath during voir dire.

5. Jury— capital trial—jury selection—opposition to death penalty—challenge for cause—denial of rehabilitation attempt

The trial court did not abuse its discretion in denying defendant's request to attempt to rehabilitate two prospective jurors challenged by the State for cause based upon their opposition to the death penalty where both jurors unequivocally stated that they could not recommend the death penalty under any circumstances.

6. Jury— capital trial—jury selection—strong enough to impose death penalty—not improper stake-out question

The prosecutor's questions to prospective jurors in a capital trial as to whether they were "strong enough" to recommend and impose the death penalty was not an improper "stake-out" question. Use of the term "strong enough" was not an impermissible inquiry as to the kind of verdict the prospective jurors would render or how they would be inclined to vote on a given state of facts.

7. Criminal Law— jury selection—actions of trial judge—not partiality to prosecution

The trial judge did not express an opinion or show partiality to the prosecution in this capital trial when he instructed the prosecutor during bench conferences to ask prospective jurors certain questions concerning their death penalty views where the trial judge also instructed defense counsel to ask certain questions, and it appears that the judge was merely fulfilling his duty to insure that a fair and impartial jury tried defendant's case.

8. Criminal Law— capital trial—actions by trial judge—not improper assistance to prosecutor

The trial judge did not express an opinion or show partiality to the prosecution in the guilt-innocence and sentencing phases of a capital trial when he interjected his own questioning during the prosecutor's examination of witnesses, instructed the prosecutor on the proper form of questions, suggested how the prosecutor should rephrase questions, intervened to correct improper questions by the prosecutor, and instructed the prosecutor to ask witnesses certain questions where the trial judge also interjected his own questioning while defense counsel was examining witnesses, interrupted defense counsel's questioning to clarify testimony, and instructed defense counsel to ask witnesses certain questions. Although the trial judge's actions might give the appearance of improper assistance to the prosecution, they are not sufficient to have had a prejudicial effect, especially in light of the fact that the judge aided both sides in formulating questions.

9. Evidence— irrelevancy—murder trial—weakness of Virginia uttering charges

In a first-degree murder prosecution in which the victim was the prosecuting witness on charges against defendant in Virginia of uttering forged checks belonging to the victim, testimony by the Virginia prosecutor that he thought the case against defendant on the uttering charges was weak was irrelevant and properly excluded by the trial court since it did not go to prove the existence of any fact of consequence in the determination of defendant's guilt of murder.

10. Evidence— chain of custody—watch found at crime scene

The trial court did not commit plain error by admitting into evidence a watch found at a murder scene, although the watch was not discovered until three days after the murder, the murder scene had not been secured, and a buckle which was initially on the watch was not on the watch at trial, where several witnesses testified that the watch was the same watch found at the murder scene and that it was defendant's watch; the watch was present in photographs of the scene taken on the day of the murder; and a member of the county sheriff's department testified that the watch was in the same condition as when it was found and that he maintained custody over the watch until it was trans-

ported to the SBI lab. Any alleged weakness in the chain of custody affected merely the weight, not the admissibility, of the watch.

11. Criminal Law— recesses during voir dire and sentencing—no abuse of discretion

The trial court did not improperly allow the prosecutor an opportunity to prompt his witness by allowing a recess during a voir dire hearing where the recess was apparently used by the prosecutor to insure that the witness adhered to the trial court's instruction not to mention that defense counsel may have discovered and moved a watch buckle during a jury view of the crime scene. Nor did the trial court improperly allow the prosecutor an opportunity to prompt a sentencing witness by taking a recess when the prosecutor objected to defendant's cross-examination of the witness, and the trial court informed the prosecutor that defense counsel's line of questioning was proper, told the prosecutor to instruct the witness to answer, and assured the prosecutor that the witness could clarify her testimony on redirect examination. Whether to call a recess was within the sound discretion of the trial judge, and the trial judge did not abuse his discretion.

12. Criminal Law— jury view—unsecured crime scene

The trial court did not abuse its discretion in allowing the State's motion for a jury view of a murder scene, although defendant argued that the scene was not secured and evidence there could have been tampered with, where the trial court was fully informed of all relevant facts and considered defendant's arguments when making its decision to permit the jury view. N.C.G.S. § 15A-1229(a).

13. Appeal and Error— appellate review of testimony—transcript sufficient

The transcript of defendant's murder trial was not so confusing as to render impossible appellate review of the testimony of an SBI agent who used a photograph to describe the location of blood splotches, the testimony of a deputy sheriff who used photographs and a diagram to aid his description of a shoe impression on a kitchen tile and the location of defendant's watch, and the testimony of a second SBI agent who used several exhibits to explain why the impression on the kitchen tile was identical to defendant's shoe. In order to prevent any alleged confusion in the

transcript, defendant had an opportunity to request that the witnesses mark on the exhibits as they testified but failed to do so; a reading of the transcript does not yield the level of confusion alleged by defendant; and the exhibits speak for themselves as to the blood spatters, watch, and shoe imprints.

14. Evidence— polygraph test—inadmissibility

Evidence concerning defendant's polygraph test was irrelevant and not admissible to show his cooperation with law officers or to show a consciousness of innocence.

15. Criminal Law— ruling on evidence—facetious statement by trial judge—not pressure on defendant to testify or showing of partiality

The trial judge's facetious statement, made when considering whether defendant's statement that he agreed to submit to a polygraph test was hearsay, "Fine. Call him. And let him say that he agreed to take the polygraph test," did not exert pressure on defendant to testify or show partiality by the trial judge against defendant, particularly since defendant did not take the stand during the guilt-innocence phase of the trial.

16. Discovery— pathologist as witness—requirement of written report—provision to defendant—discretion of trial court

Although there was no statutory requirement that a written report be prepared by a forensic pathologist who testified for the State in a capital sentencing proceeding, the trial court did not err when, in its discretion, it ordered the State to instruct this witness to prepare a written report, ordered the State to provide defendant with a copy of that report, and postponed the witness's testimony until the next day so that defendant could adequately prepare. N.C.G.S. § 15A-903(e).

17. Evidence— capital sentencing—embezzlement, false pretenses, prostitution—foundation for questions

The prosecutor was not improperly permitted to ask unfounded questions to a witness in a capital sentencing proceeding concerning whether he had knowledge of defendant's involvement in an embezzlement scheme, defendant's receipt of money for uncompleted construction jobs, or defendant's prostituting women at his residence where the witness denied knowledge of these matters, but subsequent witnesses testified about

the embezzlement scheme and about defendant's taking money and not completing construction projects, and defendant's daughter had testified previously about the prostitution at defendant's house.

18. Evidence— capital sentencing—cross-examination—impeachment—good faith questions—rebuttal of mitigating circumstances

The prosecutor's cross-examination of defendant's sister in a capital sentencing proceeding concerning whether she talked to others about defendant being violent was properly permitted to impeach the witness's direct testimony that defendant was not violent. Furthermore, the prosecutor's question as to whether this witness had heard that defendant inappropriately touched her niece's minor daughter was asked in good faith where the witness responded that she had heard about the inappropriate touching and the same evidence had been admitted previously, and this question was proper to rebut one or more of the submitted mitigating circumstances.

19. Appeal and Error— objection sustained—question answered—motion to strike—request for curative instruction

When the trial court sustains an objection to a question but the witness nonetheless answers the question, the objecting party has no basis for appeal absent a motion to strike or a request for a curative instruction.

20. Evidence— hearsay—embezzlement scheme—admission for nonhearsay purpose

Testimony elicited from a witness concerning an alleged embezzlement scheme was not hearsay since it was not admitted for the truth of the matter asserted but was admitted to explain the discrepancy between the witness's earlier statements to the police and his trial testimony.

21. Evidence— affirmative answers to questions—questions not unfounded

The prosecutor did not ask unfounded questions based on hearsay rumors about the reasons why defendant's day-care center was closed down when the witnesses responded affirmatively to those questions.

22. Homicide— first-degree murder—defendant as perpetrator—sufficient evidence

The State's evidence was sufficient to prove that defendant was the perpetrator of a first-degree murder where it tended to show that the victim was the prosecuting witness against defendant in an uttering forged checks case scheduled for trial approximately one week after the murder occurred; the victim's assailant entered the victim's house and repeatedly hit the victim on the head as the victim tried to escape, leaving a trail of blood-spatter marks leading from the den, into the kitchen, and down the main hallway; the assailant then manually strangled the victim while the victim unsuccessfully attempted to defend himself; defendant's watch and a shoe impression that matched defendant's shoe were found at the crime scene; and while the watch and shoe impression were not discovered until three days after the scene was initially examined, they were present in photographs taken at the initial examination.

23. Appeal and Error— preservation of issues—constitutionality of review standard—failure to raise in trial court

Defendant's contention that the standard of review which allows the appellate court to consider incompetent evidence to defeat a motion to dismiss violates defendant's constitutional right against double jeopardy will not be considered on appeal where defendant did not raise this issue in the trial court; furthermore, the appellate court has not determined that incompetent evidence was admitted or relied on by the trial court in ruling on defendant's motion to dismiss.

24. Criminal Law— prosecutor's closing argument—inferences supported by evidence

Where the evidence in a first-degree murder case showed that defendant had a key to the murder victim's post office box, the prosecutor's jury argument that if defendant has "a mail box key, he's probably got a house key" was a reasonable inference based on the evidence; moreover, whether defendant had a key was not significant since the evidence showed that defendant could gain access to the victim's house through a sliding door without a key. Also, the prosecutor's argument that defendant used a hammer to assault the victim was a reasonable inference to be drawn from evidence that an autopsy revealed both round and claw-shaped marks on the victim's head and that defendant possessed at least two claw hammers.

25. Criminal Law— prosecutor's closing argument—capital sentencing—statements supported by evidence, not grossly improper

The prosecutor's argument in a capital sentencing proceeding that defendant "was making a thousand dollars a week sometimes off of each girl" was supported by testimony of the victim's daughter that she would in fact generate a thousand dollars a week in prostitution and illegal drugs for defendant. Further, the prosecutor's argument that defendant told the victim that he would die on the day defendant murdered him was not so grossly improper as to require the trial court to intervene ex mero motu.

26. Criminal Law— prosecutor's closing argument—capital sentencing—defense counsel's reaction to witness—no gross impropriety

The prosecutor's statement in his closing argument in a capital sentencing proceeding that he thought defense counsel "was going to kill" defendant's ex-wife was not meant literally but was meant to imply that defense counsel's reaction to the ex-wife's demeanor and lack of responsiveness when defense counsel asked whether she knew defendant during the time of his first wife's death were damaging to defendant's case; therefore, the statement was not so grossly improper as to require intervention by the trial court ex mero motu.

27. Criminal Law— prosecutor's closing argument—capital sentencing—defense witnesses—Alzheimer's disease

The prosecutor's analogy to Alzheimer's disease when referring to the 180-degree turnaround in the evidence presented by defendant's witnesses was not prejudicial to defendant.

28. Criminal Law— prosecutor's closing argument—capital sentencing—payment of expert—no gross impropriety

Assuming arguendo that the prosecutor's argument in a capital sentencing proceeding that defendant's expert witness was being paid to give favorable testimony was improper, it did not entitle defendant to a new sentencing proceeding.

29. Criminal Law— prosecutor's closing argument—capital sentencing—discrediting family relationship—no impropriety

The prosecutor's closing argument attempting to discredit defendant's evidence that he had a loving relationship with his

family was proper during a capital sentencing proceeding which focused on defendant's character.

30. Criminal Law— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in other cases considering both the crime and the defendant where defendant was convicted on the basis of premeditation and deliberation; the jury found as aggravating circumstances (1) that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, and (2) that the murder was especially heinous, atrocious, or cruel; the evidence showed multiple blunt-force injuries to the head of the victim, multiple defensive wounds to the victim's arms and leg, and manual strangulation to death; the evidence of the defensive wounds and the amount of time required for fatal strangulation indicated that the victim suffered before he died and that he was aware of but unable to prevent his impending death; defendant's motive for killing the victim was that the victim was to testify against defendant in a criminal prosecution; and no evidence in the case suggests that defendant sought medical help for the victim.

Justices MARTIN and WAINWRIGHT 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 Grant (Cy A.), J., on 8 April 1997 in Superior Court, Northampton County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 November 1998.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Elizabeth G. McCrodden for defendant-appellant.

PARKER, Justice.

Defendant John Henry Fleming was indicted on 23 September 1996 for the first-degree murder of Genie Pelham ("victim"). Defendant was tried capitally and found guilty of first-degree murder on the basis of premeditation and deliberation. Following a capital-sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment accordingly.

The State's evidence at trial tended to show the following. On or about 17 May 1996, defendant entered the home of the victim and assaulted him with a blunt object. Based upon the blood-spatter marks found at the crime scene, Anthony Jernigan, a special agent with the State Bureau of Investigation ("SBI") and a crime-scene specialist, concluded that the assault began in the victim's den. The victim moved from the middle of the love seat to the north end of the love seat. While the assault continued, the victim moved from the den, to the kitchen, and finally to the main hallway. Judging from the level of the blood-spatter marks, the victim rose and fell approximately six different times as his assailant hit him on the head. Defendant's black watch and a shoe impression matching defendant's unique shoe imprint were found at the scene of the crime.

The autopsy revealed over a dozen contusions and lacerations on the victim's head. The forensic pathologists also found abrasions on the victim's neck, arms, and right leg. The injuries to the victim's arms and shin may have been defensive wounds. Additionally, the left side of the victim's hyoid bone, which is found at the base of the tongue, was broken. The cause of death was strangulation with the hand or hands. This conclusion was consistent with the fingernail marks found on the victim's neck, the hemorrhage into the tissues underneath the skin of the neck, and the fracture and hemorrhage of the hyoid bone.

At the time of the murder, defendant and Eugenia Pelham, the victim's daughter, were having a relationship; the victim did not approve of this relationship. The victim also intended to be a prosecuting witness against defendant for three counts of uttering forged checks on the victim's bank account. Defendant's uttering trial was scheduled for 23 May 1996.

Defendant presented no evidence at the guilt-innocence phase.

Additional facts will be presented as necessary to discuss specific issues.

PRETRIAL ISSUES

[1] By his first assignment of error, defendant contends that the trial court erred in denying his motion to prohibit the use of the aggravating circumstance that the victim's murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1997). Defendant argues, *inter alia*, that the (e)(9) aggravating circumstance is unconstitutionally vague and overbroad and that, based on the evidence

presented at trial, its submission was unwarranted. For the following reasons we disagree.

As to defendant's first argument, we have repeatedly rejected the contention that N.C.G.S. § 15A-2000(e)(9) is unconstitutional for being overbroad or vague. *See State v. Gray*, 347 N.C. 143, 189-90, 491 S.E.2d 538, 560 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 486 (1998); *see also State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Further, 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). We have stated that the (e)(9) aggravating circumstance is appropriate "when the murder in question is conscienceless, pitiless, or unnecessarily torturous to the victim." *State v. Kandies*, 342 N.C. 419, 450, 467 S.E.2d 67, 84, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). In determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance, 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. *See, e.g., State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998).

Applying these principles in this case, we conclude that the evidence was sufficient to support submission of the (e)(9) aggravating circumstance. Here, the State's evidence tended to show that the victim was repeatedly assaulted with a blunt object in his own home. As the victim struggled to defend himself, defendant continued to hit him on the head as the victim moved from the den, through the kitchen, and into the main hallway. The victim had multiple cuts and bruises on his head, arms, and right leg. Defendant also manually strangled the victim to the point where his hyoid bone was fractured.

The forensic pathologists testified that the repeated blows to the victim's head did not render the victim unconscious. Defendant then applied so much pressure to the victim's neck that blood could not reach his brain. At this point the victim lost consciousness, his brain lost its ability to function, he stopped breathing, his heart stopped beating, and he ultimately died of cardiac arrest. One of the forensic pathologists testified that it would take approximately two minutes or more for a strangling victim to lose consciousness.

We hold that this evidence, when viewed in the light most favorable to the State, was sufficient to support a reasonable inference that the victim remained conscious during his ordeal and suffered great physical pain and torture as, already bloodied and bruised from the beatings, he was strangled so forcefully that his neck was repeatedly scratched. *See State v. Artis*, 325 N.C. 278, 320, 384 S.E.2d 470, 494 (1989) (holding that the (e)(9) aggravating circumstance was properly submitted where strangulation victim physically and psychologically suffered), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). This assignment of error is overruled.

JURY SELECTION

Next, defendant argues that the trial court erred in denying his motion for individual *voir dire* and sequestration of jurors during *voir dire* and that the *voir dire* process under N.C.G.S. § 15A-1214(d) through (f) was unconstitutional.

"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). Whether to grant sequestration and individual *voir dire* of prospective jurors rests within the trial court's discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Atkins*, 349 N.C. 62, 105-06, 505 S.E.2d 97, 123 (1998).

[2] Defendant's sole argument in support of abuse of the trial court's discretion in refusing to permit individual *voir dire* or sequestration during *voir dire* is that prospective jurors who were unwilling to serve as jurors did not truthfully answer questions during *voir dire*. A careful review of the transcript does not reveal that prospective jurors misled the court in order to avoid jury duty. Of the three prospective jurors defendant now claims may have been less than candid, one was excused because he knew the victim's family; and the other two were excused because they unequivocally stated that they could not recommend the death penalty based on their personal and religious beliefs. Defendant does not allege there is any indication, and we detect no such indication, that the prospective jurors were not telling the truth during *voir dire*. Therefore, defendant's argument that the denial of his motion has harmed him is dismissed.

Defendant further argues that, as a direct result of the statutory process under N.C.G.S. § 15A-1214(d) through (f), his constitu-

tional rights were violated. N.C.G.S. § 15A-1214 provides, in pertinent part:

> (d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.
>
> (e) Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.
>
> (f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. Only replacement jurors may be examined and challenged. This procedure is repeated until all parties have accepted 12 jurors.

[3] First, defendant argues that this process created a confusing method of questioning prospective jurors since the questioning of prospective jurors skipped from one juror to another. As a result prospective juror Brenda Jordan was called to juror seat number ten, but she was never excused or seated as a juror; and a Mr. Reeves was polled as a juror at the guilt-innocence phase, but there was no *voir dire* of Mr. Reeves. While we find it troublesome that the record reveals that Ms. Jordan was called as a prospective juror and that Mr. Reeves was polled at the conclusion of the guilt-innocence phase, we must reject defendant's argument.

Defendant concedes that the trial court followed the statutory procedure for jury selection pursuant to N.C.G.S. § 15A-1214(d) through (f). After the prosecutor passed twelve prospective jurors to defendant, pursuant to N.C.G.S. § 15A-1214(d), defendant excused,

either peremptorily or for cause, eight of these prospective jurors, pursuant to N.C.G.S. § 15A-1214(e). Therefore, eight seats remained to be filled; however, the courtroom clerk mistakenly called nine people, including Brenda Jordan to fill seat number ten, which was already occupied by juror Donnie Smith. The record discloses no *voir dire* of Ms. Jordan; thus, we can only conclude that Ms. Jordan was never seated as a prospective juror, and defendant cannot demonstrate any harm. Regarding the alleged sudden appearance of Mr. Reeves, while it is impossible to discern whether the courtroom clerk merely misspoke when polling the jury during the guilt-innocence phase or whether the transcript contains an error, *see State v. DeCastro*, 342 N.C. 667, 698, 467 S.E.2d 653, 669, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996), defendant has not been prejudiced.

[4] Further, defendant argues on appeal that the statutory scheme detailed in N.C.G.S. § 15A-1214(d) through (f) is unconstitutional because it allows the prosecutor a larger pool of prospective jurors to select from than defendant. However, defendant did not raise this constitutional issue at trial; consequently, the trial court did not have the opportunity to consider or rule on this issue. N.C. R. App. P. 10(b)(1). Therefore, defendant has failed to preserve this assignment of error for appellate review. *See State v. Flippen*, 349 N.C. at 276, 506 S.E.2d at 709-10 (holding that defendant's failure to raise a constitutional issue at trial waived appellate review of that issue); *State v. Frye*, 341 N.C. 470, 493, 461 S.E.2d 664, 675 (1995) (same), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995) (same). These assignments of error are overruled.

Next, defendant assigns error to the trial court's allowing defendant to be tried without first making the jurors take an oath to be truthful during *voir dire*. The jurors were properly sworn pursuant to N.C.G.S. § 9-14 and affirmatively responded when the courtroom clerk administered the following oath: "Do you solemnly swear that you will truthfully, without prejudice or partiality, try all issues and criminal actions that come before you and give true verdicts according to the evidence, so help you God?" Defendant nonetheless argues that the failure to require prospective jurors to swear to tell the truth during *voir dire* tainted his trial. Defendant, however, did not object to any lack of oath during *voir dire*. Thus, this assignment of error is likewise not preserved for appellate review and is accordingly overruled. *See* N.C. R. App. P. 10(b)(1); *State v. Flippen*, 349 N.C. at 276, 506 S.E.2d at 709-10.

[5] Next, defendant contends that the trial court erred in denying his motion to permit defense counsel to question prospective jurors challenged for cause by the State. Defendant argues that he should have been afforded an opportunity to rehabilitate prospective jurors Foreman and Joyner when the State challenged them for cause based upon their opposition to the death penalty.

The *voir dire* of prospective juror Foreman follows:

Q. [PROSECUTOR] Before yesterday had you ever thought about the death penalty, ever considered the death penalty before yesterday?

A. [JUROR] No.

Q. Do you have personal or religious feelings concerning the death penalty?

A. Yes.

Q. Are those strong feelings that you have for the death penalty?

A. Yes.

Q. Are they personal and religious?

A. Yes.

Q. Because of your strong personal and religious feelings with respect to the death penalty, would you, yourself, be able to recommend or vote for the death penalty?

A. No.

Q. Knowing the court would follow your vote and impose the death penalty?

A. No.

Q. So regardless of what the circumstances might be or the facts might be in the case, you would be unable to recommend the death penalty for anyone under any circumstances; is that correct?

A. Yes.

Q. That's based upon your own personal beliefs and religious beliefs?

A. Right.

Q. So regardless of what the law is and the evidence might be in the case, you would not recommend the death penalty for anyone under any circumstances?

A. No.

Q. Is that correct?

A. Yes.

The State challenged prospective juror Foreman for cause, and defendant objected and requested an opportunity to rehabilitate. The trial judge overruled the objection and excused Mr. Foreman pursuant to N.C.G.S. § 15A-1212(8), which provides that a juror may be challenged for his inability to render a verdict in accordance with the laws of the State. Similarly, prospective juror Joyner stated her inability to recommend the death penalty based on her personal or religious feelings, was challenged for cause, and was excused under N.C.G.S. § 15A-1212(8).

The trial court retains discretion as to the extent and manner of questioning, and its rulings on a challenge for cause will not be overturned absent a showing of abuse of discretion. *See State v. Atkins*, 349 N.C. at 105-06, 505 S.E.2d at 123.

> 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). Since both prospective jurors unequivocally stated that they could not recommend the death penalty under any circumstances, we hold that the trial court did not abuse its discretion when denying defendant's request to attempt to rehabilitate these prospective jurors. This assignment of error is overruled.

[6] Next, defendant claims that the trial court erred in failing to direct the prosecutor to cease questioning prospective jurors about whether they were "strong enough" to recommend and impose the death penalty. Defendant contends that the prosecutor improperly used this question to "stake out" prospective jurors.

According to defendant, the prosecutor used the term "strong enough" forty-nine times during jury selection. After the thirty-third

time, the trial judge told the prosecutor that he was not sure that he liked the term "strong enough" and admonished the prosecutor to refrain from using it; nevertheless, the prosecutor continued to use the term "strong enough" sixteen more times during jury selection. The trial court should not permit counsel to ask questions which would tend to "stake out" the prospective jurors and cause them to pledge themselves to a future course of action. *State v. Bond*, 345 N.C. 1, 16, 478 S.E.2d 163, 170 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). However, when read in context, the use of the term "strong enough" was not an impermissible inquiry as to the kind of verdict the prospective jurors would render or how they would be inclined to vote on a given state of facts. *See State v. Walls*, 342 N.C. 1, 38-39, 463 S.E.2d 738, 757 (1995) (holding that questions which did not attempt to elicit in advance what a juror's decision would be under a given state of facts were not stake-out questions), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). We note also that defendant did not object to these questions from the prosecutor. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

In his next assignment of error, defendant argues that the trial court's repeated prompting of the prosecutor on what questions to ask and how to ask them denied defendant his due process rights, violated Article I, Section 18 of the North Carolina Constitution, and violated N.C.G.S. § 15A-1222. Defendant has listed thirty-nine instances in support of his claim that the trial court improperly involved itself in defendant's trial. Defendant submits that, *inter alia*, the trial court repeatedly assisted the prosecutor, told him to qualify witnesses, suggested questions to aid the State's case or to avoid objections by defendant, and explained defendant's tactics. Defendant asserts that, alone or in combination, these instances violated the requirement that the trial court remain impartial and prejudiced defendant.

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1997). N.C.G.S. § 15A-1222 does not apply when the jury is not present for the questioning. *State v. Rogers*, 316 N.C. 203, 220, 341 S.E.2d 713, 723 (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). "The law imposes on

the trial judge the duty of absolute impartiality." *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959). The trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties. *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978). "Furthermore, it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts." *State v. Rogers*, 316 N.C. at 220, 341 S.E.2d at 723; *see also State v. Jackson*, 306 N.C. 642, 651, 295 S.E.2d 383, 388 (1982).

> "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." [*State v.*] *Larrimore*, 340 N.C. [119,] 155, 456 S.E.2d [789,] 808 [(1995)]. "The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, [516] U.S. [994], 133 L. Ed. 2d 436 (1995). In performing this duty, however, the trial court's position as the "standard-bearer of impartiality" requires that "the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury." *Larrimore*, 340 N.C. at 154-55, 456 S.E.2d at 808.

State v. Jones, 347 N.C. 193, 207, 491 S.E.2d 641, 649-50 (1997).

Applying these principles to the remarks of the trial court which form the basis of defendant's assignment of error and after conducting a thorough review of each alleged instance of improper conduct or questioning on the part of the trial judge, we detect no prejudicial error and reject defendant's claim of partiality. Nonetheless, we will briefly address the alleged improprieties.

[7] The first few instances of partiality defendant claims occurred were all during jury-selection bench conferences. First, the trial judge instructed the prosecutor to ask prospective jurors if they "would be unable or able" to recommend the death penalty in order to avoid confusion in the record, since it appeared to the trial judge that prospective jurors occasionally responded "No" when they meant to say "Yes." Next, the trial court instructed the prosecutor to ask whether prospective jurors believed the death penalty would be "the

right punishment or the correct thing" under certain circumstances, rather than "an appropriate punishment," to ensure that the prospective jurors understood what was being asked. Later, the prosecutor challenged a prospective juror for cause; defendant objected and requested the opportunity to rehabilitate which was allowed. During this rehabilitation, the trial judge called counsel to the bench and expressed his concern about the prospective juror's ability to be a fair and impartial juror given her feelings concerning the death penalty. The judge told defense counsel to focus on the issue of the death penalty by asking a hypothetical question and then told the prosecution that when the prospective juror was passed back to the prosecutor for more questioning, he should ask her a "why" question as to her position on the death penalty so that the judge could rule on the for-cause challenge. The prosecutor eventually used a peremptory challenge to excuse this prospective juror. Having reviewed the entire transcript of jury selection and having also found that the judge instructed defense counsel to ask certain questions, we determine that the judge was merely fulfilling his duty to ensure that a fair and impartial jury tried defendant's case.

[8] The following complained-of instances occurred during the guilt-innocence phase of defendant's trial: the trial judge asked a witness what the basis was for her opinion that defendant looked "serious" and later instructed the prosecutor to rephrase a question to prevent a potentially objectionable response from a witness. The judge informed the prosecutor that certain statements would be inadmissible; so the prosecutor rephrased his questions to restrict the witness' response. The judge admonished the prosecutor for improper comments. During a bench conference, the judge explained to the prosecutor that luminal only reacts to the heme in hemoglobin, not to animal fat. On three occasions the judge intervened *ex mero motu* to correct improper questions, once to explain in a bench conference why the question was improper and twice to rephrase a question. Several times the judge explained why he sustained or overruled defense counsel's objections. On two occasions the prosecutor had to rephrase his questions—the latter instance was based on hearsay which the judge subsequently ruled was not hearsay, explaining why it was not to defense counsel in a bench conference. At another point the judge sustained defendant's objection and during the ensuing bench conference suggested how the question could be rephrased. On another occasion after two objections by defense counsel, the judge rephrased the question for the prosecutor. The judge inter-

vened to conserve the court's time and avoid having the prosecutor ask the witness a long stream of questions about where in the kitchen blood was discovered. During *voir dire* of a witness, the judge intervened to avoid wasting time and later directed the prosecutor to ask certain questions for the judge's own understanding. The judge twice told the prosecutor that a witness needed to be qualified as an expert before giving an opinion; however, the prosecutor had not yet questioned either witness regarding an opinion. The judge directed the prosecutor to ask a clarifying question regarding evidence pertaining to the victim's shoes. On another occasion, the judge instructed the prosecutor to ask the witness what Eugenia Pelham had said about the black watch. During *voir dire* of a witness, the judge ruled that any reference to the fact that defense counsel, during the jury view, had perhaps found and moved the buckle from the black watch would be inadmissible as unfairly prejudicial to defendant and warned the prosecutor to prevent his witness from testifying to that fact. The judge limited the prosecutor's redirect examination of Deputy Mason concerning his conversation with the assistant commonwealth attorney in Virginia. At one point the judge interrupted the prosecutor and asked a witness ten questions, without objection from either party, regarding his qualifications as an expert; the record indicates that it was nearly time for the court to recess for the evening and that in order to have any meaningful examination prior to recessing, the judge decided to quickly qualify the witness as an expert. The prosecutor asked a leading question to which defense counsel did not object, but the judge intervened anyway and instructed the prosecutor on the proper form of the questions. At another point the judge sustained an objection and suggested how the prosecutor should rephrase the question; it was later discovered that defense counsel's objection was not based on the form of the question, and the objection was ultimately sustained based on relevancy.

From our review of the transcript, we note that in multiple instances the trial judge also interjected his own questioning while defense counsel was examining witnesses, interrupted defense counsel's questioning to clarify a witness' testimony, and instructed defense counsel to ask his witness certain questions during witness examinations.

Defendant cites eight further instances which occurred at his sentencing. In the first instance defendant contends that the trial judge improperly told the prosecutor how to argue against a mitigat-

ing circumstance; however, our review reveals a dialogue between the judge and the prosecutor about whether the prosecutor *would be able to* argue, not *how to* argue, against a mitigating circumstance. Next, defendant contends that the judge improperly told the prosecutor how to avoid a hearsay objection; but the transcript discloses that the judge overruled the objection and explained his reasons for doing so. Later, during a bench conference, the trial judge told the prosecutor to ask the witness what his definition of torture was. This direction was not improper since the witness' understanding of the term and the prosecutor's understanding were obviously different. Defendant also complains about the trial court's telling the prosecutor to bring a witness back to the stand to make his point; however, the judge merely explained that in order for the corroborating testimony to be admissible, the prosecutor might need to recall a witness; the judge then overruled defense counsel's objection. Defendant also argues that on two occasions, the trial judge told the prosecutor how to ask certain questions. The transcript reveals that the judge was merely attempting to clarify the witness' testimony. Next, defendant notes that the trial judge initiated his own questioning of the witness; the judge, however, felt that these questions were necessary for the jury to understand why the earlier testimony had been elicited. Finally, defendant notes that the trial judge instructed the prosecutor to tie the witness' illegal actions to defendant. Once again defendant never objected to the testimony, which was otherwise irrelevant if not tied to defendant.

Having reviewed the portions of the transcript to which defendant assigns error, we conclude that the trial judge conducted defendant's guilt-innocence phase and sentencing proceeding in an impartial manner and made every effort to ensure that defendant received a fair trial. *State v. Heatwole*, 344 N.C. 1, 28, 473 S.E.2d 310, 324 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). Further, we note that the trial judge properly instructed the jury at both the guilt-innocence and the sentencing proceedings that the law requires the presiding judge to be impartial and that it should not draw any inferences from his rulings, questions, or anything else he might have said or done.

We recognize that in an ideal trial no occasion would arise which would prompt the trial judge to ask questions of a witness for clarification and understanding of the testimony. But as this Court stated in *Andrews v. Andrews*, "[t]he comment made or the question propounded should be considered in the light of all the facts and atten-

dant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." 243 N.C. 779, 781, 92 S.E.2d 180, 181 (1956). The instances cited by defendant might give the appearance of improper assistance to the prosecution but are not sufficient to have had a prejudicial effect, especially in light of the fact that the judge aided both sides in, *inter alia*, formulating questions. Accordingly, defendant's assignment of error is overruled.

Next, defendant contends that the trial court erred in refusing to allow defendant to question certain witnesses regarding specific issues.

[9] First, defendant argues that he should have been allowed to cross-examine the Virginia prosecutor about the strength of Virginia's case against defendant. According to the State's theory, defendant's motive for murdering the victim was that the victim was the prosecuting witness in a Virginia trial in which defendant was charged with uttering forged checks belonging to the victim. During *voir dire* the Virginia prosecutor testified that he thought that the Commonwealth's case against defendant on the uttering charges was weak. Defendant asserts that this evidence was relevant and should have been admitted to rebut the State's theory of defendant's motive.

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). Evidence is "relevant when it reveals a circumstance surrounding one of the parties and is necessary to understand properly their conduct or motives or if it allows the jury to draw a reasonable inference as to a disputed fact." *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998). In this case, however, the testimony proffered by defendant does not go to prove the existence of any fact of consequence in the determination of his guilt. *See State v. York*, 347 N.C. 79, 95, 489 S.E.2d 380, 389 (1997). The trial court properly ruled that the evidence concerning the Virginia prosecution was relevant only as to "whether or not [defendant] believed he had committed a criminal act or whether he was likely subject to being found guilty and imprisoned for that criminal act, even if the [Virginia] prosecutor now states" that he does not think that defendant committed a criminal act. Thus, testimony concerning the merits, or lack thereof, of the Commonwealth's case against defendant was

irrelevant and properly excluded. *See* N.C.G.S. § 8C-1, Rule 402 (1992) (stating that evidence that is not relevant is not admissible).

Second, defendant claims that he should have been permitted to question Annie Clemonts regarding the victim's alleged sexual acts with the victim's daughter and granddaughter. Defendant asserts that this evidence was relevant to counter the victim's granddaughter's sentencing testimony concerning the impact of her grandfather's death. Defendant claims that the trial court excluded the evidence based on the prosecutor's contention that the evidence was untrue. However, the transcript discloses that the trial court did not in fact prohibit defense counsel from asking these questions. Instead, the trial court informed defense counsel that if he elicited these statements from Ms. Clemonts, the State then would be permitted to question Ms. Clemonts regarding the circumstances surrounding these statements, which the trial court suggested would be detrimental to defendant's case. Defendant and defense counsel presumably agreed since defense counsel did not pursue this line of questioning. Thus, this assignment of error is overruled. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.").

[10] Defendant next argues that the trial court erred in allowing the State to introduce State's exhibit S-2, a black watch found at the crime scene.

Before real evidence may be received into evidence, the party offering the evidence must first satisfy a two-pronged test. "The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). Determining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound discretion. *Id.* at 388-89, 317 S.E.2d at 392. "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Id.* at 389, 317 S.E.2d at 392. Any weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility. *Id.*

Defendant notes that the crime scene was initially searched on 17 May 1997, but the watch was not discovered until 20 May 1997.

During this interval the crime scene was not secured because the back door did not lock. Moreover, the buckle which was initially on the watch was not on the watch at trial thus suggesting that the watch had been altered.

We first note that defendant failed to object to the admission of the watch. Therefore, defendant has failed to properly preserve his right to appellate review. *See* N.C. R. App. P. 10(b)(1). Since 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. 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." *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998). Plain error exists where, after reviewing the entire record, the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that justice could not have been done. *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998).

In this case several witnesses testified that the watch admitted into evidence was the same watch found at the crime scene and that it was defendant's watch. The watch was also present in photographs taken during the 17 May 1997 search. Further, except for its having been cleaned up and having the buckle removed, Bernard Mason of the Northampton County Sheriff's Department testified that the watch was in the same condition as when it was found. Mason further testified that he maintained custody over the watch until it was transported to the SBI lab. Defendant made no showing that the watch admitted into evidence was not the watch found at the scene of the crime; and any alleged weakness in the chain of custody affected merely the weight, not the admissibility, of the watch. Therefore, we hold that the trial court did not commit plain error by admitting the watch into evidence.

Defendant further argues that the trial court erred by admitting a kitchen tile which allegedly contained an impression of defendant's shoe. Defendant argues that because the crime scene had been unsecured, the tile lacked reliability and should have been excluded. Again, we note that defendant did not object to the tile's admission at trial. Normally, we would review this evidentiary matter for plain

error; however, defendant failed to contend specifically and distinctly that this issue amounted to plain error as required by Rule 10(b)(4). Therefore, defendant has waived plain error review; and we must overrule this assignment of error.

By his next assignment of error, defendant contends that the trial court committed plain error in allowing and instructing the prosecutor to prompt his witnesses after the witnesses had taken the stand thereby violating defendant's due process rights.

[11] Defendant's first argument is that during the prosecutor's *voir dire* of Mason, the prosecutor asked the trial court's permission to talk to Mason and the trial court recessed for eighteen minutes. Defendant maintains that the trial court was allowing the prosecutor an opportunity to prompt his witness.

Again, we must acknowledge defendant's failure to raise this issue during his trial, thus constituting waiver pursuant to Rule 10(b)(2). Further, we have applied the plain error rule only to jury instructions and evidentiary matters, *State v. Atkins*, 349 N.C. at 81, 505 S.E.2d at 109, and decline to extend application of the plain error rule to this situation. However, a review of the transcript of Mason's *voir dire* testimony reveals no impropriety on the part of the prosecutor or the trial court. During the *voir dire* the trial court interrupted the questioning and conducted a bench conference to inquire how the prosecutor intended to handle the discovery of the clasp from the black watch. After further *voir dire* and discussion the trial court determined that it would not let Mason testify as to who pointed the clasp out to him. At that point the prosecutor asked to talk with the witness. The trial judge said, "He's not to say anything about Mr. Reaves or Mr. Barnes, whatever he says. We'll take fifteen minutes." The only logical conclusion that may be drawn is that the recess was used by the prosecutor to ensure that the witness adhered to the trial court's instruction not to mention the fact that defense counsel may have discovered and moved the watch's buckle during the jury view of the crime scene. In context the thrust of the trial court's comments in the bench conference was to prevent any unfair prejudice to defendant. Whether to permit a recess was within the sound discretion of the trial judge, and the trial judge did not abuse his discretion.

Defendant argues that the trial court also allowed the prosecutor a chance to prompt one of his sentencing witnesses. During cross-examination defense counsel asked Dr. Gilliland to read a portion of

a book on forensic pathology. The prosecutor objected on the grounds that the book was not in evidence and that the witness was asked to read only a portion of a book that she had not previously read. The court informed the prosecutor that defense counsel's line of questioning was proper, decided to take a fifteen-minute recess, told the prosecutor to instruct the witness to answer, and assured the prosecutor that the witness could clarify her testimony on redirect examination. Whether to take a recess was in the trial court's sound discretion, and defendant has failed to show how he was prejudiced by the trial court's action in calling the recess. Accordingly, this assignment of error is dismissed.

[12] Defendant next contends that the trial court erred in allowing the State's motion for a jury view of the crime scene. Defendant argues that the crime scene was never secured, that evidence there could have been tampered with, and thus that the trial court abused its discretion in allowing the jury view. Defendant further suggests that the trial court should have inquired, *sua sponte*, about the security of the scene of the crime.

N.C.G.S. § 15A-1229(a) provides that the decision to permit a jury view lies within the discretion of the trial court. The decision will not be disturbed absent an abuse of that discretion. *State v. Tucker*, 347 N.C. 235, 240, 490 S.E.2d 559, 561 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 649 (1998). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

In this case defendant's argument in support of an abuse of discretion focuses on the fact that the crime scene was not secured, that tampering may have occurred, and that the trial court, therefore, had a duty to question witnesses about this fact. We disagree. Prior to the trial court's granting a jury view, defendant argued that there was only a piece of law-enforcement crime-scene yellow tape securing the back porch and that tampering was a possibility. Thus, the trial court was fully informed of all relevant facts and considered defendant's arguments when making its decision to permit the jury view. Accordingly, the trial court did not abuse its discretion; and this assignment is overruled.

[13] By his next assignment of error, defendant argues that the trial court erred in failing to control the trial in such a manner that defendant would receive effective appellate review. Specifically, he con-

tends that on seven occasions, the transcript of defendant's trial is so confusing as to render impossible appellate review of the evidence against defendant.

The first portion of the transcript about which defendant complains occurred during the prosecutor's opening statement. Referring to pictures, the prosecutor informed the jury that the State's evidence would show the layout of the victim's house and the location of blood-spatter marks and bloodstains. Defendant did not object to these statements and has thus failed to preserve his right to appellate review. N.C. R. App. P. 10(b)(1).

The remaining instances to which defendant assigns error involve the testimony of witnesses. Defendant first complains about the testimony of SBI Special Agent Anthony Jernigan. Using a photograph, Jernigan described where certain blood splotches were located; he also drew their location on a board. Next defendant raises the testimony of Deputy Mason. Mason testified, with the assistance of a photograph, about an impression found on a kitchen tile which matched defendant's shoe. Later, Mason testified, with the aid of a photograph and a diagram, about the location of the watch and the watch buckle. The final three references concern SBI Special Agent Joyce Petzka's testimony. Using various State's exhibits, Petzka explained to the jury why the impression on the kitchen tile was identical to defendant's shoe. Some of the exhibits used during these portions of the trial were admitted into evidence.

In order to prevent any alleged confusion in the transcript, defendant had an opportunity at trial to request that the witnesses mark on the exhibits as they testified. Defendant did not do so. Further, our reading of the transcript does not yield the level of confusion that defendant alleges. The exhibits which were admitted into evidence are available for review by this Court and speak for themselves as to the blood spatters, black watch, and the shoe imprints. This assignment of error is overruled.

[14] Defendant's next contention is that the trial court erred in allowing the State's motion *in limine* to suppress evidence concerning defendant's polygraph test. Defendant contends that his submission to a polygraph test should have been admitted for the purpose of showing his cooperation with law enforcement officers. Defendant claims that the trial court erroneously excluded this evidence on the grounds of hearsay. Defendant also contends that the testimony was relevant to show a consciousness of innocence in the same

way evidence of flight is relevant to show a defendant's consciousness of guilt.

We have previously held "that in North Carolina, polygraph evidence is no longer admissible in any trial." *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983); *see also State v. Jones*, 342 N.C. 457, 466, 466 S.E.2d 696, 700, *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996); *State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 291 (1991). Moreover, the record discloses that defendant was permitted to introduce testimony regarding his cooperation with law enforcement officers. Additionally, the trial court did not exclude the evidence based on hearsay; instead, it properly ruled that polygraph evidence was irrelevant. Defendant's reliance on *State v. Mitchell*, 328 N.C. 705, 403 S.E.2d 287 (1991) and *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988) is misplaced in that the procedural posture in which the polygraph issue arose in those cases distinguishes them from this case. In *Mitchell* and *Harris* a witness actually mentioned taking a polygraph or requesting codefendants to take a polygraph. This Court did not approve such testimony, but concluded, based on the record before it, that the error, if any, was not prejudicial. In this case, the trial court allowed the State's motion *in limine* to preclude the testimony. Defendant has presented us with no compelling reason to alter our long-standing holdings that evidence concerning polygraph testing is inadmissible. Thus, we find no merit to this assignment of error.

[15] Next, defendant argues that the trial judge erroneously challenged defendant to take the witness stand. During a discussion among the trial judge, defense counsel, and the prosecutor outside the jury's presence over whether to permit evidence of defendant's polygraph test, the trial judge considered whether defendant's statement that he agreed to submit to a polygraph test was hearsay. The trial judge then said to defense counsel, "Fine. Call him. And let him say that he agreed to take the polygraph test. I'm being facetious about that, but that's the only way, it appears to me, it can come in." Defendant submits that this statement put pressure on defendant to take the stand and was another example of the trial court's partiality against defendant. We disagree.

After conducting more research and hearing further arguments on the issue, the trial judge ruled that the polygraph evidence was not hearsay but that it was inadmissible on relevancy grounds. We are not convinced that this statement exerted pressure on defendant to testify particularly since defendant did not take the stand during the

guilt-innocence phase. Likewise, this statement, which was admittedly facetious, does not support a claim that the judge was not impartial. Therefore, we reject defendant's contention.

SENTENCING PROCEEDING

Next, defendant contends that the trial court erred in denying his motion to be apprised of which aggravating circumstances apply and in allowing evidence for which defendant could not prepare.

Defendant concedes that this Court has held that the State is not required to supply a list of the aggravating circumstances it intends to use against defendant. *See, e.g., State v. McLaughlin*, 323 N.C. 68, 84, 372 S.E.2d 49, 61 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). The reasoning behind this holding is that N.C.G.S. § 15A-2000(e) lists the only eleven circumstances which may be used in aggravation; thus, the statute provides sufficient notice. *Id.* However, defendant contends that the reasoning is unsupported in this case because (i) defendant did not receive a copy of a report from Dr. M.G.F. Gilliland, the State's expert witness, prior to trial or within sufficient time for preparation; and (ii) the State introduced evidence of additional factors beyond those listed in N.C.G.S. § 15A-2000(e) to aggravate defendant's sentence.

[16] During the sentencing proceeding, the State called Dr. Gilliland, a forensic pathologist, to testify about, *inter alia*, the victim's wounds and the pain and suffering that these wounds might have caused. Dr. Gilliland had not previously prepared a written report concerning her expert opinion. Soon thereafter, a bench conference occurred in which the trial judge told the prosecutor that he previously had informed both parties that he requires that expert witnesses prepare a report within forty-eight hours of testifying. The judge then instructed the prosecutor to have Dr. Gilliland prepare a report and told him that Dr. Gilliland's testimony would be delayed until the next morning so that defendant and his counsel could review the report. Defendant submits that the judge's treatment of the State's witness is yet another instance of his partiality toward the State.

By statute the General Assembly has dictated the scope of discovery in criminal proceedings. N.C.G.S. § 15A-903 provides, in pertinent part, that

> [u]pon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant 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, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

N.C.G.S. § 15A-903(e) (1997). While the statute requires the State upon motion to provide defendant with written reports, nowhere does it require that such reports be made. The statute also does not specifically authorize a judge to require that a written report be prepared; however, in our view, the judge did not err by ordering Dr. Gilliland to prepare a written report in this case. *See State v. Lee*, 335 N.C. 244, 291, 439 S.E.2d 547, 572 (finding no error when trial court ordered defendant's witness to prepare a report so that the State may prepare for that witness' testimony), *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Since there is no statutory requirement that a report be made, we hold that the trial court did not err when, in its discretion, it ordered the State to instruct its witness to prepare a written report, ordered the State to provide defendant with a copy of that report, and postponed the witness' testimony until the next day so that defendant could adequately prepare.

As for defendant's argument that the State introduced evidence in aggravation, apart from what is permitted by N.C.G.S. § 15A-2000(e), defendant has chosen to address that portion of this argument more fully in his next assignment of error. Likewise, we will do the same.

Defendant next contends that the trial court erred in allowing the State to question defendant's and its own sentencing witnesses about inadmissible and prejudicial matters. Defendant sets forth a chart containing over twenty instances where he alleges that the prosecutor asked unfounded, prejudicial, or otherwise impermissible questions, thus making defendant appear to be a child molester, a violent man, the head of a prostitution ring, a co-conspirator to embezzlement, an obtainor of money through false pretenses, and an adulterer. Defendant submits that collectively the questioning constitutes plain error.

The Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1997). Any evidence the trial court "deems relevant to sentence" may be introduced at this stage. N.C.G.S. § 15A-2000(a)(3). The State "must be permitted to present any competent, relevant evidence relating to the defendant's charac-

ter or record which will substantially support the imposition of the death penalty." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985) (emphasis omitted), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373. Moreover, "[t]he State may offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence." *State v. Heatwole*, 344 N.C. at 21, 473 S.E.2d at 320. The scope of cross-examination is governed by the sound discretion of the trial court and the requirement that the questions 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). Further, "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). When a prosecutor affirmatively places before the jury incompetent and prejudicial matter by injecting his own personal opinions which are neither in evidence nor admissible, an abuse of discretion may be found. *Id.* After careful review of the transcript portions cited by defendant, we reject his argument.

[17] The first alleged improper witness examination by the prosecutor involved the cross-examination of Bishop D.L. Manning. The prosecutor inquired whether the bishop had any knowledge about defendant's involvement in a scheme to embezzle money from a Shoney's restaurant, defendant's receiving money for uncompleted construction jobs, or defendant's prostituting women at his residence. Defendant's objections were overruled, and the witness denied any knowledge of these matters. Subsequent witnesses testified about the embezzlement scheme and about defendant's taking money and not completing construction projects. The victim's daughter had testified previously about the prostitution at defendant's house. Thus, the questioning was proper; and the trial court did not abuse its discretion in overruling defendant's objections.

[18] The next argument relates to the prosecutor's questioning of defendant's sister about whether she talked to others about defendant's being violent. Defendant failed to object, and the witness said she had not talked about his being violent. Since defendant failed to object to the questions of which he now complains, in applying the plain error rule, we must determine whether the trial court abused its discretion by failing to intervene *ex mero motu*. *See State v. Locklear*, 349 N.C. 118, 156, 505 S.E.2d 277, 299 (1998). We hold that these were proper questions attempting to impeach the witness' direct examina-

tion testimony that defendant was not violent; thus, there was no error. The witness was also asked if she had heard that defendant had inappropriately touched her niece's minor daughter, and without objection she responded that she had heard about the inappropriate touching. Further, the same evidence had been admitted previously; but defendant did not assign error to it on appeal. Not only did the prosecutor ask the question in good faith, but the question was also proper to rebut one or more of the submitted mitigating circumstances. For the same reasons, we find no error in the prosecutor's questioning the witness about whether she knew that the niece's daughter was subpoenaed to appear in court or that the witness' niece sent her daughter to Baltimore.

[19] Third, defendant contends that the cross-examination of his first cousin was improper. The prosecutor asked about the witness' knowledge of specific legal matters, namely, defendant's taking out a warrant for trespassing and filing suit for failure to pay a mortgage payment. The witness had heard about the warrant, but only heard about the other lawsuit in court; however, the civil defendant in that lawsuit previously had testified that defendant had in fact sued her. Defendant contends these statements involved hearsay; however, as already stated, the Rules of Evidence do not apply during sentencing. Again, these questions were asked in good faith; and there was no abuse of discretion. Later, this witness was asked about the inappropriate touching of the minor and about defendant's shooting a gun at someone. The witness responded that he had heard about neither incident prior to being in court. Defendant failed to object, and we hold that the trial court did not err. The witness was then asked a question regarding defendant's first wife; defendant objected, and the trial court sustained the objection. Nonetheless, the witness answered the question; and defendant did not make a motion to strike or request a curative instruction. When the trial court sustains an objection to the question, the objecting party has no basis for appeal absent a motion to strike or a request for a curative instruction. *State v. Barton*, 335 N.C. 696, 709-10, 441 S.E.2d 295, 301-02 (1994). We hold, therefore, that the trial court did not err.

Next, defendant complains about questions based on hearsay regarding defendant's prostituting women, having lawsuits filed against him, having his day-care center foreclosed, and shooting at someone. Defendant failed to object to any of these questions. Defendant has not demonstrated that the prosecutor did not have a good faith basis for asking these questions, and we hold that the trial

court did not abuse its discretion by failing to intervene *ex mero motu*. We also find no abuse of discretion when the trial court overruled hearsay objections regarding defendant's receiving money for construction projects that were never completed and about the witness' receiving complaints concerning defendant's poor construction work.

[20] Defendant also complains that the questioning of Thomas Braswell regarding the alleged scheme to embezzle from Shoney's called for hearsay. The trial court explained during a bench conference that the testimony was not hearsay since it was not being admitted for the truth of the matter asserted. Instead, the testimony was being admitted to explain the discrepancy between Braswell's earlier statements to the police and his trial testimony. We hold that the trial court properly overruled defendant's objection.

[21] Defendant further argues that questioning concerning the reasons why his day-care center was closed down was improper or prejudicial. The witness stated that defendant told him the center was closed because of a rumor that defendant was "having some type of activity with the children" but that the accusations were not found to be true "by the law." Defendant argues that the prosecutor asked unfounded questions, based on hearsay rumors; however, we cannot agree with defendant when witnesses, as in this case, responded in the affirmative. Whether taken singly or collectively, we are unconvinced that the prosecutor's questioning of the witnesses was improper, constituted abuse of the trial court's discretion, or amounted to plain error, or that defendant has suffered prejudice. Accordingly, these assignments of error are overruled.

By his next assignment of error, defendant contends that the trial court erred by denying his motion to dismiss. Defendant argues that the evidence was insufficient to support the charge of first-degree murder; he also argues that this Court's standard of review of whether a motion to dismiss was properly denied violates the Double Jeopardy Clause of the North Carolina and United States Constitutions.

[22] First, defendant argues that the State's evidence was not sufficient to prove that he was the perpetrator of the murder. He does not argue that a premeditated and deliberate murder did not take place. According to defendant the evidence was circumstantial and consisted only of hearsay statements by defendant that the victim was going to get himself killed, a black watch that defendant allegedly

possessed and that was allegedly found at the scene of the crime, and a shoe impression found on a kitchen tile that allegedly matched defendant's shoe. The watch and shoe impression were not discovered until three days after the victim's body was discovered, and in the interim the crime scene was never secured. Further, law enforcement personnel failed to conduct hair, fiber, nail clipping, or fingerprint tests because defendant had previously been in the victim's house.

When ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State; and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). The State must present substantial evidence of each element of the offense charged. *Id.* "[T]he trial court should consider all evidence actually admitted, whether competent or not, that is favorable to the State." *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed," *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983); however, "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied," *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

In the case *sub judice*, the State's evidence proved that the victim was the prosecuting witness against defendant in an uttering forged checks case scheduled for trial approximately one week after the murder occurred. The evidence further showed that the victim's assailant entered the victim's house and repeatedly hit the victim on the head as the victim tried to escape, leaving a trail of blood-spatter marks leading from the den, into the kitchen, and down the main hallway. Then the assailant manually strangled the victim while the victim unsuccessfully attempted to defend himself. Defendant's watch and a shoe impression that identically matched defendant's shoe were also found at the crime scene. While the watch and shoe impression were not discovered until three days after the scene was initially examined, they were present in photographs taken at the initial examination. This evidence supports a reasonable inference—more than a mere suspicion or conjecture—that defendant was the perpetrator of the murder.

[23] Defendant further argues that this Court's standard of review of the trial court's denial of his motion to dismiss violates his constitutional rights against double jeopardy. He submits that allowing the appellate court to consider incompetent evidence to defeat a motion to dismiss effectively permits a defendant to be tried twice for the same crime.

We note initially that defendant did not raise the constitutionality of considering incompetent evidence on the motion to dismiss at the trial court. "[T]his Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." *State v. Wilkinson*, 344 N.C. 198, 221, 474 S.E.2d 375, 387 (1996). Moreover, based on defendant's assignments of error on appeal, we have not determined that incompetent evidence was admitted or relied on by the trial court in ruling on the motion to dismiss. This assignment of error is overruled.

Next, defendant contends that the trial court erred in allowing the State to argue highly prejudicial matters at the close of both the guilt-innocence and sentencing proceedings. Defendant argues that the examples of recklessness and impropriety in the prosecutor's argument were so numerous and so severe that the trial court's failure to intervene *ex mero motu* entitles him to a new trial or sentencing proceeding.

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. Locklear*, 349 N.C. at 151-52, 505 S.E.2d at 296. Also, trial counsel "may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998). Further, the context and factual circumstances surrounding the remarks must be considered. *State v. Womble*, 343 N.C. 667, 692-93, 473 S.E.2d 291, 306 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). Where 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. Davis*, 349 N.C. at 23, 506 S.E.2d at 467. Applying these principles to the instant case, we find no error.

[24] At five separate points during his jury argument at the close of the guilt-innocence phase, according to defendant, the prosecutor's comments warranted the trial court's intervention. The first one was the prosecutor's argument that defendant had a key to the victim's house. The prosecutor argued that if defendant has "a mailbox key, he's probably got a house key." While there was no evidence that defendant had a house key, he did have a key to the victim's post office box. Therefore, that defendant probably had a house key, too, was a reasonable inference based on the evidence. Further, the victim's daughter testified that defendant showed her how to enter the victim's house through the sliding door without a key; thus, whether or not defendant had a key was not significant since the evidence showed that he could gain access to the victim's house at any time. The remaining four instances all involve references by the prosecutor to a hammer. The prosecutor argued to the jury that the blunt object that caused the contusions and lacerations to the victim's head was a hammer. The autopsy revealed several marks on the victim's head; some were round, and others were claw-shaped. According to the evidence, defendant was involved in construction projects and possessed at least two claw hammers. The prosecutor's argument that defendant used a hammer to assault the victim was thus a reasonable inference to be drawn from the evidence. Further, defense counsel had an opportunity to rebut the inference that a hammer was used, and in fact defense counsel did argue in his closing argument that there was no evidence of a hammer and that common sense dictates that a hammer was not used. We hold that these arguments did not infect the trial with unfairness and that the trial court did not abuse its discretion by failing to intervene *ex mero motu*.

The other allegedly prejudicial statements occurred during defendant's sentencing proceeding. "[T]he foci of the arguments in the two phases are significantly different, and rhetoric that might be prejudicially improper in the guilt phase is acceptable in the sentencing phase." *State v. Artis*, 325 N.C. at 324, 384 S.E.2d at 496.

Several of the statements again involved references to a hammer. We first note that the State's forensic pathologist suggested during sentencing that the round and claw-shaped marks on the victim's head could have been inflicted by a hammer. On cross-examination of defendant's forensic pathologist, defendant did not object when the prosecutor inquired about the pain caused when someone is hit with a hammer. Accordingly, we hold that use of a hammer was a reasonable inference based on the evidence.

[25] Next, defendant complains about the prosecutor's statement that defendant was "making a thousand dollars a week sometimes off of each girl." However, the victim's daughter testified that she would in fact generate a thousand dollars a week in prostitution and illegal drugs for defendant. Thus, this statement was supported by the evidence. Then the prosecutor mentioned that defendant took advantage of people and that he told the victim, "you're going to die today." A review of the transcript shows that there was evidence that defendant had manipulated people. Further, we hold that an argument that defendant told the victim that he would die on the day defendant murdered him is not so grossly improper as to require the trial court to intervene *ex mero motu*. In another complained-of comment, the prosecutor correctly anticipated defense counsel's plea for sympathy for defendant.

[26] Later, the prosecutor stated that he "thought Mr. Barnes [defense counsel] was going to kill" defendant's ex-wife. During the ex-wife's testimony, defense counsel asked whether she knew defendant during the time of his first wife's death; the witness had a grin on her face, was unable to speak for a minute, and had to have the question repeated. In context the prosecutor's closing argument was certainly not meant literally, but was meant to imply that defense counsel's reaction demonstrated that the witness' demeanor and lack of responsiveness were rather damaging to defendant's case. This Court does not in any way condone even the most benign implication that an attorney appeared ready to or capable of harming a witness. As this Court has previously stated, "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)). Further, such comments do not comport with the General Rules of Practice for the Superior and District Courts, which mandate that "[a]ll personalities between counsel should be avoided" and that "[c]ounsel are at all times to conduct themselves with dignity and propriety." Gen. R. Pract. Super. and Dist. Ct. 12, 1999 Ann. R. N.C. 10. However, based on the record in this case, the trial court did not abuse its discretion by failing to intervene *ex mero motu*.

[27] The prosecutor then mentioned Alzheimer's disease, which apparently referred to the 180-degree turnaround in the evidence presented by defendant's witnesses. We can discern no prejudice to defendant by this analogy to Alzheimer's disease.

[28] Defendant also argues that the prosecutor improperly stated that defendant's expert witness was being paid to give favorable testimony. Even assuming *arguendo* that the statement was improper, it does not entitle defendant to a new sentencing proceeding. *State v. Hill*, 347 N.C. 275, 300, 493 S.E.2d 264, 278 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 1099 (1998). Next, defendant argues that the prosecutor improperly argued that defendant attempted to suborn perjury and placed a contract on Thomas Braswell. We have reviewed the record and hold that these inferences were based on the evidence and were not grossly improper.

[29] Defendant challenges the prosecutor's attempt to discredit defendant's evidence that he had a loving relationship with his family. This argument was proper during the sentencing proceeding which focuses on defendant's character. *See* N.C.G.S. § 15A-2000(d)(2); *State v. Gray*, 347 N.C. at 186, 491 S.E.2d at 558.

As for the remaining prosecutorial remarks which defendant submits were improper and prejudicial, we have reviewed them and hold that they were either sufficiently supported by the evidence, not so grossly improper as to require the trial court to intervene *ex mero motu*, or both. Therefore, we conclude that, even viewed collectively, defendant's contention that the prosecutor's remarks entitled him to a new trial or sentencing proceeding is meritless.

Defendant next contends that the trial court erred in denying his motion to set aside the verdict. Defendant argues that the evidence was insufficient to support his conviction and, alternatively, that the jury sentenced him to death under the influence of passion, prejudice, and other arbitrary factors.

The denial of a motion to set aside the verdict on the basis of insufficient evidence is within the discretion of the trial court and is reviewable on appeal under an abuse of discretion standard. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985); *see also Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997). As previously discussed, the jury's verdict was consistent with substantial evidence regarding each element of first-degree murder and with defendant's being the perpetrator of the offense. Defendant's argument that the jury imposed the death penalty under the influence of passion, prejudice, and other arbitrary factors is also rejected and will be fully discussed later as required by N.C.G.S. § 15A-2000(d)(2). These assignments of error are overruled.

By his final assignment of error, defendant contends that the trial court erred in denying defendant's motion for a new hearing. In support of his contention, defendant references his above arguments. Having determined that no prejudicial error occurred based on any of defendant's earlier arguments, we are compelled to reject this argument as well.

PRESERVATION ISSUES

Defendant raises two additional issues which he concedes have been decided contrary to his position previously by this Court: (i) that the trial court erred in denying defendant's motion to instruct the jury that every nonstatutory mitigating circumstance had mitigating value as a matter of law, and (ii) that the trial court erred in denying defendant's motion to substitute the word "must" for the word "may" in its instructions in sentencing Issues Three and Four. Defendant raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving 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

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 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.

[30] 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. *State v. 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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant was convicted of first-degree murder based on premeditation and deliberation. The jury found both the submitted aggravating circumstances: (i) that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, N.C.G.S. § 15A-2000(e)(7); and (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

Three statutory mitigating circumstances were submitted for the jury's consideration: (i) that defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); 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 none of these three statutory mitigating circumstances to exist.

Twenty-six nonstatutory mitigating circumstances were submitted; and the jury found nine of these to exist and have mitigating value: (i) that defendant displayed a kind and generous spirit towards many friends in his community, (ii) that he had been helpful to the needs of others within his community, (iii) that he provided a home

to several foster children, (iv) that he had built several churches for the community, (v) that he had been a good provider for his family, (vi) that he had used his work skills to the benefit of those within his community, (vii) that the relationship between defendant and the victim's daughter was an extenuating circumstance, (viii) that defendant had been sensitive to the needs of others within his community, and (ix) that defendant had been productive in his lifetime despite his limited formal education.

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; *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.

In five of the seven cases in which this Court has concluded that the death penalty was disproportionate, the jury did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181; *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703. Since the jury in the present case found this statutory aggravating circumstance to exist, this case is distinguishable from those cases. As we have previously stated, "[w]hile this fact is certainly not dispositive, it does serve as an indication that the sentence of death . . . is not disproportionate." *State v. Walls*, 342 N.C. at 72, 463 S.E.2d at 777. Defendant's crime in this case, which included multiple blunt-force injuries to the head of the victim, multiple defensive wounds to the victim's arms and leg, and manual strangulation to death, is equally brutal to other murders where a death sentence was imposed. The evidence of the defensive wounds and the amount of time required for fatal strangulation indicates that the victim suffered before he died and that he was aware of but unable to prevent his impending death.

That defendant was convicted of premeditated and deliberate murder is also significant. "The finding of premeditation and deliber-

ation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

In the other two cases in which we have concluded that the death penalty was disproportionate, the jury did find that the murders were especially heinous, atrocious, or cruel. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170. However, both cases are distinguishable from the present case on other grounds. In *Stokes* the Court emphasized that the defendant was found guilty of first-degree murder based upon the felony-murder rule; that there was little, if any, evidence of premeditation and deliberation; and that the defendant was seventeen years old at the time of the murder and acted in concert with a considerably older co-felon. *State v. Stokes*, 319 N.C. at 21, 24, 352 S.E.2d at 664, 666. In the instant case, defendant was a sixty-nine-year-old adult at the time of the murder, acted alone, and was found guilty of first-degree murder on the basis of premeditation and deliberation.

In *Bondurant* the defendant shot the victim but then immediately directed the driver of the car in which they had been riding to proceed to the emergency room of a hospital. *State v. Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. In concluding that the death penalty was disproportionate, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. *Id.* at 694, 309 S.E.2d at 182. In contrast, the evidence in the present case tended to show that defendant did have a motive to kill, namely, the fact that the victim was to testify against defendant in a criminal prosecution. Moreover, no evidence in this case suggests that defendant sought medical help for the victim.

Another distinguishing characteristic of this case is that two aggravating circumstances were found by the jury. Of the seven cases in which this Court has found a sentence of death disproportionate, in only two, *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170, and *State v. Young*, 312 N.C. 669, 325 S.E.2d 181, did the jury find the existence of multiple aggravating circumstances. *Bondurant*, as discussed above, is clearly distinguishable. In *Young* this Court focused on the failure of the jury to find the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance, which the jury found in the present case. Moreover, the jury in the present case found as an aggravating circumstance that defendant committed the murder to hinder the enforcement of laws. *See State v. Maynard*, 311

N.C. 1, 35-36, 316 S.E.2d 197, 216 (holding death penalty not disproportionate where the defendant beat his victim in the head and killed him because the victim had agreed to testify against the defendant in another matter pursuant to a plea arrangement; the jury found as aggravating circumstances that the murder was committed to hinder the enforcement of laws and that it was especially heinous, atrocious, or cruel), *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984).

Defendant argues that although at the time of the murder he had yielded to the temptations of the victim's daughter, a young woman who drew him into a ring of drug addicts, in his younger years and prior to the death of his wife, he had been an upstanding, hardworking citizen. These facts are reflected in the nonstatutory mitigating circumstances found by the jury. The jury considered these mitigating circumstances in reaching its result, and we cannot say the jury's failure to find that these mitigating circumstances outweighed the aggravating circumstances renders the penalty disproportionate. *State v. Gray*, 347 N.C. at 192, 491 S.E.2d at 561.

Although we review all of the cases in the pool when engaging in this statutory duty, as we have repeatedly stated, it is worth noting again that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *State v. 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 capital sentencing proceeding, free from prejudicial error, and that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

NO ERROR.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this opinion.

STATE OF NORTH CAROLINA v. MELANIE SAMMONS ANDERSON

No. 60A97

(Filed 9 April 1999)

1. **Indigent Defendants— expert psychiatric assistance—no showing of specific need**

The trial court did not abuse its discretion in a capital first-degree murder prosecution by denying defendant's motion for expert psychiatric assistance where defense counsel conceded that defendant was not going to raise an insanity defense and the request for assistance was based on mere speculation of the trial tactic the State would employ rather than the requisite showing of specific need.

2. **Criminal Law— motion to replace attorney—properly denied**

The trial court did not err in a capital first-degree murder prosecution by denying defendant's pro se motion to have her attorney relieved where defendant raised the issue with Judge Rousseau when the original second counsel had to be replaced; Judge Seay subsequently reviewed the file and asked defendant if she intended to pursue the motion; and defendant replied that she had not been aware that her counsel was handling another murder at that time and that Judge Rousseau had disposed of the motions. Defendant was granted a fair opportunity to be heard and, without a request to hear the issue de novo, Judge Seay properly left the matter as Judge Rousseau had resolved it. Moreover, nothing in the record indicates that defendant's counsel was not qualified to represent defendant, nor is there any evidence that defendant's counsel did not serve as a zealous advocate.

3. **Evidence— reference to trial of codefendant—prohibited—no error**

The trial court did not err in a capital first-degree murder prosecution for the killing of a two and a half year old child by ruling that the defense could not refer to the trial of defendant's boyfriend, the victim's uncle. The trial court ruled only that defendant could not refer to the results of the boyfriend's trial and did not prohibit defendant from impeaching adverse witnesses whose testimony differed between the trials. The court indicated that the issue would be looked at if it came up, but

there was no point during the trial at which defense counsel asked the court to revisit the issue and defendant failed to assign error to any restriction on her cross-examination of witnesses.

4. Jury— capital trial—jury selection—female defendant—questions not inappropriate

The trial court did not err in a capital prosecution for first-degree murder by allowing the prosecutor to ask prospective jurors, "Would the fact that the defendant is a female in any way affect your deliberations with regard to the death penalty?" An inquiry into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty was not an inappropriate effort to ferret out any prejudice arising from defendant's gender.

5. Jury— capital trial—jury selection—church membership—questions inappropriate

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by sustaining objections to defendant's questions concerning church membership and whether church members ever expressed opinions about the death penalty. Defendant's questions did not make an appropriate inquiry regarding the prospective jurors' religious beliefs or their ability to impose the death penalty or a life sentence. Furthermore, defendant was able to determine whether the prospective jurors would consider a life sentence by asking if they would automatically vote for the death penalty.

6. Evidence— murder of a child—prior abuse of children—admissible

The trial court did not err in a capital first-degree murder prosecution for the death a child by admitting evidence that defendant had previously punished her children through use of a belt and biting. The evidence tended to establish the identity of the person who committed the crime, a plan, and the absence of accident, which are permissible purposes under N.C.G.S. § 8C-1, Rule 404(b) and which are relevant in determining whether defendant committed felonious child abuse and first-degree murder by herself or acting together with someone else. Moreover, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree and, here, the probative value was not substantially outweighed by any danger of unfair prejudice.

7. Appeal and Error— preservation of issues—objections to testimony sustained—answers not in record

Defendant could not show that a trial court ruling in a capital first-degree murder prosecution excluding testimony was prejudicial where the record failed to demonstrate what the answers would have been had the witnesses been permitted to respond to defendant's questions.

8. Homicide— first-degree murder—acting in concert—instructions

There was no plain error in a capital prosecution for first-degree murder in the court's instruction on acting in concert where defendant contended that the instruction was improper under *State v. Blankenship*, 337 N.C. 543, but the crimes in this case occurred in August 1994 and *Blankenship* is inapplicable. Moreover, defendant's argument that the instructions given by the court did not clearly explain to the jurors that they must find that defendant's common purpose with her boyfriend was to commit each and every crime charged fails as to felonious child abuse, felony murder based on felonious child abuse, and first-degree murder because those crimes do not require specific intent. As to first-degree murder based on premeditation and deliberation, defendant concedes that the trial court's preliminary instructions required the jurors to find that defendant herself must have had the specific intent to kill and the court later repeated the instruction on premeditated and deliberate murder, again requiring the jurors to find that defendant had the specific intent to kill.

9. Criminal Law— court's remarks—reference to killing as murder—not plain error

There was no plain error in a capital prosecution for first-degree murder where the court in its instructions twice referred to the killing as a murder. The remarks did not express any opinion, but merely instructed the jury on the three possible theories on which a first-degree murder conviction can be based and clearly explained that the jurors could find defendant not guilty as to each of the three theories. In context, the remarks were not prejudicial.

10. Evidence— capital sentencing—psychiatrist—opinion as to defendant's responsibility

There was no error in a capital sentencing proceeding in admitting the testimony of a forensic psychiatrist that defendant "does not have a disorder that would relieve her of her responsibility for her actions." The term "responsibility" is not a precise legal term with a definition that is not readily apparent; in this context, it is a medical term used appropriately by an expert in the field of psychiatry to describe the effect of defendant's mental conditions on her actions.

11. Sentencing— capital sentencing—mitigating circumstance—minor participant—evidence insufficient

The trial court did not err in a capital sentencing hearing by not submitting to the jury the mitigating circumstance that defendant was an accomplice or accessory with relatively minor participation pursuant to N.C.G.S. § 15A-2000(f)(4). Assuming that defendant properly preserved the issue for appellate review, the evidence was not sufficient to support submission of the circumstance; although defendant may not have inflicted the closed-head injury the night the child died, defendant significantly abused her throughout her stay and thus cannot be considered to have been a minor participant in such conduct.

12. Sentencing— capital sentencing—mitigating circumstance—duress or domination—evidence insufficient

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance that defendant acted under duress or under the domination of another person, N.C.G.S. § 15A-2000(f)(5). The evidence clearly indicates that defendant disciplined and abused the two and one-half year old victim in the weeks that she lived with defendant and her boyfriend and the State presented evidence from a staff psychologist at Dorothea Dix Hospital that defendant did not display the level of dependency that would be expected from one characterizing herself as so submissive. While defendant testified that she told police that the dog had injured the child out of fear of defendant, that evidence does not show that the first-degree murder, torture, or felony child-abuse were committed while defendant was under duress or the domination of the boyfriend and evidence that defendant had been involved in abusive relationships with men, including the boyfriend, goes to the general aspects of

the relationship and does not support the assertion that defendant acted under the domination of the boyfriend on the night the victim died or during the abusive events that led up to the child's death. A jury finding of this circumstance would have been based solely upon speculation and conjecture.

13. Appeal and Error— preservation of issues—witness not ordered to testify under immunity—no request for immunity

The trial court did not err in a capital sentencing hearing arising from the death of a two and one-half year old child by not granting immunity to defendant's boyfriend and asking him to testify where defendant subpoenaed her boyfriend to testify on her behalf; his convictions for first-degree murder and felonious child abuse were on appeal at the time; and his appellate counsel counseled him to plead his Fifth Amendment privilege, which he did. Defendant never asked the court to order the boyfriend to testify under a grant of immunity and thus failed to preserve the argument for appellate review.

14. Sentencing— capital sentencing—aggravating circumstances—especially heinous, atrocious, or cruel—evidence sufficient

The trial court did not err in a capital sentencing proceeding by submitting to the jury the aggravating circumstance that the killing was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The victim's age and the existence of a parental relationship may be considered in determining the existence of this factor; here, the victim was staying with defendant and her uncle while her mother remained hundreds of miles away in Pennsylvania, defendant had assumed the role of primary caregiver, the victim was two and one-half years old and dependent on defendant and her uncle for their care and protection, and she was brutally beaten and severely abused.

15. Appeal and Error— preservation of issues—constitutionality of aggravating circumstance—no objection at trial—not specifically and distinctly alleged in assignment of error

Defendant's contention that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad was not considered on appeal where defendant failed to object to the instruction at trial and did not

specifically and distinctly allege in her assignment of error that the trial court committed plain error.

16. Criminal Law— capital sentencing—prosecutor's argument—no error

The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu to strike arguments by the prosecutor where the prosecutor properly argued the facts of the case and urged the jury to impose the death penalty.

17. Homicide— first-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss where there was sufficient evidence for a rational jury to find that defendant committed first-degree murder under each of the theories presented.

18. Appeal and Error— preservation of issues—constitutionality of murder instruction—not raised at trial

Defendant's contention that the court's instruction on first-degree murder was unconstitutionally vague because it did not effectively distinguish first-degree murder from lesser forms of homicide was waived by her failure to raise any constitutional issues at trial.

19. Sentencing— capital sentencing—instructions—consideration of mitigating evidence

There was no error in a capital sentencing proceeding in the court's use of "may" instead of "must," which defendant contended made the consideration of mitigating evidence discretionary.

20. Sentencing— capital sentencing—death sentence not arbitrary

The record fully supports the aggravating circumstance submitted and found by the jury in a capital sentencing proceeding and there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

21. Sentencing— capital sentencing—death sentence not disproportionate

A sentence of death for the killing of a two and one-half year old child was not disproportionate where defendant was convicted on the basis of premeditation and deliberation as well as

felony murder, indicating a more calculated and cold-blooded crime, and the case is most analogous to cases in which the court has held the death penalty not to be disproportionate, as in *State v. Perkins*, 345 N.C. 254, where the defendant had assumed a parental role. The fact that a codefendant was sentenced to life is not determinative.

Justices MARTIN and WAINWRIGHT 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 judgment imposing a sentence of death entered by Rousseau, J., on 26 September 1996 in Superior Court, Wilkes County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for felonious child abuse was allowed on 22 January 1998. Heard in the Supreme Court 29 September 1998.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

Defendant was indicted 30 January 1995 for first-degree murder and felonious child abuse. In September 1996, defendant was tried capitally and found guilty of first-degree murder on the basis of malice, premeditation and deliberation; on the basis of torture; and under the felony murder rule. She was also found guilty of felonious child abuse. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment accordingly. The trial court also sentenced defendant to three years' imprisonment for felonious child abuse.

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.

The victim, Tabitha Pierce, was two and one-half years old at the time of her death. Tabitha's uncle, Ronald Pierce, lived with defendant, who was his girlfriend. In July 1994, defendant and Pierce visited Tabitha's parents in Pennsylvania. Tabitha's mother agreed to let Tabitha come to North Carolina and stay with defendant and Pierce for several weeks. On 24 August 1994, defendant and Pierce took Tabitha to Wilkes Regional Medical Center. Tabitha was unconscious, and her body was covered with bruises, grab marks, pinch marks, scratches, bite marks, and other injuries. Tabitha was airlifted to the pediatric intensive care unit at Baptist Hospital in Winston-Salem because of the severity of her injuries. On 25 August 1994, Tabitha died after life support was withdrawn.

Defendant told the nursing supervisor at Wilkes Regional Medical Center that earlier in the evening, she had found Tabitha outside, with a dog standing over her. However, she told the registration clerk at the hospital that she heard a gasp in the bedroom and found Tabitha in her room making a "gurgling" sound. Defendant said that she grabbed and shook her and that Tabitha collapsed on the bed. She also claimed that Tabitha had slid on wet carpet, causing the bruises on her face. Defendant and Pierce together later recounted the evening's events to Karolen Bowman, M.D., an expert in pediatric medicine at Wilkes Regional Medical Center. They told her that Pierce ran outside when he heard dogs barking and found Tabitha limp and making gurgling noises, whereupon they then brought her to the hospital. Pierce and defendant also stated that Tabitha bruised easily.

When David Pendry, a detective with the Wilkes County Sheriff's Department, questioned Pierce and defendant at the hospital, defendant agreed with Pierce's explanation that a dog jumped on Tabitha and knocked her down. Pierce stated that when he went outside, he found Tabitha lying on the ground, unconscious and not breathing. They then brought her to the hospital. Defendant later told another law enforcement officer that both Tabitha's old and new injuries were caused when a dog jumped on her and knocked her down.

Defendant's former mother-in-law, Lucille Macemore, testified that some time after 11:00 p.m. on 24 August 1994, defendant called her from Wilkes Regional Medical Center and stated, "Lucille, I've killed Tabitha."

The State's evidence tended to show that Tabitha had numerous injuries extending all over her body, including bruises on her face,

cheeks and jaw, chin, forehead, sides of her neck, collarbones, over the front of her chest, on her back, over her right flank, her buttocks, upper and lower legs, her eyelid, and on her shins. Patches of her hair had been pulled out traumatically. Tabitha had also suffered injuries caused by a blunt trauma to the mouth. There was evidence of forceful pinching and grabbing and human adult bite marks on Tabitha's body. She had suffered a blunt trauma to her pubic area. Dr. Patrick E. Lantz, the forensic pathologist, found bruises in the forms of grab marks, belt marks, shoe marks, and marks from a radio antenna and a metal tray. Tabitha's brain was swollen with a hemorrhage both over the surface of the brain in the lining as well as a subdural hematoma between the skull bone and the brain. There were retinal hemorrhages in the back of her eyes indicating that she had been shaken violently. Dr. Lantz opined that these injuries had been inflicted at various times, would have been painful, and would have required considerable force.

William Fisher, M.D., the resident family doctor at Wilkes Regional Emergency Department, testified that he did not believe Tabitha's injuries were caused by a dog, but instead by "some sort of a beating." Dr. Bowman testified that, based on her observations and on the history given to her by Pierce and defendant, she believed that Tabitha had "been severely abused over a matter of days to weeks." Sybille Sabastian, a registered nurse in the Wilkes Regional emergency room, opined, based on her experience and her observations of Tabitha's injuries, that Tabitha "had been beaten." Sarah Sinal, M.D., an expert in pediatric medicine who saw Tabitha in the pediatric intensive care unit at Baptist Hospital, testified that, in her opinion, Tabitha was "a victim of severe child abuse." She concluded that Tabitha was a victim of the shaken-baby syndrome and the battered-child syndrome. Dr. Lantz testified that, in his opinion, Tabitha's injuries were not caused by a dog, that the injuries were inflicted at various times, and that Tabitha was a victim of battered-child syndrome.

PRETRIAL ISSUES

I.

[1] In her first assignment of error, defendant contends that the trial court erred in denying her motion for expert psychiatric assistance. Defendant argues that an expert was needed to present evidence that defendant was acting under the domination of Ronald Pierce and that she was under duress at the time of Tabitha's death. Upon considera-

tion of a medical report from Dorothea Dix Hospital during an *ex parte* hearing, the trial court denied the motion on the grounds that defendant's sanity was not likely to be an issue in the case. Defendant argues in her brief that she is entitled to a new trial because the trial court's denial of expert psychiatric assistance deprived her of her constitutional rights to the assistance of counsel and a fundamentally fair trial. We disagree.

Turning first to a defendant's entitlement to expert psychiatric assistance, 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 stated:

> In accordance with *Ake* [*v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985)], this Court has held that upon a threshold showing of specific need for expert assistance, funds for such must be made available. Further, the statutory right to "counsel and the other necessary expenses of representation," N.C.G.S. § 7A-450(b) (1989), includes the assistance of experts upon a showing of a particularized need therefor. The trial court has authority to approve a fee for the service of an expert witness who testifies for an indigent person.
>
> To establish a particularized need for expert assistance, a defendant must show that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert will materially assist him in the preparation of his case. Although particularized need is a flexible concept and must be determined on a case-by-case basis, [*State v.*] *Parks*, 331 N.C. [649,] 656-57, 417 S.E.2d [467], 471 [(1992)], "[m]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided," *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). The trial court has discretion to determine whether a defendant has made an adequate showing of particularized need. In making its determination the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made.

Page, 346 at 696-97, 488 S.E.2d at 230 (citations omitted).

During the *ex parte* hearing prior to trial, defendant offered into evidence a report from Dr. Robert Rollins, a forensic psychiatrist, and a report from Dorothy Humphrey, the staff psychologist, both of whom worked at Dorothea Dix Hospital. In his report, Dr. Rollins

determined that defendant has "limited intellectual ability"; that she is "capable of proceeding to trial"; and that she "[d]oes not have a disorder that would relieve her of responsibility for her actions." Ms. Humphrey reported that defendant "has an IQ of 75 to 76" and that "her expressed concern and affection for her children appear genuine." During the *ex parte* hearing, the following exchange occurred:

> MR. CAMERON [defense counsel]: . . . Well, my main point was, I suppose, Your Honor, to stress the things in the report itself, such as the borderline intellectual ability, and the fact that . . . and, I'm not sure I understand all this, in which they say "the principal and primary diagnoses" and then it goes on to say "mixed personality disorder with inadequate (sic) dependent (sic) and emotionally unstable features."
>
> You know, of course, this trial, as it now stands, would be a two part trial. We, perhaps, may need the psychiatric report for the second phase more so than even the first phase. But, we are concerned to some degree with the first aspect of the trial in anticipating the State's theory, they may have to put this, since . . . she's not the mother of the child, that they may consider her to be in position of being, having parental control, and thus, being in a position of a parent, which may place a greater responsibility on her to act if the situation developed there in which the child was in danger by someone else, she might be in a position of, if the State were going on that theory that she was in a position of a parent, that this would require some action on her part. And, perhaps her low IQ and emotional stability and fear of this other individual might, would prevent her from acting as a parent would have, or should have.
>
> THE COURT: Any, any evidence now, other than this report?
>
> MR. CAMERON: I do not, we do not intend to put the Defendant on the stand, Your Honor, but I think, as I say, the report speaks for itself in that respect.
>
> We're just anticipating a little bit of what the State might do. I don't know if it intended to join them for trial, but I've not, you know, if they were joined, it may be more reason at that point, at that time, to have a psychiatrist review to show why she may not have stepped in and done more than she did on that occasion.

THE COURT: You're not, you didn't file notice that you were going to plead insanity, not guilty by reason of insanity did you?

MR. CAMERON: No, sir. No, sir.

The trial judge then made the following findings:

> The Defendant is present with counsel at the ex parte hearing, offered into, the Defendant offered into evidence the report of Dr. Rollins, a forensic psychiatrist from Dorothea Dix Hospital, and from the staff psychologist Dorothy Humphrey, and upon a careful consideration of the report, the Court finds that the Defendant has not made a threshold showing that her sanity is likely to be a significant factor in her defense, and the Court specifically finds that there's no evidence to support a finding that fundamental fairness requires any appropriation to provide access of this Defendant to another psychiatrist; that the Court finds, determines and concludes that the evidence offered by the Defendant in this case does not . . . entitle the Defendant to the assistance of an expert funded by the State to prepare for her defense, specifically, that . . . the threshold showing of specific necessity has not been met. The motion of the Defendant for the appropriation of funds to allow the Defendant to undergo psychological and/or psychiatric testing is DENIED.

Applying the principles of *Ake* to the case at bar, we find that the trial court did not abuse its discretion in denying defendant's motion for psychiatric assistance. In determining whether an indigent defendant is entitled to expert psychiatric assistance, defendant must make the " 'threshold showing to the trial court that [her] sanity is likely to be a significant factor in [her] defense.' " *State v. Pierce*, 346 N.C. 471, 481, 488 S.E.2d 576, 582 (1997) (quoting *Ake*, 470 U.S. at 82-83, 84 L. Ed. 2d at 66). To the contrary, defense counsel here conceded that defendant was not going to raise an insanity defense. Moreover, defense counsel's request for assistance was based on mere speculation of what trial tactic the State would employ rather than the requisite showing of specific need. Thus, we conclude that the trial court did not abuse its discretion in denying the motion because "the evidence presented by defendant does not approach the showing found sufficient by the Supreme Court of the United States in *Ake* or by this Court in [*State v.*] *Gambrell*[, 318 N.C. 249, 347 S.E.2d 390 (1986)]." *Id.* at 484, 488 S.E.2d at 583.

This assignment of error is overruled.

II.

[2] In her second assignment of error, defendant contends that she is entitled to a new trial because the trial court erred in denying defendant's *pro se* motion to have attorney Bradley Cameron relieved of representing her in this case. We disagree.

On 26 August 1994, Mr. Cameron was appointed as defense counsel for defendant. On 6 February 1995, defendant wrote a letter to a district court judge complaining that she "felt in the dark about her case" because she had seen and spoken to Mr. Cameron only a few times. She wrote that Mr. Cameron had not tried to meet her needs in the case, and thus, she requested that a new attorney be appointed. Chief District Court Judge Edgar B. Gregory responded to her letter on 7 February 1995, explaining to defendant that her case was in Superior Court and that any motion regarding her representation should be directed to Superior Court Judge Preston Cornelius.

Defendant's arraignment was subsequently held on 21 February 1995 with Judge Cornelius presiding. However, defendant did not raise any concerns about Mr. Cameron at this hearing. Then on 3 April 1995, defendant wrote a letter to Judge Cornelius reporting that Mr. Cameron had visited her only once in jail. She complained about Mr. Cameron's qualifications and again requested that he be dismissed from her case. Defendant sent the same letter to Judge Rousseau on 16 April 1995.

On 21 April 1995, Judge Rousseau addressed defendant's concerns about Mr. Cameron in court. The following exchange took place:

> THE COURT: You're being held on murder charges, I believe, is that correct?
>
> DEFENDANT ANDERSON: Yes, sir. Yes, sir.
>
> THE COURT: Well, you're charged with first degree murder?
>
> DEFENDANT ANDERSON: Yes, sir.
>
> THE COURT: You have written me several letters here this week. What, what do you want to say about them?
>
> DEFENDANT ANDERSON: I just don't feel like I'm getting done right. I haven't seen my attorney that much.

THE COURT: Well, one of your attorneys has been involved in a murder case that's been on this week. What do you [sic] lawyers say about it? I believe you say they had a Rule 24 Hearing?

Mitch McLean, who had been appointed as second counsel in defendant's case, stated that because of a conflict of interest, he had been permitted to withdraw from the case, and that he had gone to the jail to explain the situation to defendant. Judge Rousseau then addressed defendant:

THE COURT: . . . [M]a'am, do you understand that Mr. McLean can't represent you?

DEFENDANT ANDERSON: Yes, sir.

THE COURT: What do you say about Mr. Cameron?

DEFENDANT ANDERSON: I've just been in there for eight months and I hadn't seen my attorney that much.

THE COURT: Well, you know he can't stay with you every day?

DEFENDANT ANDERSON: Yes, sir, I know that.

THE COURT: He's got other things to do, and he's been working on this other murder case.

DEFENDANT ANDERSON: Yes, sir.

THE COURT: And, of course, your case can't be tried probably until the other case is tried.

DEFENDANT ANDERSON: (Nods head affirmatively).

THE COURT: The one we were on this week (sic). And, I'll have to appoint another lawyer if . . . Mr. McLean's gotten out.

MRS. HARDING [prosecutor]: Yes, sir.

THE COURT: Anything else you want to say about it, ma'am?

DEFENDANT ANDERSON: No, sir.

THE COURT: Well, I'll see about getting you another lawyer as soon as I can.

DEFENDANT ANDERSON: Thank you, sir.

Attorney Donna Schumate was later appointed as second counsel. On 19 August 1995, the matter of representation again arose in front of Judge Thomas W. Seay, Jr. When Judge Seay reviewed

defendant's court file and saw the letters she had written to Judge Rousseau in April, he inquired if she intended to pursue her motion to dismiss Mr. Cameron from her case. Mr. Cameron responded that he was aware of the letters, but he had never spoken with defendant about them. The court pursued the matter as follows:

> THE COURT: All right, then this is Melanie, Melanie Sams (sic) Anderson, will you stand, please?
>
> DEFENDANT ANDERSON: Yes, sir. (Standing).
>
> THE COURT: Is it, then you say you, in your latest letter, April 20th, says, "I ask that you please have Brad Cameron dismissed from my case."
>
> DEFENDANT ANDERSON: Yes, sir, I did. I was brought over here one time in front of Judge Rousseau . . . .
>
> THE COURT: . . . about this?
>
> DEFENDANT ANDERSON: About this.
>
> THE COURT: About this letter? And, it was resolved at this time?
>
> DEFENDANT ANDERSON: Yes, sir. I wasn't aware, you know, that Mr. Cameron was handling the Munsey murder, and handling several cases at the time . . . .
>
> THE COURT: . . . . but, Judge Rousseau has already disposed of these motions then?
>
> DEFENDANT ANDERSON: Yes, sir. Yes, sir.
>
> THE COURT: Well, if he's disposed of it, that's the way it is.
>
> DEFENDANT ANDERSON: Thank you, sir.

Defendant now contends that she was never allowed an adequate opportunity to be heard on her complaints regarding Mr. Cameron. After a thorough review of the record, we conclude that the trial court did not err.

"A cardinal principle of the criminal law is that the sixth amendment to the United States Constitution requires that in a serious criminal prosecution the accused shall have the right to have the assistance of counsel for his defense." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981). "While it is a fundamental principle that an

indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963), an indigent defendant does not have the right to have counsel *of his choice* appointed to represent him." *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980).

In the case before us, defendant was granted a fair opportunity to be heard on the matter. Further, based in part on her assurances to Judge Rousseau on 21 April 1995, defendant appeared to be satisfied with the trial court's resolution of her representation. During the 19 August 1995 exchange with Judge Seay, defendant did not ask that the court reconsider the motion, nor did she bring any additional concerns about Mr. Cameron before the court. Thus, without a request for Judge Seay to consider the issue *de novo*, Judge Seay properly left the matter as Judge Rousseau had resolved it.

"The competency of a criminal defendant's counsel does not amount to a denial of the constitutional right to counsel unless it is established that the attorney's representation was so ineffective that it renders the trial a farce and a mockery of justice." *Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797.

> Thus, when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper.

Thacker, 301 N.C. at 352, 271 S.E.2d at 255. Nothing in the record indicates that Mr. Cameron was not qualified to represent defendant in this case. Nor is there any evidence that Mr. Cameron did not serve as a zealous advocate for defendant throughout the entire time in which he represented her. In sum, "[a]t no place in the record is there any evidence which would tend to show that defense counsel were unable to mount a defense which would be consistent with the concept of effective representation." *Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798.

The hearings conducted by Judges Rousseau and Seay "fulfilled the obligation of the court to inquire into defendant's reasons for wanting to discharge [her] attorney[] and to determine whether those reasons were legally sufficient to require the discharge of counsel." *Id.* at 335, 279 S.E.2d at 797. This Court has stated that a defendant

does not "have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services. Similarly, the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused; such a factor is but one consideration to be weighed in the balance." *Id.* (citations omitted).

Therefore, we conclude that defendant's complaints about Mr. Cameron's allegedly insufficient representation did not entitle defendant to have Mr. Cameron dismissed from this case. "Because of the potential these challenges have for disrupting the efficient dispensing of justice, appellate courts ought to be reluctant to overturn the action of the trial judge in disposing of the matter." *Id.* at 337, 279 S.E.2d at 798. The trial court properly denied defendant's *pro se* motion to have her attorney removed from her case.

This assignment of error is overruled.

III.

[3] Next, defendant argues that the trial court erred in ruling that the defense could not make reference to the trial of Ronald Pierce, who was tried separately for the murder of Tabitha in October 1995.

On 16 September 1996, the State filed a motion *in limine* requesting that the trial court prohibit defendant from referring to Ronald Pierce's convictions for first-degree murder and felonious child abuse. After hearing from both the prosecution and defendant, the following exchange took place:

> THE COURT: Well, at this time, I will DIRECT that you not mention anything about the Pierce trial.
>
> Now, if you call him as a witness, we'll have to see at that time what we're going to do.
>
> MR. CAMERON: If we get, again, another matter, Your Honor, let's say we've got a witness testifying somewhat different from what they testified earlier.
>
> THE COURT: Well, what the jury did in the Pierce [trial] is immaterial to what the jury might do in this case. And, results of a jury verdict is (sic) immaterial in this case, period.
>
> MR. CAMERON: I understand about the results, but I, I think it may well be pertinent to other matters, though, Your Honor.

THE COURT: Well, what the jury did is immaterial. She's to be tried on this case. The State has the burden of proof on this case. And, what the State might have proven in the other case does not bear on what the State might prove in this case.

MR. CAMERON: And, again, I say, Your Honor, this motion was filed this morning, and it didn't meet . . . .

THE COURT: . . . well, in the interest of justice, I will say . . . .

MR. CAMERON: . . . whose justice?

THE COURT: Huh?

MR. CAMERON: In whose justice . . . not this Defendant's justice.

THE COURT: In the interest of justice, I will DIRECT that you not mention it until it comes up, and we'll look at it if it does come up some other time.

MR. CAMERON: I understand.

Defendant claims that the trial judge's ruling denied her of her constitutional rights to present a defense, to due process of law, and to be free from cruel or unusual punishment. However, in her brief, she concedes that "[t]he trial court's ruling that the result of the *Pierce* trial was irrelevant may have been correct." Defendant further argues, though, that as a result of the trial court's ruling, she was essentially prevented from cross-examining adverse witnesses about their testimony in Ronald Pierce's trial. We disagree.

First, careful review of the record reveals that the trial court ruled only that defendant could not refer to the results of the Pierce trial. The trial court did not prohibit defendant from impeaching adverse witnesses whose testimony was different from that in the Pierce trial. In fact, the trial judge stated, "I will DIRECT that [the defense counsel] not mention [the Pierce trial] until it comes up, and we'll look at it if it does come up some other time." After carefully reviewing the record, however, we find no point during the trial at which the defense counsel asked the trial court to revisit the issue of references to the Pierce trial, nor has appellate counsel for defendant pointed to one.

Second, defendant failed to assign error to any restriction on her cross-examination of witnesses. Defendant did not specifically raise

this issue with the trial court during the examination of these witnesses for its consideration, nor did she include this issue in her assignment of error that she presented to this Court.

This assignment of error is overruled.

IV.

[4] In her next assignment of error, defendant contends that the trial court erred in allowing the prosecutor to stake out prospective jurors by asking them, "[W]ould the fact that the Defendant is a female[] in any way affect your deliberations with regard to the death penalty?" We disagree.

> The purpose of *voir dire* is to ensure an impartial jury to hear defendant's trial. The *voir dire* of prospective jurors serves a two-fold purpose: (I) to determine whether a basis for challenge for cause exists, and (ii) to enable counsel to intelligently exercise peremptory challenges. The trial court has broad discretion to ensure that a competent, fair, and impartial jury is impaneled. "[D]efendant must show prejudice, as well as a clear abuse of discretion, to establish reversible error." *State v. Syriani*, 333 N.C. 350, 372, 428 S.E.2d 118, 129, *cert. denied*, [510] U.S. [948], 126 L. Ed. 2d 341 (1993), *reh'g denied*, [510] U.S. [1066], 126 L. Ed. 2d 707 (1994).

State v. Gregory, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995) (citations omitted), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

Defendant cites to the holdings in *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990), and *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), in support of her contention. However, both *Davis* and *Johnson* involved *voir dire* of prospective jurors in which the defendant attempted to ask hypothetical questions involving the existence of a mitigating circumstance. In the case *sub judice*, the prosecutor's questions were not impermissible hypothetical questions " 'designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts.' " *Johnson*, 317 N.C. at 383, 346 S.E.2d at 618 (quoting *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)). An inquiry into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty was not an inappropriate effort to ferret out any prejudice arising out of defendant's gender. As we have previously stated, "the

prosecutor here was simply inquiring into the sympathies of prospective jurors in the exercise of his right to secure an unbiased jury." *State v. McKoy*, 323 N.C. 1, 15, 372 S.E.2d 12, 19 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Defendant has shown no abuse of discretion.

This assignment of error is overruled.

V.

[5] In her fifth assignment of error, defendant asserts that the trial court erred in sustaining the prosecutor's objection to questions posed by defendant to prospective jurors about their religious beliefs. We disagree.

This Court, in *State v. Cummings*, 346 N.C. 291, 312, 488 S.E.2d 550, 562 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998), stated that "[p]rospective jurors in a capital case must be able to state clearly that " 'they are willing to temporarily set aside their own beliefs [concerning the death penalty] in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, [149-50] (1986))."

> While a wide latitude is allowed counsel in examining jurors on *voir dire*, the form of the questions is within the sound discretion of the court. "In this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion." *State v. Bryant*, 282 N.C. 92, [96,] 191 S.E.2d 745[, 748] (1972), *cert. denied*, [410 U.S. 958, 35 L. Ed. 2d 691, *and cert. denied*,] 410 U.S. 987, 36 L. Ed. 2d 184 (1973).

Vinson, 287 N.C. at 336, 215 S.E.2d at 68.

In the present case, defendant attempted to question prospective jurors about their church membership and whether their church members ever expressed opinions about the death penalty. The trial court properly exercised its discretion in regulating the *voir dire* by prohibiting such questions.

This Court has stated that "defendant's right of inquiry . . . is the right to make *appropriate* inquiry concerning a prospective juror's moral or religious scruples, beliefs and attitudes toward capital punishment." *Id.* at 337, 215 S.E.2d at 69. Here, defendant's questions did

not make appropriate inquiry regarding the prospective jurors' religious beliefs or their ability to impose the death penalty or a life sentence. Instead, defendant inquired about the prospective jurors' church affiliations and the beliefs espoused by others affiliated with or representing their churches regarding the death penalty. These questions in this case fall beyond the scope of appropriate questions regarding the specific jurors' moral or religious views and were properly prohibited by the trial court. *See State v. Lloyd*, 321 N.C. 301, 307, 364 S.E.2d 316, 321 (holding "that the trial court properly prohibited the defense counsel's inquiry into the religious affiliations and practices of prospective jurors"), *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

Further, defendant was able to determine whether the prospective jurors would consider a life sentence by asking if they would automatically vote for the death penalty. Abuse of discretion has not been shown where "the defendant was able to elicit the information necessary to select competent, fair and impartial jurors without questioning [prospective] jurors about their personal religious beliefs and affiliations." *Id.*

This assignment of error is overruled.

GUILT-INNOCENCE PHASE

VI.

[6] Defendant next argues that the trial court erred in allowing the State to present evidence that defendant punished her daughter by hitting her with a belt and punished her son by biting him. The trial court conducted a *voir dire* to determine the admissibility of the disputed evidence. After listening to arguments from defendant and the State, Judge Rousseau concluded that the testimony was admissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence for the sole purpose of showing "the identity of the perpetrator of the crime in this case." N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1997).

The prosecutor called Deborah Thompson to the witness stand, and she testified before the jury that she had observed defendant and Ron Pierce discipline defendant's daughter, Brandy. Ms. Thompson testified that defendant removed a belt that was hanging on a coat stand, and then she and Pierce took Brandy into a bedroom and shut the door behind them. She stated that she could "hear Melanie [defendant] hollering at Brandy, and . . . what sounded like the belt hitting her, and Brandy was screaming and Ron [Pierce] was laughing

during the whole thing." Ms. Thompson testified that defendant had the belt in her hand when she returned from the bedroom, and then she hung it back on the coat stand.

The prosecutor next called to the stand Julia Szekely, one of defendant's neighbors, who testified that she had observed defendant discipline her son, Roger, by biting him "[r]eal hard." She testified that, as a result, Roger "was in pain. He was crying hard." Ms. Szekely also recalled that one afternoon when she was in defendant's house, defendant disciplined her daughter, Brandy, by doubling a belt in half and "smack[ing] [Brandy] with it" about five or six times. Ms. Szekely testified that Brandy "cried hard. You could tell it hurt."

At the end of their testimony, the trial court instructed the jury as follows:

> Now, members of the jury, what you've heard the last two witnesses testify about the Defendant biting one or both, I mean hitting one or both of her children with a belt and biting one, this evidence was received for the sole purpose of showing, if you find that it does so, the identity of the person who committed the crime charged in this case, or that there existed in the mind of the Defendant, a plan, scheme or system or design involved in the crime charged in the case, and the absence of accident.
>
> If you believe this evidence, you may consider it, but only for that limited purpose. You may not convict this Defendant on these charges for something she may have done in the past.

Evidence during the trial revealed that agents of the North Carolina State Bureau of Investigation retrieved two belts from defendant's house. Dr. Lantz, the forensic pathologist, testified that he could match one of the retrieved belt's buckle with the patterned abrasion-contusion on Tabitha's left knee. He determined this by viewing the leather and stitching of the belt and the angle of the metal belt buckle which were reflected in the injury on Tabitha's left leg. Dr. Lantz also found adult human bite marks on Tabitha's left thigh and buttocks. The State introduced evidence from Dr. Ernest Burkes, Jr., an expert in forensic odontology, that, in his opinion, the adult human bite marks on Tabitha's body were compatible with defendant's dental impressions.

Defendant claims that the evidence introduced during Ms. Thompson's and Ms. Szekely's testimony was inadmissible for any purpose. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides, in pertinent part:

> 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).

Moreover, this Court has stated that

> "[t]his rule is 'a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' *State v. Coffey*, 326 N.C. [268,] 278-79, 389 S.E.2d [48,] 54 [(1990)]. The list of permissible purposes for admission of 'other crimes' evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.

Pierce, 346 N.C. at 490, 488 S.E.2d at 587 (quoting *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995)).

The State offered evidence that defendant had previously punished her children through her use of a belt and biting, which tended to establish, first, the identity of the person who committed this crime; second, a plan; and finally, absence of accident. All of these are permissible purposes for which evidence may be offered under Rule 404(b) and are relevant in determining whether defendant committed felonious child abuse and first-degree murder by herself or acting together with someone else.

We also reject defendant's contention that the probative value of this evidence was outweighed by the danger of unfair prejudice under Rule 403 of the North Carolina Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

> prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992). This Court has noted that, " '[n]ecessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree.' " *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 512-13 (1996) (quoting *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994)). However, it is well established that

> [t]he determination to exclude evidence on these grounds is left to the sound discretion of the trial court. "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, [756,] 340 S.E.2d 55[, 59] (1986).

State v. Mickey, 347 N.C. 508, 518, 495 S.E.2d 669, 676 (citation omitted), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 106 (1998).

In the instant case, the trial court conducted a *voir dire* on the disputed evidence and concluded that the evidence was relevant and admissible. We conclude that the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice and that the trial court did not abuse its discretion in admitting Ms. Thompson's and Ms. Szekely's testimony into evidence.

Defendant also claims, in a footnote to this argument in her brief, that admission of this testimony violates her rights under the Due Process and Confrontation Clauses of the United States Constitution. We note that defendant's arguments of constitutional error were not raised at trial and are thus deemed waived on appeal. *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 519 (1998); *see* N.C. R. App. P. 10(b)(1).

This assignment of error is overruled.

VII.

[7] Defendant also contends that the trial court erred in sustaining the State's objection to the testimony of two witnesses, Douglas Delp and Shelly Perry. Defendant claims that these two witnesses would have testified that defendant feared Ronald Pierce. We find no merit to this contention.

"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, defendant has failed to preserve this issue for appellate review.

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

State v. Johnson, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995) (citations omitted).

In the case at bar, the record fails to demonstrate what the witness' answers would have been had they been permitted to respond to defendant's questions. "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. Locklear*, 349 N.C. 118, 150, 505 S.E.2d 277, 296 (1998). Thus, defendant cannot show that the trial court's ruling with respect to the exclusion of this testimony was prejudicial.

This assignment of error is overruled.

VIII.

[8] In her next assignment of error, defendant contends that the trial court committed plain error by improperly instructing the jury on acting in concert in accordance with *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), which was subsequently overruled 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). In *Blankenship*, "this Court held that for each charge of acting in concert related to a specific intent crime, the State must prove each defendant's intent to commit the specified crime." *State v. Bonnett*, 348 N.C. 417, 439, 502 S.E.2d 563, 578 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3468 (1999). We note that

Blankenship was filed by this Court on 9 September 1994, but the crimes committed in this case occurred in August 1994. Therefore, the acting-in-concert rule as stated in *Blankenship* is inapplicable to the case *sub judice.*

Defendant specifically complains that the instructions given by the trial court did not clearly explain to the jurors that they must find that defendant's common purpose with Pierce was to commit each and every crime charged. We disagree.

Because defendant did not object at trial, this Court's review is limited to plain error.

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "Indeed, even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). After reviewing the record, we find that this is not the extraordinary case where the alleged error is so fundamental that a reversal is justified.

Defendant's argument regarding the trial court's instructions on felonious child abuse, felony murder based on felonious child abuse, and first-degree murder by means of torture fails based on this Court's holding in *Pierce.* In *Pierce*, the defendant, this defendant's co-defendant, similarly argued that the trial court erred in instructing the jury on the offenses of felonious child abuse, first-degree murder under the felony murder rule, and first-degree murder by torture, as

"the court's instructions did not require the jury to find that defendant possessed the requisite specific intent to commit these crimes." *Pierce*, 346 N.C. at 495, 488 S.E.2d at 590. This Court held that defendant's argument was without merit because "none of these crimes require specific intent." *Id.*

As to the first-degree murder based on premeditation and deliberation, defendant concedes that the trial court's preliminary instructions to the jurors required them to find that defendant herself must have had the specific intent to kill. Also, the trial court later repeated the jury instruction on premeditated and deliberate murder, again requiring the jurors to find that defendant had the specific intent to kill. Based on our previous holdings and the trial court's proper instructions on murder based on premeditation and deliberation, we conclude that the trial court did not commit error, much less plain error, in its instructions to the jury.

This assignment of error is overruled.

IX.

[9] In her next assignment of error, defendant argues that the trial court committed plain error in characterizing Tabitha's death as a "murder" before the jury rendered its verdict. Defendant argues that this was an impermissible opinion on the evidence.

After instructing the jury on premeditated and deliberate murder, the trial court instructed:

> Now, let me go back and say, the State is seeking the first degree murder on three different theories; that is, premeditation, deliberation, and with malice, which I've just covered.
>
> They're also seeking, asking you to find the Defendant guilty of first degree murder on the terror theory, and the third theory . . . or, excuse me. Torture. Not terror but torture, on the theory of torture.
>
> The third theory is that, the felony murder, murder rule. And, I will go over those other two in just a minute. I've been over the first degree on premeditation and deliberation with malice.
>
> Now, members of the jury, bear in mind, it's only one murder. It's only one killing, but there are three ways you may find this Defendant guilty of first degree murder; one, two or three ways, but again, there's only one murder.

After the trial court finished instructing the jury on the other theories of first-degree murder, it stated:

> Again, members of the jury, there's one murder. There's three ways you can find the Defendant guilty of murder. You can find her guilty of either one of them, two of them or all three of them, or not, or find her not guilty on either theory.

This Court has stated in *State v. Porter*, 340 N.C. 320, 457 S.E.2d 716 (1995), the well-established principle that

> [j]udicial expression of opinion regarding the evidence is statutorily prohibited under N.C.G.S. §§ 15A-1222 and -1232. "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984). The burden rests upon defendant to show that the trial court's remarks were prejudicial.

Porter, 340 N.C. at 330, 457 S.E.2d at 721 (citations omitted). Based on these principles, we do not find that the trial court's remarks to the jury expressed any opinion regarding the evidence or its sufficiency.

" '[I]n determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments.' " *State v. Hartman*, 344 N.C. 445, 467, 476 S.E.2d 328, 340 (1996) (quoting *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981)), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 708 (1997). " '[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 v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973)), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991).

In the present case, the trial court merely instructed the jury on the three possible theories on which a first-degree murder verdict could be based. The trial court also clearly explained in its instructions to the jurors that they could find defendant not guilty as to each of the three theories. Furthermore, at the conclusion of its instructions, the trial court stated:

> Now, this Court has no opinion as to what your verdict should or should not be. And, any ruling I've made throughout the

course of the trial or anything I've said to the lawyers, to the witnesses, to you, or anybody else should not be considered by you as an expression of an opinion.

Therefore, when viewed in context, we find that the trial court's remarks were not prejudicial. "[I]f a defendant is not prejudiced by a judge's remarks, they will be considered harmless." *White*, 340 N.C. at 297, 457 S.E.2d at 860.

Accordingly, we find no error, and defendant's ninth assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

X.

[10] Next, defendant contends that the trial court committed plain error in allowing a portion of Dr. Robert Rollins' testimony. Pursuant to defendant's motion, defendant was sent to Dorothea Dix Hospital on 31 July 1995 for evaluation of her capacity to proceed to trial. Dr. Rollins, a forensic psychiatrist, and Dorothy Humphrey, a staff psychologist, conducted an examination of defendant and prepared a report of their findings. Dr. Rollins testified during the capital sentencing proceeding about his diagnosis of defendant. He testified that she suffered from mixed personality disorder, limited intellectual ability, and depression. On cross-examination, the prosecutor asked Dr. Rollins about his evaluation and if he had found that "[d]efendant does not have a disorder that would relieve her of her responsibility for her actions." Dr. Rollins answered that defendant did not suffer from such a disorder. Defendant did not object to this testimony.

In support of her assignment of error, defendant argues that Dr. Rollins' testimony was inadmissible because it embraces a legal term of art, "responsibility." Defendant also complains that the testimony was irrelevant and that it misled the jury into rejecting mitigating circumstances. We disagree.

This Court has stated that "[t]he trial court exercises broad discretion over the scope of cross-examination and, in a sentencing proceeding, is not limited by the Rules of Evidence." *Locklear*, 349 N.C. at 156, 505 S.E.2d at 299. "More specifically, the trial court must permit the State 'to present any competent evidence supporting the imposition of the death penalty.' " *State v. Warren*, 347 N.C. 309, 325-26, 492 S.E.2d 609, 618 (1997) (quoting *State v. Heatwole*, 344 N.C. 1, 25, 473 S.E.2d 310, 322 (1996), *cert. denied*, 520 U.S. 1122, 137

L. Ed. 2d 339 (1997)), *cert. denied*, — U.S. —, 140 L. Ed. 2d 818 (1998).

In addition, in *State v. Daniel*, 333 N.C. 756, 763-64, 429 S.E.2d 724, 729 (1993), we stated that "testimony by medical experts relating to precise legal terms such as 'premeditation' or 'deliberation,' definitions of which are not readily apparent to such medical experts, should be excluded." However, the term "responsibility" is not a precise legal term with a definition that is not readily apparent. Instead, it is, in the context used here, a medical term used appropriately by an expert in the field of psychiatry to describe the effect of defendant's mental conditions on her actions. In *State v. Flippen*, 344 N.C. 689, 699, 477 S.E.2d 158, 164 (1996), we similarly found that a forensic pathologist's use of the term "homicidal assault" was not a legal term of art. Thus, in the case at bar, the trial court did not err in allowing Dr. Rollins' testimony.

This assignment of error is overruled.

XI.

[11] In her eleventh assignment of error, defendant asserts that the trial court erroneously failed to submit to the jury two statutory mitigating circumstances. In particular, the trial court refused to submit the statutory mitigating circumstances that defendant was an accomplice in or accessory to a capital felony committed by another person and her participation was relatively minor, pursuant to N.C.G.S. § 15A-2000(f)(4), and that defendant acted under duress or under the domination of another person, pursuant to N.C.G.S. § 15A-2000(f)(5). Defendant claims that enough evidence to support these mitigating circumstances existed, and thus, their exclusion requires a new sentencing hearing. Defendant did not specifically assign error to the trial court's failure to submit either the (f)(4) or (f)(5) statutory mitigating circumstance as directed by N.C. R. App. P. 10(a). Instead, defendant's assignment of error references the failure to submit "several" statutory mitigating circumstances. Though not mandatory, we note that defendant failed to include either of these statutory mitigating circumstances in her list of proposed mitigators that she submitted to the trial court. Defendant also did not object when the trial court failed to submit these mitigating circumstances to the jury. Nonetheless, it is well established that the "[t]rial court has no discretion as to whether to submit statutory mitigating circumstances when evidence is presented in a capital case which may support a statutory circumstance." *State v. Skipper*, 337 N.C. 1, 44,

446 S.E.2d 252, 276 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

> The trial court must submit the circumstance if it is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In sum, the test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a juror could reasonably find that the circumstance exists based on the evidence.

State v. Fletcher, 348 N.C. 292, 323, 500 S.E.2d 668, 686 (1998) (citations omitted).

Assuming *arguendo* that defendant has properly preserved the trial court's failure to submit the (f)(4) mitigating circumstance for review by this Court, we conclude that sufficient evidence did not exist to support its submission. The evidence tends to show that defendant abused Tabitha by: (1) stuffing a paper towel in her mouth when she cried; (2) requiring her to stand with her head against the wall, her feet back and her arms up in the air while holding one foot in the air, with the paper towel in her mouth; (3) hitting her with various objects such as a shoe and radio antenna; (4) placing Tabitha's wet underwear on her head with the wet portion over her nose; (5) depriving her of food and drink; (6) "backhanding" her when she asked for a drink; (7) teasing Tabitha and making her cry; (8) making her support her weight by hanging on a chest of drawers, with her chin on her hands and her feet dangling, until she fell off, sometimes lasting twenty and thirty minutes, then putting her back again; (9) confining her to a dark room as a form of punishment; and (10) grabbing her and shaking her for wetting her pants. By defendant's own admission, she forced food down Tabitha's throat, shoved paper towels down Tabitha's throat to keep her from crying, struck her with a shoe, made her hang from a dresser, bit her, and deprived her of liquids. Lastly, evidence was presented that defendant called her former mother-in-law from the emergency room on the night that Tabitha died and declared, "I've killed Tabitha."

Viewing this evidence in its entirety, we cannot conclude that the (f)(4) mitigating circumstance that defendant was an accomplice in or accessory to the capital felony committed by another person and her participation was relatively minor was supported by substantial evidence. Although defendant may not have inflicted the closed-head injury on the night Tabitha died, defendant did significantly abuse

Tabitha throughout her stay with defendant and Ronald Pierce and, thus, cannot be considered to have been a minor participant in such conduct. Thus, the trial court was not required to submit the (f)(4) mitigating circumstance.

[12] We also find that there was not sufficient evidence to support the submission of the N.C.G.S. § 15A-2000(f)(5) mitigating circumstance that defendant acted under duress or under the domination of another person. Although defendant claimed that she was scared of Ronald Pierce and that he was in "complete control," the evidence reviewed above clearly indicates that defendant disciplined and abused Tabitha repeatedly throughout the several weeks that Tabitha lived with defendant and Pierce. Defendant testified that, out of fear of Pierce, she told the police that the dog had injured Tabitha. However, this evidence does not show that defendant's actions of first-degree murder, torture, or felony child abuse were committed while she was under duress or the domination of Pierce.

Evidence was also introduced at trial that defendant had been involved in abusive relationships with men, including Pierce, and that Pierce had previously been criminally prosecuted for assaulting defendant. This evidence merely goes to the general aspects of defendant's relationship with Pierce and thus, fails to support defendant's assertion that she acted under the domination of Pierce on the night that Tabitha died or during the abusive events that occurred leading up to Tabitha's death. Further, the State presented evidence at the sentencing hearing that defendant's evaluation by the staff psychologist at Dorothea Dix Hospital revealed that defendant did not display the level of dependency that would be expected from one characterizing herself as so submissive.

Based upon the lack of evidence presented supporting defendant's argument that she acted under duress or the domination of Pierce, "a jury finding of this circumstance would have been based solely upon speculation and conjecture, not upon substantial evidence, and the submission of the instruction would be unreasonable as a matter of law." *State v. Daniels*, 337 N.C. 243, 273, 446 S.E.2d 298, 316-17 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Thus, taking all of the evidence as a whole, we conclude that the trial court did not err in failing to submit the (f)(5) mitigating circumstance.

This assignment of error is overruled.

XII.

[13] Defendant next argues that she is entitled to a new sentencing hearing because the trial court erred in not ordering Ronald Pierce to testify. Specifically, in this assignment of error, defendant alleges that "[t]he trial court erred in not granting immunity and ordering to testify Ronald Pierce, inasmuch as this ruling denied the defendant's state and federal constitutional rights to present a defense, to due process of law, and to be free from cruel or unusual punishment."

Defendant subpoenaed Pierce to testify on her behalf during the sentencing phase of the trial. Pierce's convictions for first-degree murder and felonious child abuse were on appeal at the time. Pierce's appellate counsel, Ms. Margaret Ciardella, expressed to the trial court that she had counseled Pierce to plead his Fifth Amendment privilege to any questions that might incriminate him. The following exchange then ensued.

THE COURT: Then the State will want to know how he treated this child, the Pierce child.

MR. CAMERON: Unless they, are they limited, though, to what came out on direct?

THE COURT: No, sir. Then he'd have to plead the Fifth, I guess.

MRS. HARDING: And, then the State would move [to] strike all of his testimony, then, Your Honor. It's sort of self-defeating.

MS. CIARDELLA: Your Honor, if I may, I, I would submit that any, any statement from him regarding treatment of any children in [their] house would be incriminating.

Later when Pierce arrived in the courtroom, the trial court and defense counsel again discussed Pierce's potential testimony.

MR. CAMERON: . . . Your Honor, we would attempt to call Mr. Pierce, however I understood . . . , after talking with his counsel, that he is going to refuse to answer any questions for me. I would like it on the record.

THE COURT: Like what?

MR. CAMERON: That he refuses to testify.

THE COURT: Bring him in . . . put him up here on the witness stand.

As directed by the trial court, defendant called Pierce to testify and attempted to question him about the manner in which defendant treated her children. Pierce pled the Fifth Amendment to defendant's questions. Defendant indicated that she had nothing further to ask of Pierce, and the trial court instructed Pierce to step down from the witness stand. The trial court concluded the inquiry as follows:

> THE COURT: Just a minute. Anything you want to say about it, Mr. Cameron?
>
> MR. CAMERON: I believe that's all that I know how to proceed with it, at this time, Your Honor, in that respect.

Our thorough review of the transcript reveals that during the several conversations concerning Ronald Pierce's testimony, defendant never asked the trial court to order Pierce to testify under a grant of immunity. Thus, defendant has failed to preserve this argument for appellate review and may not raise it for the first time on appeal. N.C. R. App. P. 10(b)(1); *see State v. Pickens*, 346 N.C. 628, 641, 488 S.E.2d 162, 169 (1997). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

Therefore, this assignment of error is overruled.

XIII.

[14] In her next assignment of error, defendant contends that the trial court erred in submitting to the jury the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9) (1997). Defendant argues that the State offered insufficient evidence to support the submission of this statutory aggravating circumstance.

"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. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998) (quoting *Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328).

"Whether a trial court properly submitted the (e)(9) aggravating circumstance depends on the facts of the case." *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. Rouse, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994) (quoting *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979)), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 260 (1995). "The victim's age and the existence of a parental relationship between the victim and the defendant may also be considered in determining the existence of the especially heinous, atrocious or cruel circumstance. *State v. Elliott*, 344 N.C. 242, 280, 475 S.E.2d 202, 219 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997).

Applying the foregoing principles to the case *sub judice*, we conclude that the evidence, viewed in the light most favorable to the State, supported the submission of the (e)(9) aggravating circumstance. The State offered evidence that the victim was staying with defendant and Pierce in defendant's house while her mother remained hundreds of miles away in Pennsylvania. Defendant had assumed the role of a primary caregiver to Tabitha in the weeks preceding her death. "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.' " *Flippen*, 349 N.C. at 270, 506 S.E.2d at 706 (quoting *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)). Tabitha was only two and one-half years old at the time of her death. She was vulnerable and wholly dependent on defendant and Pierce for their care and protection. Under these circumstance, Tabitha was brutally beaten and severely abused.

We hold that the trial court did not err in submitting this aggravating circumstance to the jury.

This assignment of error is overruled.

XIV.

[15] Next, defendant argues that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad, both on its face and as applied, and thus the trial court's instruction to the jury regarding the aggravator was unconstitutional. Defendant, however, failed to object to this instruction at trial. Thus, pursuant to N.C. R. App. P. 10(b)(1), she has not properly preserved the issue for review by this Court. Likewise, defendant made no constitutional claims at trial regarding this instruction and will not be heard on any constitutional grounds now. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988).

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure sets forth the necessary procedure for preserving jury instruction issues for appellate review.

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objections; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of the party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2).

Defendant failed to object to the trial court's instructions and, thus, has waived her right to appellate review of this issue. Furthermore, we will not review the alleged error under a plain-error analysis because defendant did not "specifically and distinctly" allege in her assignment of error that the trial court committed plain error. N.C. R. App. P. 10(c)(4). Lastly, this Court has consistently rejected this argument. *State v. Simpson*, 341 N.C. 316, 356-57, 462 S.E.2d 191, 214 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996).

Defendant's fourteenth assignment of error is overruled.

XV.

[16] Defendant also argues that the trial court erred by not intervening *ex mero motu* to strike improper arguments made by the prosecutor. Because defendant failed to object to [these statements] during the closing arguments, she "must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *Rouse*, 339 N.C. at 91, 451 S.E.2d at 560. " '[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. Warren*, 348 N.C. 80, 126, 499 S.E.2d 431, 457 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 216 (1998). "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.' " *State v. Guevera*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998) (quoting *State v. Green*, 336 N.C.

142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)).

In the case before us, the prosecutor argued:

> Now, you'll recall that the questions asked of you were "Do you have any moral or religious scruples against the death penalty?" Each of you, in your own way, indicated you did not.
>
> And, then I asked you "Do you feel like it's an appropriate punishment in some cases," and each of you said, "Yes," you did, in some cases.
>
> You also indicated that it would be difficult for you to do, as well it should be. It's an ultimate punishment. To recommend it is the most serious thing you can do in a courtroom.
>
> But, there are some cases where it must be done. And, if this isn't one, I can't imagine one. The law in this state will only let us ask you for a death penalty in certain very, very specific instances.
>
> We are required, indeed required, to ask you for the death penalty in certain cases. We don't have an option. And, in this particular case, we are asking you because the law says we must, but because it deserves it as well.
>
> And, it deserves it because it has an aggravating circumstance. The aggravating circumstance in this case is just as plain as any one of those pictures is to you. The aggravating circumstance in this case is that this killing, this murder, this first degree slaughter of this child, by that woman (Points to Defendant), and Ronald Pierce, was especially heinous. It was especially atrocious, and it was especially cruel.

" 'We have previously held that the prosecutor is allowed to argue the seriousness of the crime.' " *State v. Lemons*, 348 N.C. 335, 357, 501 S.E.2d 309, 322 (1998) (quoting *State v. Barrett*, 343 N.C. 164, 180, 469 S.E.2d 888, 898, *cert. denied*, — U.S. —, 136 L. Ed. 2d 259 (1996)). "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.' " *Locklear*, 349 N.C. at 162, 505 S.E.2d at 303 (quoting *State v. Strickland*, 346 N.C. 443, 467, 488 S.E.2d 194, 208 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 757 (1998)).

With these principles in mind and after reviewing the prosecutor's arguments in context, we conclude that the statements were not so grossly improper as to mandate the trial court to intervene *ex mero motu*. Here, the prosecutor properly argued the facts of the case and urged the jury to impose the death penalty. In doing so, the prosecutor relied on the strength of the evidence to support the especially heinous, atrocious, or cruel aggravating circumstance. *See State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993) (where this Court found that the prosecutor's statement that " 'I won't have the opportunity to again get in front of you and try to convince you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with' " was proper and that the "prosecutor was not stating his personal opinion, but merely arguing that the jury should conclude from the evidence before it that the imposition of the death penalty was proper in this case"), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

Defendant also complains that the prosecutor improperly stated during his jury argument that defendant "signed her own death warrant." This Court has repeatedly held that such an argument is not improper. *See, e.g., Heatwole*, 344 N.C. 1, 473 S.E.2d 310; *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); *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).

We conclude that "[t]he prosecutor's comments in this case were proper in light of his role as a zealous advocate for convictions in criminal cases." *McCollum*, 334 N.C. at 227, 433 S.E.2d at 154. Accordingly, these remarks were not " 'so prejudicial and grossly improper as to require corrective action by the trial court *ex mero motu*.' " *Lemons*, 348 N.C. at 357, 501 S.E.2d at 323 (quoting *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988)).

This assignment of error is overruled.

XVI.

[17] Next, defendant contends that "[t]he trial court erred in denying . . . defendant's motion to dismiss, inasmuch as there was insufficient evidence to support each element of the offenses, and the ruling denied . . . defendant's state and federal constitutional rights to due process of law, and to be free from cruel or unusual punishment." Defendant made a motion to dismiss at the close of the State's evidence and later renewed her motion on the same basis at the close of

all the evidence. Defendant's basis for the dismissal was that there was not "any evidence linked to this defendant . . . with what these doctors said to be the fatal blow, this severe head injury." The trial court denied both of defendant's motions to dismiss. Viewing the evidence in the light most favorable to the State, we hold that there was sufficient evidence presented for a rational jury to find that defendant committed first-degree murder under each of the theories presented—on the basis of malice, premeditation and deliberation; on the basis of torture; and under the felony murder rule.

[18] Defendant also assigns as error under this argument that "[t]he trial court's instruction on first degree murder did not effectively distinguish first degree murder from lesser forms of homicide, rendering the first degree murder statute unconstitutionally vague as applied to this defendant." However, we note that defendant did not raise any constitutional claims at trial and, thus, may not raise them for the first time on appeal to this Court. N.C. R. App. P. 10(b)(1); *see Call*, 349 N.C. at 412, 508 S.E.2d at 522.

Accordingly, defendant's assignment of error is waived.

PRESERVATION

XVII.

[19] Defendant next raises an issue which she has properly denominated as a preservation issue and which she concedes this Court has decided against her position: The trial court erred in using "may" instead of "must" in its instructions on the capital sentencing procedure, thereby making the consideration of mitigating evidence discretionary with the jury during sentencing. Because defendant has presented no compelling reason for this Court to reconsider its position on this issue, this assignment of error is overruled. *See Gregory*, 340 N.C. at 417-19, 459 S.E.2d at 668-69.

PROPORTIONALITY

[20] Having concluded that defendant's trial and separate capital sentencing proceeding were free from prejudicial error, we turn now to the duties reserved exclusively for this Court in capital cases. It is our duty according to 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 the murder was especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9). Defendant argues that defendant's sentence of death was the result of arbitrary prosecution and capricious conduct. However, after thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstance submitted to and found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We now turn to our final statutory duty of proportionality review.

[21] 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. We have found the death penalty disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, — U.S. —, 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 find that this case is distinguishable from each of these cases.

" 'None of the cases found disproportionate by this Court involved the murder of a child.' " *State v. Perkins*, 345 N.C. 254, 291, 481 S.E.2d 25, 42 (quoting *Elliott*, 344 N.C. at 288, 475 S.E.2d at 224), *cert. denied*, — U.S. —, 139 L. Ed. 2d 64 (1997). Further, of the cases in which this Court has found the death penalty disproportionate, the jury found the especially heinous, atrocious, or cruel aggravating circumstance in only two cases. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170.

Neither *Stokes* nor *Bondurant* is similar to this case. Defendant here was convicted of murder on the basis of premeditation and deliberation as well as under the felony murder rule. In *Stokes*, the defendant was convicted solely on the basis of the felony murder rule. This Court has 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). In *Bondurant*, the defendant exhibited his remorse, as he "readily spoke with policemen at the hospital, confessing that he fired the shot which killed [the victim]." *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 183. "Defendant here did not exhibit the kind of conduct we recognized as ameliorating in *Bondurant*." *Flippen*, 349 N.C. at 278, 506 S.E.2d at 711.

We conclude that this case is most analogous to cases in which this Court has held the death penalty not to be disproportionate. "In *Elliott* we upheld the death penalty where the defendant had assumed a parental role in caring for the young victim; the defendant had brutally beaten the victim; the defendant was convicted of first-degree murder on the basis of premeditation and deliberation; and the jury found the sole aggravating circumstance that the murder was especially heinous, atrocious, or cruel." *Perkins*, 345 N.C. at 291, 481 S.E.2d at 43 (citing *Elliott*, 344 N.C. at 289-90, 475 S.E.2d at 225).

Defendant complains that the sentencing was disproportionate in that Ronald Pierce was sentenced to life in prison, whereas defendant was sentenced to death. However, this Court has stated 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." *State v. McNeill*, 349 N.C. 634, 655, 509 S.E.2d 415, 427 (1998). Therefore, we find no merit to this contention.

After comparing this case to other roughly 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 trial and capital sentencing proceeding, free from prejudicial error. Therefore, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this opinion.

STATE OF NORTH CAROLINA v. PATRICIA G. BROWN

No. 188A96

(Filed 9 April 1999)

1. **Constitutional Law— double jeopardy—solicitation to commit murder—first-degree murder as accessory**

Defendant's right to be free from double jeopardy was violated when she was convicted and punished for both solicitation to commit murder and first-degree murder under an accessory before the fact theory since solicitation to commit murder is a lesser-included offense of murder as an accessory before the fact. Accordingly, defendant's solicitation conviction must be vacated.

2. **Evidence— hearsay—state of mind exception—victim's statements—marital problems—relevancy**

In a prosecution of defendant for the first-degree murder of her husband, statements made by the husband to five colleagues about his financial problems within the marriage, the couple's disagreements, deterioration and incompatibility within the marriage, and the husband's concern for his safety due to the ill will within the marriage were admissible under the existing state of mind exception to the hearsay rule and were relevant to contradict defendant's contention that she and her husband had a loving and compassionate relationship.

3. **Evidence— statements to murder victim—consideration of divorce—relevancy to show motive**

In a prosecution of defendant for the first-degree murder of her husband, testimony by three witnesses that defendant and the victim were having marital problems and that they had suggested that the victim might consider divorce was relevant to establish a motive for the murder. Evidence of motive is always relevant and admissible where it tends to show that defendant committed the alleged act.

4. **Evidence— hearsay—statements to murder victim—not proof of matter asserted**

In a prosecution of defendant for the first-degree murder of her husband, testimony by a witness that she told the victim that "you can always get a divorce" and by a second witness that he told the victim that "he might consider divorce" did not constitute

inadmissible hearsay since the statements were made by the persons testifying and were not offered to prove whether the victim could get or consider a divorce.

5. Evidence— opinion testimony by lay persons—personal observations—shorthand statements of facts

In a prosecution of defendant for the first-degree murder of her husband, testimony by a colleague of the victim that he sensed that the victim was unhappy in his marriage relationship, testimony by a witness that she "had suspected [defendant] all the time," testimony by an officer that defendant "appeared to be trying to be emotional" during an interview, and testimony by another witness that there "seemed to be tension" between the victim and defendant were based on the personal observations of the witnesses and were admissible under N.C.G.S. § 8C-1, Rule 701 as shorthand statements of facts.

6. Evidence— corroboration—conversations with other witnesses—testimony not identical

Testimony by witnesses about their prior conversations with other witnesses, although not precisely identical to the original testimony, was properly admitted for corroborative purposes since it tended to strengthen, supplement and confirm the testimony of the other witnesses, and the trial court gave the jury proper limiting instructions.

7. Evidence— victim character evidence—defendant's tactical decision to allow—waiver of issue on appeal

In a prosecution of defendant for the murder of her husband, defendant may not complain on appeal that the trial court erred in admitting victim character evidence when she made a tactical decision to allow and support the introduction of the victim's character to bolster her defense that she had no reason to murder such a loving and caring husband.

8. Evidence— accomplice testimony—plea arrangements—parole eligibility

The trial court properly allowed two accomplices to testify in this murder trial that they were witnesses for the State because of their plea arrangements and correctly precluded them from testifying with regard to their understanding of when they might be eligible for parole.

9. Evidence— impeachment of coconspirator—statements and letters to wife-coconspirator

The trial court did not improperly prohibit a defendant on trial for the murder of her husband from impeaching a coconspirator with statements contained in letters he wrote to his wife, also a coconspirator, while both coconspirators were incarcerated. Rather, the record shows that the trial court did allow defendant to cross-examine the coconspirator about these statements for impeachment purposes.

10. Evidence— murder trial—condom in victim's dresser—irrelevancy

Evidence that defendant's mother found a condom in the victim's dresser drawer after his murder was irrelevant and properly excluded in this prosecution of defendant for the first-degree murder of her husband.

11. Evidence— refreshing recollection—use of letter—knowledge of roles in murder—relevancy

The trial court did not err by allowing the prosecutor to use during cross-examination a letter a witness wrote to her daughter, a coconspirator in the murder of defendant's husband, to refresh the recollection of the witness about a statement in the letter that she understood her daughter's part in the murder and "everyone else that had a part in it." Further, this statement was relevant as it went directly to the issue of the witness's knowledge that roles or parts were in fact played by the coconspirators in the murder.

12. Evidence— redirect examination—affidavits not fraudulent—evidence not improperly excluded

The trial court did not err by excluding evidence on redirect examination that defendant did not fraudulently complete sworn affidavits disclosing her financial resources and assets after the prosecutor used the affidavits to impeach defendant on cross-examination by eliciting from her that she had significantly undervalued and omitted much of her property on both affidavits where the trial court allowed defendant to explain on redirect examination that she was not trying to mislead anyone but had attempted to be honest and did the best she could in completing these documents.

13. Criminal Law— prosecutor's closing arguments—inferences from the evidence

In a prosecution of defendant for the first-degree murder of her husband as an accessory before the fact, the prosecutor's closing argument that defendant called the victim to inform him that a coconspirator, the actual gunman, was coming to visit was based on a reasonable inference supported by the evidence when viewed in the context in which the argument was made and the overall factual circumstances to which it referred. Also, the prosecutor's statements about defendant's financial motivations for the murder were supported by testimony at trial concerning what defendant was expected to receive upon her husband's death.

14. Sentencing— conspiracy to murder—aggravating factor—position of leadership or dominance—not element of joined accessory murder conviction

The trial court did not erroneously use the acts that formed the gravamen of a joined accessory murder conviction when it found as an aggravating factor for conspiracy to commit murder that "defendant occupied a position of leadership or dominance of other participants in the commission of the offense." With the possible exception of the included required action that defendant "commanded" the principal to murder the victim, accessory before the fact to murder does not in any way require that the defendant occupy a position of leadership or dominance in the commission of the crime, and there was no evidence in this case that defendant "commanded" the principal.

Justices MARTIN and WAINWRIGHT 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 life imprisonment entered by Ross, J., at the 29 May 1995 Criminal Session of Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant also appeals from an order denying her motion for appropriate relief entered by Ross, J., on 21 May 1997 in Superior Court, Guilford County. Defendant's motion to bypass the Court of Appeals as to an additional judgment was allowed by this Court 16 February 1998. Heard in the Supreme Court 29 September 1998.

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

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

LAKE, Justice.

The defendant was indicted on 1 August 1994 for first-degree murder; on 12 December 1994, she was indicted for the additional counts of solicitation to commit murder and conspiracy to commit murder. Defendant was tried capitally to a jury at the 29 May 1995 Criminal Session of Superior Court, Guilford County, Judge Thomas W. Ross presiding. The jury found defendant guilty of all charges. Following a capital sentencing proceeding, the jury recommended a sentence of life imprisonment as to the first-degree murder conviction. On 31 July 1995, the trial court sentenced defendant to life imprisonment for first-degree murder and to a single concurrent term of thirty years' imprisonment for the convictions for solicitation to commit murder and conspiracy to commit murder.

At trial, the evidence tended to show that in March or April of 1990, defendant contacted her sister and brother-in-law, Sheila and Leroy Wentzel, in New Hope, Alabama, and asked if they knew anyone who would shoot and kill her husband, Fred Brown, in High Point, North Carolina. Leroy Wentzel volunteered. Defendant met with the Wentzels in Alabama to discuss how her High Point house was arranged and to plan the murder. Defendant paid the Wentzels $1,000 up front to kill her husband and offered to pay them an additional $30,000 upon completion of the killing. After this initial meeting, Leroy Wentzel started driving to North Carolina. On his way, Wentzel decided that he could not continue with the murder plans, and he called defendant and told her that he "couldn't do it at that time."

Several months later, Leroy and Sheila Wentzel visited defendant in her High Point home and met defendant's husband, Fred Brown. After this visit, on 23 April 1991, Leroy Wentzel again spoke with defendant, and they made arrangements for the murder of defendant's husband. Wentzel testified that they planned that he would call Fred Brown at his house on 24 April 1991, under the pretext that Wentzel's car had broken down. Defendant made arrangements to be at a real-estate meeting and to have her daughter out of the house so that her husband would be the only one home to receive Wentzel's

phone call. At approximately noon on 24 April 1991, Wentzel called defendant and told her that he was on his way.

Wentzel drove to High Point. He took a .22-caliber revolver and wore a yellow and black sweatshirt. At approximately 9:30 p.m., Wentzel arrived in High Point and, from a dark area along Highway 68, called defendant's home and told defendant's husband that his car had broken down. After learning Wentzel's location, the victim said he would be out in a few minutes to assist him. Wentzel opened the hood of his car and pulled the coil wire off so the vehicle would not start. When the victim arrived, he turned the hazard lights of his vehicle on, and he and Wentzel looked under the hood of Wentzel's vehicle and discussed what to do next. Wentzel then suggested that they walk away from the car a distance. While doing so, he told the victim that the victim's wife wanted him dead and showed him the gun from under the sweatshirt.

The victim begged Wentzel not to kill him and started to run. Nonetheless, Wentzel shot the victim once in the back, and he fell to the ground; Wentzel then shot the victim twice more in the head from close range to make certain he was dead. Wentzel returned to his car and proceeded to drive down the road. However, upon remembering that defendant had told him to make the murder look like a robbery, Wentzel returned to the crime scene, removed the victim's wallet from his back pocket, turned the hazard lights of the victim's vehicle off and then started home to Alabama. As he drove home, Wentzel threw the victim's wallet away. Several months later, he threw the gun into the Coosa River. A passerby discovered the victim's body lying facedown in a ditch beside Highway 68, with a sweatshirt wrapped around his right arm. A pool of blood surrounded the victim's head. An autopsy indicated that the victim had sustained three gunshot wounds, one to the back and two to the left side of the head. Over the course of the next few months, defendant paid Wentzel approximately $3,500.

Thereafter, in June 1994, when Leroy Wentzel was on the verge of suicide, he wrote two letters which he gave to his daughter, Janelle, with instructions to open only after his death. In these letters, Wentzel stated that he "shot Fred Brown by his wife, Pat," and that he was to be paid $30,000. On 13 July 1994, Wentzel was arrested and jailed in Pennsylvania for failure to pay child support. Also, on 13 July 1994, Janelle Wentzel gave her father's letters to the police in Reading, Pennsylvania, and she confirmed that her father also had

told her about the murder of Fred Brown and that he did it for his wife's sister, the defendant. The Reading Police Department contacted the Guilford County Sheriff's Department with regard to the alleged homicide. In November 1994, detectives from the Guilford County Sheriff's Department talked with Wentzel regarding the killing of Fred Brown. Wentzel gave statements to the detectives about the murder and his involvement. Both of Wentzel's sons confirmed that their father also had told them about the murder and that it was done for defendant, who was to receive insurance money as a result of her husband's death.

The evidence further tended to show, from defendant and victim's tax returns for the years 1984 through 1990, that they were having financial problems. After the murder, on 30 April 1991, a representative from the victim's employer went to defendant's residence, upon her request, to discuss death benefits. Upon learning of the amount of death benefits and retirement contributions to which defendant was entitled, defendant stated that she could not believe that her husband died and did not leave her at least $250,000 in life insurance. On 4 June 1991, two death-benefit checks were issued to defendant totaling $143,307.25. Defendant portrayed her marital relationship with her husband to be loving, caring and compassionate. However, colleagues of the victim and a housekeeper all testified that defendant and the victim had marital problems and strife within their marriage.

[1] In her first assignment of error, defendant contends that her conviction of solicitation to commit murder must be vacated because her conviction of both solicitation to commit murder and first-degree murder under an accessory before the fact theory constitute unconstitutional multiple punishment for the same offense. Defendant further contends that she is entitled to a new sentencing proceeding in the conspiracy case because her solicitation to commit murder conviction must be vacated. Defendant asserts that her constitutional right to be free from double jeopardy was violated because she was punished for both a lesser-included offense (solicitation) as well as the greater offense (murder). This Court has previously addressed this issue under similar facts and held that "solicitation to commit murder is a lesser included offense of murder as an accessory before the fact" and that "solicitation to commit murder merges into the offense of being an accessory before the fact to the same murder." *State v. Westbrooks*, 345 N.C. 43, 55-57, 478 S.E.2d 483, 490-91 (1996). Accordingly, we hold that, in this case, defendant's solicitation conviction must be vacated.

Defendant, in her second assignment of error, seeks this Court's reconsideration of its prior holding that conspiracy to commit murder is not a lesser-included offense of first-degree murder as an accessory before the fact. This Court has stated:

> [T]he offense of conspiracy and the offense of being an accessory before the fact are separate, distinct crimes, which do not merge into each other and neither of which is a lesser included offense of the other. A person may, therefore, be lawfully convicted of and punished for both a conspiracy to commit a murder and being an accessory before the fact to the same murder.

State v. Looney, 294 N.C. 1, 11, 240 S.E.2d 612, 618 (1978). Consistent with this and as we held in *Westbrooks*, 345 N.C. at 57, 478 S.E.2d at 491, we find no compelling reason for this Court to overrule our previous holding on this issue. This assignment of error is overruled.

[2] In defendant's third assignment of error, defendant contends that the trial court erroneously admitted into evidence at trial hearsay statements attributed to the victim. We find no error in this regard. At trial, five colleagues of the victim's testified that they talked with the victim about his financial problems within his marriage; the couple's disagreements, deterioration and incompatibility within the marriage; and the victim's concern for his safety due to the ill will within the marriage. The trial court admitted the following testimony: (1) Kenneth Vaughn's testimony that Fred Brown told him, "I would not be surprised if [Pat and her mother] didn't put a contract out on me"; and "I would be better off to them, dead"; (2) Lynwood English's testimony that Fred "expressed concern from time to time [about] financial difficulties [and] . . . over the financial burden of paying for the home"; (3) Mildred Mallard's testimony that Fred said his marriage was not going well; (4) Colan Long's testimony that Fred said his marriage relationship was "kind of stormy"; and (5) Edith King's testimony that Fred said "[Sabre, their daughter,] kept stuff going and that she was a manipulator."

The trial court admitted these statements under N.C.G.S. § 8C-1, Rule 803(3), "statement[s] of the declarant's then existing state of mind" exception to the hearsay rule. Furthermore, the trial court determined that the probative value of admitting these statements outweighed any prejudicial value. Defendant argues that these statements were statements of fact rather than of state of mind, and thus should have been excluded. We disagree.

This Court has previously addressed this issue in *State v. Westbrooks*, 345 N.C. 43, 478 S.E.2d 483, when presented with almost identical facts. In *Westbrooks*, relatives of the victim-husband testified with regard to statements the victim had made about his financial and marital problems. *Id.* at 58, 478 S.E.2d at 492. We held that the trial court properly admitted these statements, as they indicated the victim's "mental condition at the time they were made and were not merely a recitation of facts." *Id.* at 59, 478 S.E.2d at 492. The Court there stated:

> "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). In the instant case evidence of the victim's state of mind is relevant in that it bears directly on the victim's relationship with the defendant at the time he was killed. . . . These statements [by the victim] also corroborate a motive for the murder—that defendant was in debt and could not repay her obligations. *See Stager*, 329 N.C. at 315, 406 S.E.2d at 897. Thus, these statements are admissible as statements of the declarant's then-existing state of mind.

Westbrooks, 345 N.C. at 59, 478 S.E.2d at 492. Similarly, in the case *sub judice*, the statements attributed to the victim were admissible, as they indicated his then-existing state of mind and were not merely a recitation of facts. In addition, the victim's statements concerning the status of his marriage were admissible to contradict defendant's contention at trial that she and the victim had a loving and compassionate relationship. Defendant's testimony about the positive state of her marriage opened the door to rebuttal evidence that the couple's relationship was not as defendant portrayed. This Court has previously stated:

> "Discrediting a witness by proving, through other evidence, that the facts were otherwise than [s]he testified, is an obvious and customary process that needs little comment. If the challenged fact is material, the contradicting evidence is just as much substantive evidence as the testimony under attack, and no special rules are required."

State v. Lambert, 341 N.C. 36, 49, 460 S.E.2d 123, 131 (1995) (quoting 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 160 (4th ed. 1993)). Thus, we conclude that the statements complained of were properly admitted as expressions of the

victim's then-existing state of mind, and this assignment of error is overruled.

In her fourth assignment of error, defendant argues that the trial court erred by admitting, through three State's witnesses, hearsay evidence about what they said to the victim before the murder. Defendant further contends that the testimony from these three witnesses should not have been admitted because it is irrelevant. We disagree as to both of these contentions.

[3] Turning first to the question of relevancy, we conclude that the trial court did not err in failing to exclude the contested testimony on relevancy grounds. The witnesses' testimony that defendant and the victim were having marital problems and strain within their marriage tends to establish a motive for the murder of defendant's husband. It is well established 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). Statements made by the declarant to the victim which tend to corroborate a motive for murder and establish the victim's then-existing state of mind are admissible. *Westbrooks*, 345 N.C. at 59, 478 S.E.2d at 493. Thus, we hold that evidence of motive is always relevant and admissible where it tends to show that the defendant committed the alleged act.

[4] Second, with regard to the hearsay contention, we conclude the trial court did not err in admitting this testimony because it does not constitute hearsay. At trial, during the guilt-innocence phase, the trial court overruled defendant's objection and admitted the following testimony from three State's witnesses: (1) Mildred Mallard testified that she told the victim, "you can always get a divorce"; (2) Colan Long testified that he told the victim, "he might consider divorce"; and (3) Kenneth Vaughn testified that he told officers that defendant's desire for their daughter to get a job and start supporting herself had

"caused a lot of strain on their part." N.C.G.S. § 8C-1, Rule 801(c) defines "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) (1992). Since the testimony in question was actually made by the person testifying and was not offered to prove whether the victim could get or consider a divorce, or otherwise as stated, it does not constitute hearsay. Accordingly, this assignment of error is overruled.

[5] In her fifth assignment of error, defendant asserts that the trial court erred in allowing irrelevant testimony of witnesses as to their own perceptions and observations of the defendant and the victim. We disagree. Defendant contends the following witnesses' testimony should have been excluded as irrelevant: (1) Colan Long, one of the victim's colleagues, testified that he "sensed at times that, you know, [Fred] was somewhat unhappy in his [marriage] relationship"; (2) Edith King testified that she "had suspected Pat all the time"; (3) law enforcement officer Ronald Washburn testified during an interview that, in his opinion, "[Pat] appeared to be trying to be emotional"; and (4) Mildred Mallard testified that there "seemed to be tension between [Fred and Pat]."

N.C.G.S. § 8C-1, Rule 701 allows a witness to testify as to his 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).

> "This Court has long held that a witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.' [*State v. Skeen*, 182 N.C. 844, 845, 109 S.E. 71, 72 (1921).] Such statements are usually referred to as shorthand statements of facts."

State v. Williams, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987) (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976)). In the case *sub judice*, the witnesses' testimony of their impressions of the victim, the defendant, and their marital relationship were all based on their own personal observations and were as such shorthand statements of fact. Therefore, the contested testimony was properly

admitted, as it clearly falls within Rule 701. Accordingly, this assignment of error is overruled.

[6] In her sixth and seventh assignments of error, defendant contends that the trial court erred in admitting into evidence at trial noncorroborative hearsay testimony of witnesses. We disagree, as we find that this testimony clearly met the test for admissibility for corroborative purposes. Defendant contests the admissibility of the following witnesses' testimony: (1) Frank Wilkins' testimony with regard to Dorothy Whittington's prior out-of-court statements to him about the number of people she saw standing off the shoulder of Highway 68 at approximately 11:00 p.m. on 24 April 1991; (2) law enforcement officer Robert Padgett's testimony with regard to what Colan Long, Kenneth Vaughn, Lynwood English and Elizabeth Bittner, the victim's colleagues, had told him about conversations they had had with the victim about incompatibility within the marriage; (3) law enforcement officer Robert Dietzen's testimony about what the housekeeper, Addie Collins, had told him about her observations of the victim's troubled marriage and the profane language she heard defendant direct towards the victim; (4) law enforcement officer Phillip Byrd's testimony with regard to what Edith King had told him about the victim's poor relationship with his family; and (5) private investigator Richard Jackson's testimony about what Sheila Wentzel had told him about the plan, conspiracy and motive for defendant killing her husband.

This Court has long held that "corroborative" means "[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *Black's Law Dictionary* 344 (6th ed. 1990); *see State v. Higginbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985). "It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible." *Id.* at 768, 324 S.E.2d at 840. The contested witnesses' testimony about their prior conversations with other witnesses, although not precisely identical to the original testimony, tended to strengthen and confirm the testimony of the first witnesses. As such, the secondary witnesses' statements constituted corroborating evidence supplementing and confirming the first witnesses' testimony.

Furthermore, when objections were made or bench conferences held regarding the testimony, the trial court consistently and properly instructed the jury that the contested testimony was at least corrob-

orative in part and admitted the statements with a limiting instruction that the evidence was to be used only for corroborative purposes. Additionally, the trial court, in its final instructions to the jury, specifically instructed:

> Now, ladies and gentlemen, when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent with or may conflict with the witness' testimony at this trial, then you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent with or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve the witness' testimony at this trial.

We therefore conclude that the trial court in each instance properly admitted the corroborative evidence and clearly and effectively instructed the jury with regard to the purpose for which it was offered. These assignments of error are overruled.

[7] In defendant's eighth assignment of error, she contends that the trial court erred in admitting inadmissible and irrelevant evidence about the victim's good character. Defendant argues that although she failed to object at trial, the trial court erred in admitting: (1) John Barrow's testimony that the victim was "very well behaved," "very well mannered," "a role model," and that he received several decorations in the military; (2) Mildred Mallard's testimony that the victim was "a caring, helpful, kind individual. He'd do anything for anyone willingly"; (3) Colan Long's testimony that the victim "did his [work] duties dutifully, [and was] very conscientious"; (4) Edith King's testimony that the victim was "a nice Christian man," "a good man. He never bothered anybody. . . . He was just a friendly man"; (5) Addie Collins' testimony that the victim was "kindhearted, very gentle. He was a believer, believed in prayer, and had a good attitude"; and (6) Kenneth's Vaughn's testimony that the victim was "a very easy going, outgoing person. He loved people [and] children. He was a Christian. He never met a stranger. Everybody liked him that came into contact with him." When 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. *See id.*

In the following instances, defendant did object to the introduction of evidence relating to the victim's character: (1) the trial court, over objection, allowed the introduction of a photograph of the victim as a captain in the Army; (2) objections to newspaper clippings about the family, Exhibits 2, 3 and 4, were sustained; (3) the trial court admitted Lynwood English's testimony, over objection, that the victim was "a very dedicated, diligent, extremely conscientious faculty member," "a very friendly person, quite gregarious, and very easy to get a long with"; and (4) the trial court allowed Colan Long's testimony, over objection, that the victim was "a very personable person, made friends easily, was very likeable, a very giving person." In each of these limited instances, when defendant did object to the introduction of evidence of the victim's character, it was where "virtually the same evidence was admitted without objection at other times during the trial, either before or after defendant's objections were made. Therefore, defendant waived his right to raise these objections on appeal." *Id.*

The record reflects that on cross-examination defendant elicited additional victim character evidence from the State's witnesses indicating that she made a tactical decision to allow and further the introduction of the victim's character to bolster her defense that she had no reason to murder such a loving and caring husband. For instance, defendant elicited on cross-examination that her husband had a distinguished military background; was a "congenial and nice man that people got along with"; had a good disposition; was a "man who loved his wife"; was well liked, competent and a good father; and was "behind his wife one hundred percent."

This Court has previously held:

> [I]t is imperative that defendant decide at trial whether he wants the statement[s] admitted or not. It is a tactical decision that can only be made by defendant, not the court. A defendant may not, for tactical reasons, fail to object at trial to evidence he hopes will help him and later on appeal assign admission of that evidence as error when in light of the jury's verdict the evidence was not helpful, or was even hurtful, to defendant. The waiver rule was designed precisely to prevent this kind of second-guessing of the probable impact of evidence on the jury by parties who lose at the trial level. Defendant made his tactical decision to let the evidence come in at trial without objection. He may not now be heard to complain.

State v. Stokes, 319 N.C. 1, 15, 352 S.E.2d 653, 661 (1987). Accordingly, in the case *sub judice*, defendant may not now complain that the trial court erred in admitting victim character evidence when she made a tactical decision to allow and support the introduction of the victim's character. This assignment of error is without merit.

[8] Defendant, in her ninth assignment of error, argues that the trial court erred in limiting her right to confront, cross-examine and impeach accomplices Leroy and Sheila Wentzel by precluding defendant from inquiring about their parole-eligibility understanding in connection with their guilty pleas. We disagree and conclude that the trial court ruled in exact accordance with the law on this issue. The trial court properly allowed Leroy and Sheila Wentzel to state that they were testifying for the State because of their plea arrangements and correctly precluded their testifying with regard to their understanding of when they might be eligible for parole. This Court has previously addressed this identical issue in *State v. Westbrooks*, where defense counsel attempted to elicit parole-eligibility understanding from two accomplices hired by defendant-wife to kill her husband. We held that the trial court properly allowed both witnesses to testify that they were motivated to testify for the State by their plea arrangement because this type of testimony is " 'more probative of bias.' " *Westbrooks*, 345 N.C. at 68, 478 S.E.2d at 498 (quoting *State v. Wilson*, 322 N.C. 117, 136, 367 S.E.2d 589, 600 (1988)). However, we also held that a witness must not testify "about his understanding of the laws concerning sentencing and parole eligibility." *Id.* Accordingly, in the case *sub judice*, we find that the trial court did not err in prohibiting the two accomplice witnesses from testifying about their understanding of parole eligibility, and this assignment of error is overruled.

[9] In her tenth assignment of error, defendant asserts that the trial court erred in prohibiting her from impeaching coconspirator Leroy Wentzel with statements contained in letters he wrote to his wife, Sheila Wentzel, while the Wentzels were both incarcerated. We disagree. Our thorough review of the record indicates that the trial court allowed defendant to cross-examine Leroy Wentzel for impeachment purposes about these statements. These letters contained statements pertinent to their pending cases. Defendant attempted to use statements contained in these letters to impeach Leroy Wentzel. The State objected, having filed a pretrial motion *in limine* to limit use of these letters pursuant to the common law spousal privilege and N.C.G.S. § 8-57(c). N.C.G.S. § 8-57(c) provides that "[n]o husband or

wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage." N.C.G.S. § 8-57(c) (1986).

After a *voir dire* regarding the admissibility of the statements contained in the letters, the trial court stated:

> If the defendant [Leroy Wentzel] claims [the statements] are privileged at the time that he is asked these questions, he will not be compelled to respond, the court finding that, under G.S. 8-57, that each of these statements are confidential communications made in writing by one spouse to another during the marriage, and, further, the court would find that the statements were induced by the marital relationship and were prompted by confidence and loyalty engendered by that relationship. . . . If the defendant [Leroy Wentzel] waives his privilege, the court will find that any statements relating to [the letters] would be the proper subject of impeachment.

The trial court then raised the additional issue that if the letters are statements of coconspirators, then defendant may have a right to use the statements that rise above any privilege. After further consideration of the issue, the trial court stated "the court is going to allow inquiry into the [letters] . . . ruling that the defendant's confrontation right, particularly in circumstances of a husband and wife being involved in a conspiracy, would outweigh the privilege that exists in our State, and would authorize cross-examination on that issue." Defendant then cross-examined Leroy Wentzel about the statements contained in the letters. Thus, the Court specifically allowed cross-examination of the witness about the statements contained in the letters. Accordingly, we find no merit in this assignment of error.

[10] In her eleventh assignment of error, defendant contends that the trial court erred in sustaining an objection to defendant's attempt to introduce evidence of the defendant's mother having found a condom in the victim's dresser drawer after his murder. We disagree and find that the trial court properly sustained the State's objection on relevancy grounds. Evidence is inadmissible if it fails to have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). We hold that the trial court properly sustained the State's objection to the introduction of this bit of contested evidence, as such evidence was plainly irrelevant to any fact of consequence to this action.

Furthermore, regardless of whether the trial court properly excluded this evidence, the trial court's decision is a matter within its discretion, and "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). We find no abuse of discretion by the trial court in excluding this contested evidence and accordingly overrule this assignment of error.

[11] In her twelfth assignment of error, defendant contends that the trial court erred in allowing cross-examination of defense witness Edna Madison about a letter she wrote to her daughter, Sheila Wentzel. We find that the trial court properly allowed the prosecutor on cross-examination to use the letter to refresh the witness's recollection about what she wrote.

Edna Madison stated on cross-examination that she had discussed the murder of the victim with both of her daughters, defendant and Sheila Wentzel. When the prosecutor asked the witness if she remembered telling Sheila Wentzel that she understood her part in the murder and "everyone else that had a part in it," the witness responded that she did not know. On *voir dire* out of the jury's presence, the prosecutor showed the witness a letter which she had written to her daughter, Sheila Wentzel, which contained the statement: "I understand your part and everyone else that had a part in it." The witness then stated that her recollection had been refreshed, and she remembered making the statement. Accordingly, the trial court then properly allowed the prosecutor to use the letter before the jury for purposes of showing the refreshing of the witness's recollection of that statement. This Court has consistently held that a party may use any material to refresh the memory of a witness, including statements made by persons other than the witness. *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). We hold in the case *sub judice* that the prosecutor properly used the letter to refresh the witness's recollection.

Additionally, defendant contends that evidence elicited from witness Edna Madison was irrelevant and thus inadmissible. We disagree. We note that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1992). The contested statement was indeed highly relevant, as it went directly to the issue of the witness's understanding or knowledge that roles or parts were in fact played by the coconspirators in the murder. The trial court did not abuse its dis-

cretion in allowing cross-examination of the witness with regard to the letter. Accordingly, this assignment of error is overruled.

[12] In her thirteenth assignment of error, defendant argues that the trial court erred in excluding evidence on redirect examination that she did not fraudulently complete sworn documents disclosing her financial resources and assets of the victim. Again, we disagree. A review of the record reveals that the trial court did not err in restricting defendant's redirect examination.

During cross-examination of defendant, the prosecutor attempted to use for impeachment purposes sworn documents which the defendant had completed indicating her financial resources and properties (Exhibits 127, 128 and 79A) to show she had omitted a substantial amount of property and business assets. Upon defense counsel's objection to the use of these documents, the trial court conducted a *voir dire* outside the jury's presence. During *voir dire*, the prosecutor established that defendant had failed to fully and accurately disclose her real estate, personal property and other resources. The trial court allowed the use of Exhibits 127 and 79A but disallowed the use of Exhibit 128. On cross-examination, the prosecutor elicited from the defendant that she had significantly undervalued and omitted much of her property on both of these affidavits. On Exhibit 127, defendant failed to list her property in Florida and a note she was entitled to collect, and she listed property she sold for $34,000 as having sold for $17,000. On Exhibit 79A, defendant failed to list savings bonds, a note, Florida property, Twentieth Century funds, Fort Sill checking and saving accounts, a Pentagon savings account, a Greenwood Trust account, a Fidelity Destiney account and a Magellan account.

On redirect examination, the trial court allowed defendant to explain that she was not trying to mislead anyone, that she had attempted to be honest and that she did the best she could in completing these documents. We find that the record clearly demonstrates that defendant was permitted to explain the inaccuracies and omissions in the affidavits on redirect examination. Accordingly, we conclude that the trial court did not erroneously exclude defendant's evidence that she did not fraudulently complete the documents. This assignment of error is overruled.

[13] In her fourteenth assignment of error, defendant contends the trial court erred in overruling her objections to portions of the prosecutor's closing argument during the guilt-innocence phase of the

trial. On review, we conclude that the trial court properly overruled defendant's objections. The record clearly reflects that the prosecutor's comments during closing arguments were not improper. 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 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).

Defendant asserts that the prosecutor's statements to the jury that defendant called the victim in the middle of a meeting with a student to inform her husband that Leroy Wentzel was coming to visit is unsupported by the evidence. We conclude on our review of the record that this portion of the prosecutor's argument, when viewed in the context in which it was made and the overall factual circumstances to which it referred, as it must be, is based on a reasonable inference supported by the evidence. The prosecutor explained within the argument that the basis was Leroy Wentzel's testimony as to what the victim said to him alongside the highway. The prosecutor stated, "Remember what . . . Leroy said? Said they talked about, 'Should we leave it here?' Well, I guess that means that he would go home with Fred. 'Shall we have it towed? What should we do?' All of it is consistent with him expecting Leroy that night."

Defendant next argues that the prosecutor's following statements about defendant's financial motivations went outside the record: (1) that "[defendant] believed there would be mortgage insurance so she would have that house free and clear. So I argue that's another $200,000"; (2) "Pat admitted on the witness stand she called Fred's sister and said 'go to the attic . . .[;] I know there's a policy [worth] about $200,000.' . . . Pat also thought there was another $200,000 out there"; and (3) "with Fred dead, [defendant expected to receive] $332,000 plus [defendant] thought there was another $320,000 out there somewhere. That's the motive for this killing. . . . It's hundreds and thousands of dollars."

We conclude that these statements by the prosecutor in closing argument were clearly supported by the testimony at trial. The prosecutor compiled a chart indicating assets defendant was expected to

receive upon her husband's death based on testimony at trial. The prosecutor's statement relating to the mortgage insurance was based upon a handwritten note of the victim's, written to the defendant, following a surgical procedure on defendant. Finally, even assuming *arguendo* that these statements by the prosecutor could be interpreted as defendant contends, this argument is clearly not so unduly prejudicial so as to render the trial fundamentally unfair. The trial court's rulings were clearly within its discretion, and this assignment of error is overruled.

[14] In her fifteenth and final assignment of error, defendant asserts that the trial court erred in finding the aggravating factor, in the sentencing on her conspiracy conviction, that "[t]he defendant occupied a position of leadership or dominance of other participants in the commission of the offense." N.C.G.S. § 15A-1340.4(a)(1)(a) (1988).[1] Defendant argues that the trial court erroneously used the acts that formed the gravamen of the joined accessory murder conviction to aggravate defendant's sentence in the conspiracy case. We do not agree.

The trial court found two aggravating factors for the conspiracy conviction: (1) "[t]he defendant occupied a position of leadership or dominance of other participants in the commission of the offense," N.C.G.S. § 15A-1340.4(a)(1)(a); and (2) "[t]he offense involved an attempted taking of property of great monetary value," N.C.G.S. § 15A-1340.4(a)(1)(m). Upon finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced defendant to a term of thirty years to run concurrently with the murder conviction. The aggravating factor that defendant occupied a position of leadership or dominance does not constitute an element of the contemporaneous murder conviction as accessory before the fact. This Court has stated the elements of accessory before the fact to murder are:

> 1) Defendant must have counseled, procured, commanded, encouraged, or aided the principal to murder the victim;
>
> 2) the principal must have murdered the victim; and
>
> 3) defendant must not have been present when the murder was committed.

State v. Davis, 319 N.C. 620, 624, 356 S.E.2d 340, 342 (1987).

1. The Fair Sentencing Act, as contained in N.C.G.S. § 15A-1340.1 through -1340.7, was repealed effective 1 October 1994, when the Structured Sentencing Act became effective for offenses occurring on or after that date. The Fair Sentencing Act applies in this case.

Thus, with the possible exception of the included required action that a defendant "commanded" the principal, as contained in the first element, accessory before the fact to murder does not in any way require that the defendant occupy a position of leadership or dominance in the commission of the crime, and while there is, in the instant case, abundant evidence that defendant procured, encouraged and even took a leadership role, there is no evidence she "commanded" the principal. To encourage or counsel another is merely to advise, inspire, stimulate, or spur on a particular course of action. *Merriam-Webster's Collegiate Dictionary* 264, 381 (10th ed. 1993). Defendant's role in the procurement of the death of her husband clearly went beyond mere counseling, procuring or encouraging the murder. However, while the evidence reflects that defendant exercised an instigating and leading role to effectively insure the murder was completed, there is no evidence or indication she "commanded" the principal. There was, in fact, evidence to the contrary, reflected in her frustration with the coconspirator. As Sheila Wentzel testified, defendant "wanted it done, she wanted Fred to be killed . . . she was angry because Leroy hadn't done it." Sheila also testified that defendant was "trying to rush" Leroy Wentzel. Finally, on the night of the murder, defendant made "arrangement to have her daughter out of the house, and she would be out of house . . . and Fred would be the only one home."

Therefore, we conclude that the trial court properly found the aggravating factor that defendant occupied a position of leadership of other participants in the commission of the conspiracy, separate and apart from her conviction of murder as an accessory. However, we further conclude that the judgment on this offense must be remanded for resentencing because the trial court consolidated it with the solicitation conviction, which we have now vacated, in imposing a single sentence of thirty years, and we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect on the sentence imposed.

We note that on 11 August 1995, defendant filed a motion for appropriate relief, and on or about 1 May 1997, defendant filed an amended and supplemental motion for appropriate relief. These motions were heard on 12 May 1997 and were denied by order of the trial court entered 21 May 1997 upon extensive findings of fact and conclusions of law, including that the allegations contained in the motion, as amended, are without merit and subject to dismissal and that defendant has failed to establish that she is entitled to a new

trial. We further note that defendant has not raised or brought forward in her brief any assignments of error or argument with respect to such findings, conclusions or order of denial, and any matters relating thereto are deemed abandoned. N.C. R. App. P. 28(b)(5).

Accordingly, we hold that defendant's conviction of solicitation to commit murder must be vacated and the judgment thereon arrested, that the judgment on the conspiracy to commit murder conviction must be remanded for resentencing, and that in all other respects defendant has received a fair trial and proper sentence, free of prejudicial error.

NO. 94CRS20532, FIRST-DEGREE MURDER: NO ERROR.

NO. 94CRS56256, SOLICITATION TO COMMIT MURDER: CONVICTION VACATED AND JUDGMENT ARRESTED; CONSPIRACY TO COMMIT MURDER: REMANDED FOR RESENTENCING.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

MARCUS BROTHERS TEXTILES, INC. v. PRICE WATERHOUSE, LLP (FORMERLY PRICE WATERHOUSE), AND JOHN DOES I-V, INDIVIDUALLY AND AS MEMBERS OF PRICE WATERHOUSE

No. 188A98

(Filed 9 April 1999)

1. Accountants and Accounting— negligent misrepresentation—audited financial statement—knowledge of use

The trial court erred by granting summary judgment for defendant in a negligent misrepresentation action against an accounting firm arising from an audited financial statement where, viewing the evidence in the light most favorable to plaintiffs, it can be inferred that defendant knew that its client (Piece Goods) regularly provided copies of its financial statements to a limited group of major trade creditors, of which plaintiff was a member.

2. Accountants and Accounting— negligent misrepresentation—audited financial statement—justifiable reliance—summary judgment

The trial court erred by granting summary judgment for defendant in a negligent misrepresentation action against an accounting firm arising from an audited financial statement where the evidence was sufficient to create a genuine issue of material fact with regard to plaintiff's justifiable reliance on the statement in its decision to extend credit.

Chief Justice MITCHELL dissenting.

Justice PARKER joins in this dissenting opinion.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 129 N.C. App. 119, 498 S.E.2d 196 (1998), reversing an order of summary judgment in favor of defendant entered by Freeman, J., on 9 December 1996 in Superior Court, Forsyth County. Heard in the Supreme Court 11 January 1999.

White and Crumpler, by Dudley A. Witt and Laurie A. Schlossberg, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Hada V. Haulsee and John J. Bowers; Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Thomas D. Myrick, and Corby Anderson; and Steven M. Witzel, pro hac vice, for defendant-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by L.P. McLendon, Jr., James T. Williams, Jr., and Jennifer L. Bolick, on behalf of the American Institute of Certified Public Accountants, amicus curiae.

WAINWRIGHT, Justice.

Plaintiff Marcus Brothers Textiles, Inc. (Marcus Brothers) is a New York-based converter of textiles that buys unfinished woven material, has it finished by independent contractors, and sells it to apparel manufacturers or retailers of fabric for home sewing. Prior to filing for bankruptcy in 1993, Piece Goods Shops Company, L.P. (Piece Goods) was a North Carolina-based retailer of fabrics, patterns, sewing notions, needlecraft supplies, and sewing machines. Piece Goods was a frequent customer of Marcus Brothers. Defendant Price Waterhouse, LLP (Price Waterhouse) is an independent certi-

fied public accounting firm with offices in North Carolina and was hired by Piece Goods to perform audits of its year-end financial statements. Price Waterhouse provided financial services for Piece Goods from 1986 until 1993, and performed audits of Piece Goods' financial statements for the fiscal years 1989 through 1992.

At the close of the fiscal year on 31 July 1992, Piece Goods prepared its year-end financial statement (1992 financial statement). As in the past, Piece Goods hired Price Waterhouse to perform an audit on the 1992 financial statement. On 22 September 1992, following the audit, Price Waterhouse sent a letter to Piece Goods in which it stated:

> In our opinion, the accompanying balance sheet and the related statements of income and partners' equity and of cash flows present fairly, in all material respects, the financial position of Piece Goods . . . at July 31, 1992 and 1991 and the results of its operations and its cash flows for the years then ended in conformity with generally accepted accounting principles.

Thereafter, Piece Goods forwarded a copy of the audited 1992 financial statement to Marcus Brothers on 29 October 1992. Marcus Brothers contends that as a result of its review of the audited 1992 financial statement, it made several extensions of credit to Piece Goods during the period from 30 December 1992 to 5 April 1993 (credit extensions).

On 19 April 1993, Piece Goods filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of North Carolina. At that time, Piece Goods was indebted to Marcus Brothers in the amount of $288,848.14 as a result of the credit extensions.

On 11 August 1995, Marcus Brothers filed its complaint against Price Waterhouse and five unnamed employees of Price Waterhouse, alleging gross negligence and negligent misrepresentation based on its audit of the 1992 financial statement. Marcus Brothers alleges the audited financial statement "included [Price Waterhouse's] unqualified opinion that the Financial Statement fairly and in all material respects accurately presented [Piece Goods'] financial position, the results of its operations, and its cash flows for the relevant years." Marcus Brothers alleges the 1992 financial statement audited by Price Waterhouse contained several material misrepresentations and reflected numerous departures from Generally Accepted Accounting

Principles ("GAAP"), and that Price Waterhouse's failure to alert readers of the financial statement to those departures violated Generally Accepted Auditing Standards ("GAAS").

Marcus Brothers contends the audited 1992 financial statement contained three material misrepresentations about Piece Goods' financial condition: (1) it showed a thirty million, three hundred thirty-two thousand dollar ($30,332,000.00) receivable from a Piece Goods general partner which was uncollectible; (2) it included interest on the worthless $30,332,000.00 receivable; and (3) it incorrectly reflected nearly all payables for certain pattern inventories as noncurrent, long-term liabilities, but reflected the inventories for those pattern inventories as current assets. Marcus Brothers claims the result was to overstate Piece Goods' working capital and distort Piece Goods' current working capital ratio.

On 5 June 1996, Price Waterhouse filed a motion for summary judgment, alleging that Marcus Brothers had failed to establish certain required elements of negligent misrepresentation, including: (1) Price Waterhouse's knowledge that Piece Goods would be supplying Marcus Brothers with the audited 1992 financial statement; and (2) Marcus Brothers' justifiable reliance upon the audited 1992 financial statement.

Following a hearing on 14 October 1996, the trial court granted Price Waterhouse's motion for summary judgment on 9 December 1996, and Marcus Brothers filed a timely notice of appeal to the Court of Appeals. A divided panel of the Court of Appeals issued an opinion on 7 April 1998 in which the order of summary judgment in favor of Price Waterhouse was reversed. The majority found that "in the light most favorable to plaintiff, there are genuine issues of material fact concerning the essential elements of knowledge and justifiable reliance." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 129 N.C. App. 119, 127, 498 S.E.2d 196, 202 (1998). The Court of Appeals dissent stated that Marcus Brothers had failed to forecast "sufficient evidence to establish either that Price Waterhouse knew the audit would be provided to Marcus [Brothers] for guidance or that Marcus [Brothers] justifiably relied on the alleged misrepresentations." *Id.* at 128, 498 S.E.2d at 202 (Wynn, J., dissenting). Based on this dissent, Price Waterhouse filed a timely notice of appeal as of right to this Court pursuant to N.C.G.S. § 7A-30(2).

At the outset, we note that although a company's "financial statements themselves are the representations of management, not the

auditor," "an audit report represents the auditor's opinion of the accuracy of the client's financial statements at a given period of time." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 207, 367 S.E.2d 609, 613 (1988). As such, the responsibility an auditor assumes in conducting an audit and preparing a report should not be taken lightly.

The issue of the scope of an accountant's liability to persons other than the client for whom an audit report was prepared is relatively new in the annals of North Carolina jurisprudence. This Court first addressed the issue in 1988 in *Raritan*, 322 N.C. 200, 367 S.E.2d 609. In *Raritan*, this Court stated that under certain circumstances, the tort of negligent misrepresentation set forth in section 552 of the Restatement (Second) of Torts could provide an appropriate remedy to plaintiffs who had been injured as a result of an accountant's negligence. Section 552 provides:

> Information Negligently Supplied for the Guidance of Others
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1977). According to this Court in *Raritan*, the Restatement approach

> recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends

> will rely on his opinion, or whom he knows his client intends will so rely. On the other hand, as the commentary [to section 552] makes clear, it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated." *Restatement (Second) of Torts* § 552, Comment h. As such it balances . . . the need to hold accountants to a standard that accounts for their contemporary role in the financial world with the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking.

Raritan, 322 N.C. at 214-15, 367 S.E.2d at 617.

Under this approach, in order for an auditor to be held liable to a third party, that party must demonstrate: (1) the accountant either (a) knew that the third party would rely on this information, or (b) knew that the client for whom the audit report was prepared intended to supply the information to a third party who would rely on this information; and (2) the third party justifiably relied upon this information in its decision concerning the transaction involved or one substantially similar to it. *Id.* at 210, 367 S.E.2d at 614. In adopting this rule, in *Raritan* this Court "rejected as too expansive the position that extends liability to all persons the accountant should reasonably foresee might obtain and rely on the information generated." David A. Logan & Wayne A. Logan, *North Carolina Torts* § 25.30, at 549 (1996) [hereinafter Logan, *N.C. Torts*]. Further, the Court held:

> We reject the . . . "privity or near-privity" approach . . . because it provides inadequately for the central role independent accountants play in the financial world. Accountants' audit opinions are increasingly relied upon by the investing and lending public in making financial decisions.

Raritan, 322 N.C. at 211, 367 S.E.2d at 615.

On appeal, Price Waterhouse contends the Court of Appeals erred by reversing the trial court's entry of summary judgment in its favor because there are no genuine issues of material fact with regard to both the knowledge and the reliance elements.

A close review of the principles of summary judgment is instructive in this case. It is well settled that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is ***no*** genuine issue as to ***any*** material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990) (emphasis added). The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law. *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 85, 249 S.E.2d 375, 378 (1978), *overruled on other grounds by Best v. Duke University*, 337 N.C. 742, 448 S.E.2d 506 (1994). The record is considered in the light most favorable to the party opposing the motion. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). Generally, " 'issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.' " *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (citations omitted). "It is only in exceptional negligence cases that summary judgment is appropriate." *Id.* " '[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' " *Id.* (citations omitted).

Rule 56 "does not contemplate that the Court will decide an issue of fact, but rather will determine whether a real issue of fact exists." *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (citations omitted). Because "this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Id.* Determining what constitutes a genuine issue of material fact is often difficult. *Id.* If there is any question as to the weight of evidence, summary judgment should be denied. *Id.* at 535, 180 S.E.2d at 830.

In negligent misrepresentation cases, "whether liability accrues is highly fact-dependent, with the question of whether a duty is owed a particular plaintiff being of paramount importance." Logan, *N.C. Torts* § 25.30, at 551. As such, summary judgment is seldom appropriate in these type of cases, " 'unless the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of the injury.' " *Alva v. Cloninger*, 51 N.C. App. 602, 609, 277 S.E.2d 535, 539-40 (1981) (quoting *Price v. Miller*, 271 N.C. 690, 693, 157 S.E.2d 347, 349-50 (1967)).

I. The Knowledge Element

[1] First, we must determine whether the evidence presented is sufficient to create a genuine issue of material fact that Price

Waterhouse knew either that Marcus Brothers would rely on the 1992 audited financial statement in its decision to extend credit to Piece Goods, or that Piece Goods would supply the information to Marcus Brothers intending Marcus Brothers would rely on this information in its decision to extend credit to Piece Goods.

In support of its case, Marcus Brothers cites numerous circumstances which indicate genuine issues of material fact as to the knowledge element. First, there is unrefuted testimony that Piece Goods had been a client of Price Waterhouse since 1986. In addition, there is deposition testimony from James J. Quinn, Director of Corporate Credit for Marcus Brothers, indicating that Piece Goods has been sending its audited financial statements to Marcus Brothers since 1983, and that these financial statements were regularly used in determining whether to extend credit to Piece Goods. Price Waterhouse's own internal 1989 memorandum states that "[Price Waterhouse] has historically reported on the financial statements of [Piece Goods,] and . . . vendors . . . are accustomed to receiving [Piece Goods'] financial statement." Further, deposition testimony from Robert Allen Smith, an audit partner for Price Waterhouse who signed off on the 1989 internal memorandum, indicates that some of Price Waterhouse's clients "typically provide" their audited financial statements to trade creditors in reference to obtaining loans or extensions of credit. There is further deposition testimony from Karen C. Frazier, an audit manager for Price Waterhouse who oversaw the audit of Piece Goods' 1992 financial statement, which indicates that audited financial statements are "used by the management of the company and possibly outsiders," and that such outsiders "could" include trade creditors such as Marcus Brothers. Marcus Brothers further cites the fact that the sixth largest check on a handwritten list of fifty "held checks" in Price Waterhouse's 1992 Piece Goods audit file is a check to Marcus Brothers in the amount of $291,337.78. Finally, Piece Goods' 1993 bankruptcy filing revealed that forty-three trade creditors had received copies of Piece Goods' audited financial statements, including Marcus Brothers.

For summary judgment, the movant is held to a strict standard in all cases and " 'all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' " *Page*, 281 N.C. at 706, 190 S.E.2d at 194 (citation omitted). Reasonable persons can reach different conclusions on the evidentiary material offered. *Id.* at 708, 190 S.E.2d at 195. Summary judgment is inappropriate where reasonable minds might

easily differ as to the import of the evidence. *Dettor v. BHI Property Company No. 101*, 324 N.C. 518, 522, 379 S.E.2d 851, 853 (1989).

For the element of knowledge, the material issues of fact demonstrate that the movants have failed to satisfy the burden of clearly establishing the lack of any triable issue of fact in the record properly before the Court. Whether the case should be submitted to the jury is a question for determination by the trial judge at the close of the evidence.

In *Raritan*, this Court, as previously noted, adopted the Restatement (Second) of Torts § 552. Included in the commentary to Section 552 is illustration 10 under comment h which provides:

> A, an independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is ***not informed*** of ***any*** intended use of the financial statements; but A knows that the financial statements, accompanied by an auditor's opinion, are ***customarily*** used in a variety of financial transactions by the corporation and that they may be relied upon by lenders, investors . . . and the like . . . . In fact B Company uses the financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial position of B Company, and through reliance upon it X Bank suffers pecuniary loss. A is not liable to X Bank.

Restatement (Second) of Torts § 552, cmt. h, illus. 10 (1977) (quoted in *Raritan*, 322 N.C. at 215 n.2, 367 S.E.2d at 617 n.2) (emphasis added). As stated in *Raritan*, "[s]ome confusion arises due to illustration 10 under Comment h. This illustration has been read by some to mean that liability turns on whether the accountant's client specifically mentions a person or class of persons who are to receive the audited financial statements." *Raritan*, 322 N.C. at 215, 367 S.E.2d at 617-18.

> The Restatement's text does not demand that the accountant be informed by the client himself of the audit report's intended use. The text requires only that the auditor ***know*** that his client intends to supply information to another person or limited group of persons. Whether the auditor acquires this knowledge from his

client or elsewhere should make no difference. ***If he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them.***

Id. at 215, 367 S.E.2d at 618 (emphasis added).

The facts of the instant case are distinguishable from *Raritan* and illustration 10. Upon remand in *Raritan Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 497 S.E.2d 178 (1991) (*Raritan* II), this Court noted some additional facts about the parties which are particularly relevant to our discussion. In *Raritan* II, this Court noted that the third-party creditor did not see the audit but reviewed a summary of it published in a Dun & Bradstreet report, which apparently overstated the corporation's actual financial position. *Id.* at 647, 497 S.E.2d at 179. Allegedly, on the basis of the Dun & Bradstreet summary of the audit, the trade creditor extended additional open credit to the corporation, which later filed for bankruptcy. *Id.* It is interesting to note that the accounting firm's engagement letter to the client provided: "[I]f we discover that we cannot issue an unqualified opinion, we will discuss the reasons with you before submitting a different kind of report . . . . Our basic audit function is to add reliability to those financial statements." *Id.* at 648, 407 S.E.2d at 179. The Dun & Bradstreet report, which also contained other summarized financial information, was the only access that the third-party creditor had to the corporation's financial statements. *Id.* at 649, 407 S.E.2d at 180. The creditor was not even aware that the audit was being performed. *Id.* at 653, 407 S.E.2d at 182.

As illustration 10 clearly states, A was ***not informed of any intended use*** of the financial statements. In the light most favorable to Marcus Brothers, there are genuine issues of material fact as to whether Price Waterhouse was informed of any intended use of the financial statements. Illustration 10 further states: "[B]ut A knows that the financial statements, accompanied by an auditor's opinion, are ***customarily*** used in a variety of financial transactions by the corporation and that they may be relied upon by lenders . . . ." (Emphasis added.) In the instant case, the circumstances surrounding Price Waterhouse's knowledge raise issues of material fact that rise above the level of "customarily used." As previously stated, all inferences of fact from the proofs proffered at the summary judgment hearing must be drawn against the movant and summary judgment is

inappropriate where reasonable minds might easily differ as to the import of the evidence. *Page*, 281 N.C. at 706, 190 S.E.2d at 194. " 'The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' " *Jenrette Transport Co. v. Atlantic Fire Ins. Co.*, 236 N.C. 534, 540, 73 S.E.2d 481, 486 (1952) (citation omitted). This Court has recently reiterated the strict standards by which the propriety of summary judgment is determined:

> Before summary judgment may be entered, it must be ***clearly established*** by the record before the trial court that there is a lack of ***any*** triable issue of fact. In making this determination, the evidence forecast by the party against whom summary judgment is contemplated is to be ***indulgently regarded***, while that of the party to benefit from summary judgment must be ***carefully scrutinized***. Further, any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated.

Creech v. Melnik, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (emphasis added) (citations omitted).

At this stage of the proceedings, and after carefully reviewing the foregoing evidence in the light most favorable to Marcus Brothers, we conclude it can reasonably be inferred that Price Waterhouse knew Piece Goods regularly provided copies of its financial statements to a limited group of major trade creditors, of which group Marcus Brothers was a member.

II. The Reliance Element

[2] Next, we must determine whether the evidence presented is sufficient to create a genuine issue of material fact with regard to the second element of negligent misrepresentation, that is, Marcus Brothers' justifiable reliance upon the 1992 audited financial statement in its decision to extend credit to Piece Goods.

At the outset, we note that the "question of justifiable reliance is analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether plaintiff reasonably relied upon the representations made by defendant." *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622, *disc. rev. denied*, 301 N.C. 95 (1980). "Ordinarily, the question of whether an actor is reasonable in

relying on the representations of another is a matter for the finder of fact." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544, 356 S.E.2d 578, 584 (1987). Further, the commentary to section 552 of the Restatement (Second) of Torts provides:

> What is reasonable is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors. ***The question is one for the jury, unless the facts are so clear as to permit only one conclusion.***

Restatement (Second) of Torts § 552 cmt. e (emphasis added).

In the light most favorable to Marcus Brothers, the facts are not so clear as to permit only a conclusion in favor of Price Waterhouse. Price Waterhouse contends that testimony showed Marcus Brothers knew and understood that the approximately thirty million dollars receivable would have to come from Piece Goods itself. This information was disclosed in footnote 3 in the financial statements. Footnote 3 states that "[l]iquidation of this receivable will be accomplished through future distributions to the general partner." However, further review of that testimony in context reveals conflicts that preclude summary judgment. While Marcus Brothers may have understood the receivable was to be repaid by future distributions, the same agents also testified that the audited financial statements did not lead them to believe the general partner had no assets at all and that the debt was worthless. James Quinn, Marcus Brothers' Director of Corporate Credit, testified that he understood the source of funds for repayment of the receivable would be "subsequent distributions to the general partner." However, Quinn also testified that he understood the receivable "would ultimately be collectible . . . [b]ecause that's what Price Waterhouse said in their audited report." Henry Woodward, Marcus Brothers' Credit Manager, testified he understood the source of repayment to be "future distributions to the partner." However, Woodward also testified "there was nothing to indicate in the certified financial statement that this asset had no value . . ." and if it was worthless, "there would at least be a qualified statement in the form of a footnote that this is a certified statement, but qualified [to] the extent that the value of this asset cannot be determinative [sic]." Woodward further testified that footnote 3 meant to him "[t]here was no question in the CPA's mind that prepared the state-

ment that this receivable would be paid, because that's what it says." Finally, Woodward testified that "if there was any doubt at all . . . that this amount was, in fact, not going to be paid, it should be stipulated in here somewhere in the footnote. It should be stipulated. It's not stipulated." The conflict in Woodward's and Quinn's testimonies regarding their understanding of the receivable cannot be appropriately reconciled on a motion for summary judgment.

Marcus Brothers alleged and made a forecast of evidence that it made several extensions of credit to Piece Goods in reliance upon the audited 1992 financial statement. Whether Marcus Brothers justifiably relied on the $30,332,000.00 receivable from a Piece Goods general partner, the accompanying interest, and current inventory are questions of fact for a jury to determine. We conclude that Marcus Brothers presented a sufficient forecast of evidence to meet this element.

In summary, we conclude the Court of Appeals properly reversed the trial court's entry of summary judgment for Price Waterhouse on Marcus Brothers' claim for negligent misrepresentation.

AFFIRMED.

Chief Justice MITCHELL dissenting.

I do not believe that plaintiff Marcus Brothers Textiles, Inc. (Marcus Brothers) forecast substantial evidence tending to show that defendant Price Waterhouse, LLP (Price Waterhouse) *knew* that the audited 1992 financial statement of Piece Goods Shops Company, L.P. (Piece Goods) would be provided to Marcus Brothers or a *limited* group of creditors of which Marcus Brothers was a member. Therefore, I would reverse the decision of the Court of Appeals and remand this case to the trial court for reinstatement of summary judgment in favor of defendant Price Waterhouse. Accordingly, I respectfully dissent from the decision of the majority.

The "actual knowledge" standard controlling an accountant's liability to a third party non-client for negligent misrepresentation of the financial statements of the accountant's client was established by this Court in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988). In adopting the actual knowledge standard, this Court expressly rejected the "reasonably foreseeable" standard, "because it would result in liability more expansive than an accountant should be expected to bear." *Id.* at 211, 367 S.E.2d at 615.

Therefore, we have rejected the notion that an accountant's liability may be extended in cases such as the present case to all persons that the accountant could reasonably foresee might obtain and rely on his work. Thus, the proper standard is not what the accountant reasonably should have known, but what the accountant in fact knew.

In adopting the actual knowledge standard in *Raritan*, this Court expressly relied upon the rationale of Section 552 of the Restatement (Second) of Torts. We explained that rationale as follows:

> [A]n accountant who audits or prepares financial information for a client owes a duty of care not only to the client but to any other person, or one of a group of persons, whom the accountant or his client intends the information to benefit; and that person reasonably relies on the information in a transaction, or one substantially similar to it, that the accountant or his client intends the information to influence. If the requisite intent is that of the *client* and not the accountant, then the accountant must *know* of his *client's intent* at the time the accountant audits or prepares the information.

Id. at 210, 367 S.E.2d at 614 (emphasis added). We also explained in *Raritan* that if an accountant

> knows at the time he prepares his report that specific persons, or a *limited* group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them.

Id. at 215, 367 S.E.2d at 618 (emphasis added). Here, no evidence whatsoever was forecast tending to show that Price Waterhouse itself intended to influence plaintiff Marcus Brothers. Therefore, the issue presented by this case is whether Price Waterhouse knew of Piece Goods' intent to provide Marcus Brothers with the 1992 financial statement for the purpose of influencing Marcus Brothers, or a limited group including Marcus Brothers, in the transactions at issue in this case or in substantially similar transactions. *Id.* I find nothing in the evidence to support a reasonable fact finder in finding that defendant Price Waterhouse possessed such actual knowledge at the time it performed the work in question for Piece Goods.

At most, the evidence forecast before the trial court and set forth by the majority in its opinion here might support a finding that Price Waterhouse could reasonably have foreseen that Marcus Brothers or an indeterminate group of persons including Marcus Brothers would

rely on its work and that Piece Goods intended such reliance. However, the forecast of evidence relied upon by the majority does no more than raise suspicion or conjecture as to the determinative issue before this Court—whether defendant Price Waterhouse *actually* knew that Marcus Brothers or a *limited* group including Marcus Brothers would rely on its work and that its client Piece Goods intended such reliance. Evidence "must do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury." *Jenrette Transp. Co. v. Atlantic Fire Ins. Co.*, 236 N.C. 534, 539, 73 S.E.2d 481, 485 (1952); *see also Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992). Even if it is assumed *arguendo* that defendant Price Waterhouse had knowledge from which it could reasonably have foreseen that its work would be relied on by an unlimited group of potential trade creditors of Piece Goods, this fact would not suffice to defeat defendant Price Waterhouse's motion for summary judgment.

I recognize that ordinarily the Restatement of Torts is secondary authority at best, as it is not the law of North Carolina. However, in *Raritan* this Court adopted the standard required by the Restatement (Second) of Torts § 552 as a part of the common law of North Carolina. Therefore, the Commentary to Section 552 and the included examples are unusually persuasive authority regarding the knowledge required on the part of an accountant in order for the accountant to have a duty to those not his clients. In this regard, illustration 10 under comment h provides as follows:

> A, an independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is not informed of any intended use of the financial statements; but A knows that the financial statements, accompanied by an auditor's opinion, are customarily used in a variety of financial transactions by the corporation and that they may be relied upon by lenders, investors . . . and the like . . . . In fact B Company uses the financial statements and accompanying auditor's opinion to obtain financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial position of B Company, and through reliance upon it X Bank suffers pecuniary loss. A is not liable to X Bank.

Restatement (Second) of Torts § 552, cmt. h, illus. 10 (1977), *quoted in Raritan*, 322 N.C. at 215 n.2, 367 S.E.2d at 617 n.2. None of the evidence relied upon by the majority tends to establish that Price Waterhouse had more knowledge of Piece Goods' plans than that illustrated in the above example.

The 1989 internal memorandum of Price Waterhouse relied upon by the majority merely stated that Price Waterhouse had "historically reported on the financial statements of" Piece Goods and that "vendors and factors" were accustomed to receiving Piece Goods' financial statements. Giving this memorandum every possible reasonable inference in favor of plaintiff, it still tends to show only that *four years later*, Price Waterhouse might reasonably have foreseen that an indeterminate group of outside vendors and creditors would receive the 1992 statement it prepared for Piece Goods. Piece Goods' 1993 bankruptcy filing listed several hundred creditors, a group which could not reasonably be found to be a *limited* group of which Marcus Brothers was a member. The information contained in the 1989 memorandum, even when taken in the light most favorable to plaintiff, could not reasonably be found to identify the type of limited group required to meet the standard established by *Raritan* and the Restatement. *See Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 583 (E.D.N.C. 1992) (similar internal memorandum created in connection with a prior audit held insufficient to establish a "limited group of persons whom [the auditor] knew would rely on its work" or to establish the state of the auditor's knowledge four years after the memorandum was prepared), *aff'd sub nom. Heritage Capital Corp. v. Deloitte, Haskins & Sells*, 993 F.2d 228 (4th Cir. 1993), *cert. denied*, 511 U.S. 1051, 128 L. Ed. 2d 338 (1994); *Bank of New Orleans & Trust Co. v. Monco Agency Inc.*, 719 F. Supp. 1328 (E.D. La. 1989) (auditor's knowledge of use of an earlier audit held insufficient to establish such knowledge as to later audit, and the auditor's knowledge that its report was being given to one bank coupled with the client's request for fifty copies of the audit was insufficient to establish knowledge that the audit would also be given to the plaintiff bank), *aff'd sub nom. First Nat'l Bank of Commerce v. Monco Agency Inc.*, 911 F.2d 1053 (5th Cir. 1990). To conclude, as the majority does here, that the 1989 memorandum is sufficient to support a finding that Price Waterhouse knew that plaintiff Marcus Brothers was a member of a "*limited group*" to whom copies of the 1992 financial statement would be provided is to conclude that an auditor who knows that his client provides financial statements to some unspecified and indeterminate group may be held liable to all of

the client's present or future creditors without limitation. The effect is to hold accountants such as defendant Price Waterhouse liable to all "reasonably foreseeable" recipients of its audit reports, a result directly contrary to the standard of liability established in *Raritan* and the Restatement.

The deposition testimony of Karen C. Frazier, an audit manager of the 1992 Piece Goods audit, is of even less help to plaintiff. She testified only as to general business practices in the industry of which Piece Goods was a part. She stated in response to a question that, "[a]s far as having an audited financial, you have an outside opinion on the financial statements that you have prepared internally to be used by the management of the company and possibly outsiders." When asked whether such "outsiders" could include trade creditors, she responded, "[i]t could." When asked whether in Piece Goods' situation outsiders would include suppliers of material, inventory and patterns, she replied that "[i]t could; yes." Given any fair construction, Ms. Frazier's deposition testimony tended to show merely that businesses in the same industry as Piece Goods "could" "possibly" provide their audited financial statements to an indeterminate and unspecified group of outsiders. Again, such evidence would at best support suspicion, speculation or conjecture as to what defendant Price Waterhouse actually knew.

The fact that plaintiff Marcus Brothers was included on a held check list also tends to show only that it was one of an *indeterminate* group of potential creditors. No evidence was forecast which could do more than create suspicion, speculation or conjecture as to whether Price Waterhouse *actually knew* that Piece Goods intended to provide the 1992 financial statements to Marcus Brothers, or to a *limited* group of which Marcus Brothers was a member, for the purpose of influencing a specific transaction or one substantially similar to any such specific transaction. This being the case, the trial court properly granted summary judgment for defendant Price Waterhouse.

In *Raritan*, this Court carefully considered the views of a legal scholar and jurist of extraordinary renown, Judge Cardozo of the New York Court of Appeals.

> It is instructive that Judge Cardozo, the architect of reasonable foreseeability as the touchstone for products liability, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), declined to adopt the same standard for accountants' liability in *Ultramares*. Judge Cardozo distinguished accountants

> from manufacturers because of the potential for excessive accountants' liability. He wrote that if accountants could be held liable for negligence by those who were not in privity, or nearly in privity, accountants would face "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. [170,] 179-80, 174 N.E. [441,] 444 [(1931)]. Because of this potential for inordinate liability Judge Cardozo concluded, as do we, that accountants should be held liable to a narrower class of plaintiffs than the class embraced by the reasonable foreseeability test.

Raritan, 322 N.C. at 213-14, 367 S.E.2d at 616-17. Although I am certain beyond all doubt that the majority has attempted in good faith to apply the actual knowledge test required by *Raritan*, its decision in this case allows a forecast of evidence to suffice which at best meets the reasonably foreseeable standard expressly rejected in *Raritan*. The result is to subject accountants such as Price Waterhouse to liability to an indeterminate class, for an indeterminate time, in an indeterminate amount, despite Judge Cardozo's warning and this Court's expressly stated desire in *Raritan* to avoid any such result. Therefore, I must respectfully dissent.

Justice PARKER joins in this dissenting opinion.

HENRY PARISH, JR., AS ADMINISTRATOR OF THE ESTATE OF LOUIS LYLE PARISH v. CLARENCE LOUIS HILL, III, NATHANIEL EUBANKS, IN HIS INDIVIDUAL CAPACITY AND AS AN OFFICER OF THE CITY OF HILLSBOROUGH POLICE DEPARTMENT, KEVIN DEAN, IN HIS INDIVIDUAL CAPACITY AND AS AN OFFICER OF THE CITY OF HILLSBOROUGH POLICE DEPARTMENT, LARRY BIGGS, IN HIS INDIVIDUAL CAPACITY AND AS CHIEF OF THE CITY OF HILLSBOROUGH POLICE DEPARTMENT, AND THE CITY OF HILLSBOROUGH

No. 368PA98

(Filed 9 April 1999)

Police Officers— high speed chase—gross negligence—summary judgment

The trial court properly granted summary judgment for two officers in their official capacities on gross negligence claims in a wrongful death action where the officers were involved in a high speed chase which ended with a one car accident in which the passenger in the fleeing car was killed. The officers pursued

defendant Hill, the driver, over a stretch of approximately ten miles of roadway during a time of day when traffic was very light, they did not attempt to overtake defendant's vehicle or to force defendant's vehicle from the roadway, and they were well behind defendant's vehicle and traveling at a reduced speed when it crashed. Plaintiff failed to demonstrate any negligence by the officers, and certainly not the degree of gross negligence required to hold the officers liable for decedent's death.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 195, 502 S.E.2d 637 (1998), affirming in part and reversing in part an order entered by Hudson, J., on 21 October 1996 in Superior Court, Durham County. Heard in the Supreme Court 11 February 1999.

Morgan, Reeves & Gilchrist, by Robert B. Morgan, and C. Winston Gilchrist, for plaintiff-appellees.

The Brough Law Firm, by William C. Morgan, Jr., for defendant-appellants Eubanks and Dean.

WAINWRIGHT, Justice.

Plaintiff, Henry Parish, Jr., as administrator of the estate of decedent Louis Lyle Parish, commenced this wrongful death action on 30 November 1994. Plaintiff, in his complaint, alleged claims against Clarence Louis Hill, III (Hill), Lieutenant (now Chief) Nathaniel Eubanks (Lieutenant Eubanks) and Officer Kevin Dean (Officer Dean) of the Hillsborough Police Department in their individual and official capacities for alleged gross negligence stemming from their roles in a pursuit-related vehicular accident. Plaintiff further alleges claims against former Police Chief Larry Biggs (Chief Biggs) and the City of Hillsborough (the City) for alleged failures in training, policy, and supervision, under both common law and federal law theories, including 42 U.S.C. § 1983. After extensive discovery, defendants Lieutenant Eubanks, Officer Dean, Chief Biggs, and the City filed a motion for summary judgment on 3 September 1996. Following a hearing, the trial court entered an order on 21 October 1996 granting defendants' motion for summary judgment as to all claims. On appeal, a unanimous panel of the Court of Appeals affirmed the trial court's summary judgment as to the claims against Chief Biggs and the City, including the section 1983 claims, and the claims against Lieutenant Eubanks and Officer Dean in their individual capacities;

however, the Court of Appeals reversed the trial court as to plaintiff's gross negligence claims against Lieutenant Eubanks and Officer Dean in their official capacities. This Court granted defendants' petition for discretionary review pursuant to N.C.G.S. § 7A-31. Defendant Hill is not a party to this appeal.

The materials filed in support of and in opposition to the summary judgment motion, including depositions of, *inter alia*, defendants Hill, Lieutenant Eubanks, and Officer Dean, show that at approximately 10:00 p.m. on the evening of 19 February 1993, decedent Louis Lyle Parish drove to the Durham apartment of his close friend, defendant Hill. Hill had borrowed his sister's BMW automobile for the evening, and the two decided to go to the "Ship Ahoy" club in Hillsborough. As they traveled to Chapel Hill, they purchased a six-pack of beer at a convenience store and began "cruising in the BMW down Franklin Street," drinking the beer. With Hill driving, they headed north to Hillsborough on NC 86.

Early the next morning, at approximately 2:00 a.m. on 20 February 1993, Lieutenant Eubanks, a sixteen-year veteran of the Hillsborough Police Department, traveled to the Orange County Communications Center to pick up the daily activity reports. He was driving his 1993 Ford Crown Victoria, marked with police emblems and blue lights. After picking up the reports, Lieutenant Eubanks drove to the intersection of New Hope Church Road and NC 86, just south of Hillsborough. Upon stopping and looking to his left, he noticed a vehicle traveling north on NC 86 in his direction. Lieutenant Eubanks entered the highway and traveled only a short distance when he realized the vehicle he had noticed earlier was approaching him at a high rate of speed. The vehicle, the BMW driven by Hill, passed Lieutenant Eubanks approximately ten seconds after Lieutenant Eubanks had turned onto NC 86. Lieutenant Eubanks estimated the speed of the BMW at approximately eighty miles per hour in a fifty-five-mile-per-hour zone. The vehicle passed Lieutenant Eubanks at a point where NC 86 curved slightly to the right and was marked with a "double yellow" line indicating a no-passing zone.

Immediately after passing Lieutenant Eubanks, Hill realized he had passed a law enforcement officer, assumed a stop would be attempted, and increased his speed to approximately ninety miles per hour. At this point, Lieutenant Eubanks decided to stop the BMW and notified dispatch of his location and intention. Lieutenant Eubanks followed Hill for approximately one-half a mile and then activated his

blue lights and siren. Because of his speed, Hill did not realize he was being ordered to stop until he turned onto I-85 northbound. In Lieutenant Eubanks' opinion, the driver of the BMW had committed the offenses of passing in a no-passing zone, speeding, and careless and reckless driving. In his deposition, Hill stated when he realized he was being directed to stop, he was confident he could lose Lieutenant Eubanks simply because Lieutenant Eubanks was still so far back. Hill maintained that belief throughout the ensuing pursuit, stating that the only reason he attempted to elude Lieutenant Eubanks was that he felt he could get away with it.

Lieutenant Eubanks followed Hill onto I-85, alerting the dispatcher that he was pursuing a vehicle that was refusing to stop. Lieutenant Eubanks requested the dispatcher to alert the Durham Police Department because the pursuit was moving towards Durham. The pursuit continued on I-85 for a distance of five miles. While Lieutenant Eubanks estimated that he and Hill passed approximately ten to twelve vehicles, Hill recollected four to five vehicles. Both agree they encountered no vehicles on NC 86 prior to entering I-85. Lieutenant Eubanks stated that Hill switched lanes several times as he encountered other vehicles in his path and that Hill turned off the BMW's headlights on several occasions in an attempt to elude Lieutenant Eubanks. Lieutenant Eubanks stated that several drivers, apparently comprehending what was taking place, pulled to the shoulder of the road to avoid danger.

During this five-mile stretch on I-85, Lieutenant Eubanks stayed primarily in the left lane, attempting to minimize the danger to other motorists, most of whom were in the right lane. On this five-mile stretch, Lieutenant Eubanks estimated Hill's top speed at 120 miles per hour and his own top speed at 130 miles per hour. The vehicles did not maintain their top speeds for the entire five miles.

At this point, Hill turned off I-85 at exit 170 and headed south on I-85. He subsequently crossed the median, and once again headed north on I-85. Lieutenant Eubanks stopped, waited for traffic to clear, and proceeded north again, thereby allowing Hill to put even more distance between himself and Lieutenant Eubanks. At the interchange of I-85 and US 70 there is a truck stop and an exit ramp. Hill exited I-85 down this exit ramp and proceeded east on US 70 toward Durham.

Officer Dean had been monitoring the pursuit by radio and had positioned himself near the truck stop. As he saw the BMW pass him

at an estimated speed of ninety to one hundred miles per hour, Officer Dean pulled out to pursue Hill but was impeded by a tractor-trailer entering the roadway. At that time, Lieutenant Eubanks was fast approaching Officer Dean and the tractor-trailer. In order to avoid a collision with Officer Dean's vehicle, Lieutenant Eubanks had to brake and pull onto the median. As a result of this incident, Lieutenant Eubanks and Officer Dean lost sight of the BMW and did not see it again until they arrived at the accident scene.

As Hill sped away from Lieutenant Eubanks and Officer Dean, he was unaware that the truck had cut off the pursuit; however, he was aware that he was no longer being closely pursued. Lieutenant Eubanks and Officer Dean resumed traveling at a normal rate of speed on US 70 in the direction the BMW was last seen. Meanwhile, Hill continued to travel at a high rate of speed along a straightaway of US 70, nearing its intersection with NC 751. Hill admitted he never saw a second officer (Officer Dean) or any other officers on US 70, encountered no additional vehicles on US 70, and never saw a blue light in his rearview mirror while on US 70. Furthermore, Hill stated he felt he had lost the officers, and the only reason he continued to drive at a high rate of speed was to simply make sure he had lost Lieutenant Eubanks.

As he approached the intersection of US 70 and NC 751, Hill was spotted by Officer Bennie E. Bradley of the Durham Police Department (Officer Bradley). Officer Bradley had been monitoring radio traffic concerning the chase and was aware the BMW might be entering Durham. Therefore, Officer Bradley had positioned his vehicle at the intersection so that he could assist if the pursuit entered Durham. As Hill approached, Officer Bradley looked back on US 70 and saw no approaching vehicles. Moments later, he observed the BMW's headlights were off and it was traveling in excess of ninety miles per hour. When Hill passed Officer Bradley's location, Officer Bradley pulled into the road and traveled only 375 feet when the BMW suddenly veered left, crossed the westbound lane of travel, and disappeared into the darkness west of Orangewood Road, ultimately crashing into a residence. Officer Bradley called for rescue and drove to the accident scene. When he exited his vehicle, Officer Bradley located the driver and then saw Lieutenant Eubanks and Officer Dean approaching the scene at normal speeds. The body of the deceased, Louis Lyle Parish, was discovered later.

In general, the weather on 19-20 February 1993 was clear and the roadways were dry. Because it was 2:00 a.m. or later, there was light

vehicular traffic. Lieutenant Eubanks had his blue lights and siren activated during the entire pursuit except for a couple of brief moments during the early part of the pursuit when he turned off the siren to communicate with Orange Central. Further, Lieutenant Eubanks never attempted to pass or ram the Hill vehicle.

At the outset, we note that it is proper for a trial court to grant summary judgment for the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). The moving party has the burden of establishing the absence of any genuine issue of material fact, and the evidence presented should be viewed in the light most favorable to the nonmoving party. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 355-56, 348 S.E.2d 772, 774 (1986); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Furthermore, although it is seldom appropriate to grant summary judgment in a negligence action, it is proper if there are no genuine issues of material fact, and the plaintiff fails to demonstrate one of the essential elements of the claim. *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996); *see also Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985).

I. STANDARD OF CARE FOR LAW ENFORCEMENT OFFICERS IN PURSUIT-RELATED VEHICULAR ACCIDENTS

It is well settled that "[p]olice officers have a duty to apprehend lawbreakers and society has a strong interest in allowing the police to carry out that duty without fear of becoming insurers for the misdeeds of the lawbreakers they pursue." *Mixon v. City of Warner Robins*, 209 Ga. App. 414, 416, 434 S.E.2d 71, 73 (1993), *rev'd on other grounds*, 264 Ga. 385, 444 S.E.2d 761 (1994). In such a situation, the law enforcement officer must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury.

The first case to address this issue in North Carolina was the case of *Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959), *overruled by Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996). In that case, the plaintiff instituted an action for negligence against a deputy sheriff for injuries allegedly suffered as the result of a

collision between his vehicle and the deputy's vehicle. The plaintiff alleged the deputy was negligent in driving at an unsafe speed. The deputy answered by denying his negligence, claiming that he was pursuing the plaintiff at the time of the accident because the plaintiff had failed to stop at a stop sign. *Id.* at 129, 110 S.E.2d at 821-22. Following the presentation of evidence, the trial court instructed the jury that it could not find the officer liable unless he was grossly negligent. *Id.* at 132, 110 S.E.2d at 823. The jury returned a verdict in favor of the deputy, and the plaintiff appealed. Upon review, this Court reversed and ordered a new trial, holding that the standard of care in such situations was not gross negligence, but ordinary negligence. In so doing, this Court relied upon both statutory and case law. In *Goddard*, this Court focused on N.C.G.S. § 20-145, which provides:

> **§ 20-145. When speed limit not applicable.**
>
> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . . *This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.*

N.C.G.S. § 20-145 (1993) (emphasis added). This Court then quoted with approval a Michigan case in which the Michigan Supreme Court concluded:

> "We know of no better standard by which to determine a claim of negligence on the part of a police officer than by comparing his conduct . . . to the care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances."

Goddard, 251 N.C. at 134, 110 S.E.2d at 824-25 (quoting *McKay v. Hargis*, 351 Mich. 409, 418, 88 N.W.2d 456, 460 (1958)); *cf. Peak v. Ratliff*, 185 W. Va. 548, 552, 408 S.E.2d 300, 304 (1991) (where the West Virginia Supreme Court held that the statutory language "clearly suggests that the emergency driver is accountable only for reckless acts or gross negligence").

This Court's ruling in *Goddard* had considerable impact on the manner in which North Carolina courts handled police-chase cases. Jeremy D. Arkin, Note, *Police Chase the Bad Guys, and Plaintiffs*

Chase the Police: Young v. Woodall *and the Standard of Care for Officers in Pursuit*, 75 N.C. L. Rev. 2468, 2481 (1997) [hereinafter Arkin, Police Chase]. "In the years following *Goddard*, North Carolina courts applied the ordinary negligence standard to an officer's general driving conduct while in pursuit of violators of the law." *Id.*

This Court departed slightly from the *Goddard* approach in the case of *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988). In reversing the trial court, this Court departed from prior precedent in two distinct ways. First, this Court bifurcated the standard of care to which an officer would be held in a pursuit-related vehicular accident. *See* Arkin, *Police Chase* at 2484. If the officer's vehicle was involved in the collision, the *Goddard* standard of ordinary negligence would apply. *Bullins*, 322 N.C. at 582, 369 S.E.2d at 603. However, in cases in which "the injuries complained of do *not* result from the officer's vehicle colliding with another person, vehicle, or object in the chase or apprehension of a law violator," a gross negligence standard applies. *Id.* at 583, 369 S.E.2d at 603.

Second, this Court construed N.C.G.S. § 20-145 as establishing a general standard of care rather than an exemption from speed laws. Arkin, *Police Chase* at 2485. This Court interpreted the last sentence of the statute to establish a general standard of care of gross negligence, contrary to this Court's holding in *Goddard*.

Thereafter, in *Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357, this Court abolished the distinction established in *Bullins*, concluding that it "[saw] no good reason why there should be a distinction between the standards of care based on whether the officer's vehicle was [involved] in the collision." *Id.* at 462, 471 S.E.2d at 359. Therefore, as the law stands currently, in *any* civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability.

In the time frame between *Bullins* and *Young*, the North Carolina Court of Appeals applied the *Bullins* standard in two decisions: *Fowler v. N.C. Dep't of Crime Control & Public Safety*, 92 N.C. App. 733, 376 S.E.2d 11 (upholding Industrial Commission's denial of claims), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 773 (1989), and *Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747 (1994) (upholding trial court's grant of summary judgment).

II. DISCUSSION

At the outset, we note that gross negligence has been defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603. Further, " '[a]n act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Wagoner v. N.C. R.R. Co.*, 238 N.C. 162, 167, 77 S.E.2d 701, 705 (1953) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 378 (1929)).

In the instant case, the Court of Appeals attempted to distinguish the facts of this case from those of *Bullins*, *Fowler*, *Clark*, and *Young*. To begin our discussion, a similar comparison of the facts and holdings in those four cases with the facts of the instant case, as well as the reasoning of the Court of Appeals, is instructive.

A. *Bullins*, *Fowler*, *Clark* and *Young*:

1. *Bullins v. Schmidt*:

At approximately 1:03 a.m. on 20 January 1985, Officer R.J. Blakely, Jr. (Officer Blakely), of the Greensboro Police Department observed an automobile with a Florida license plate occupying two lanes of traffic on US 220. The vehicle, operated by Luther McMillan, was weaving left to right between two lanes. Officer Blakely attempted to stop the vehicle by turning on his blue lights and siren, but McMillan refused to stop and continued at a low rate of speed. Officer Blakely radioed his observations to the department and was soon assisted by Sergeant C.R. Schmidt, who unsuccessfully attempted to stop the vehicle by utilizing a moving roadblock. McMillan evaded Sergeant Schmidt and continued north on US 220 at an increasingly higher rate of speed. *Bullins*, 322 N.C. at 581, 369 S.E.2d at 602.

The pursuit lasted approximately fourteen minutes and covered a distance of eighteen miles extending into Rockingham County. Officer Blakely and Sergeant Schmidt remained in contact with Lieutenant Stewart, their supervisor, who authorized them to continue the pursuit. The pursuit reached speeds of one hundred miles per hour, and several vehicles had to pull off to the side of US 220 in order to avoid a collision. Thereafter, McMillan attempted to pass a northbound vehicle while in a no-passing zone and struck the decedent's vehicle head on, killing both drivers. *Id.* at 581-82, 369 S.E.2d at 602.

At the location of the accident, US 220 was a two-lane road. At the time of the accident, McMillan's headlights were off. The police vehicles were not involved in the actual collision. Sergeant Schmidt was 100 to 125 yards behind McMillan, with Officer Blakely following Sergeant Schmidt. The officers had in fact reduced their speed and increased the distance between them and McMillan upon seeing northbound vehicles in front of McMillan. *Id.* at 582, 369 S.E.2d at 602-03.

The administrator of decedent's estate brought a wrongful death action against Officer Blakely, Sergeant Schmidt, and the City of Greensboro, alleging that the officers' conduct during the pursuit was "grossly or wantonly negligent and in reckless disregard of the rights and safety of others." *Id.* at 584, 369 S.E.2d at 604. The trial court denied defendants' motion for directed verdict at the close of all evidence. On discretionary review prior to a determination by the Court of Appeals, this Court reversed, holding as a *matter of law* that the facts presented did not constitute gross negligence or, for that matter, even ordinary negligence. *Id.*

In the instant case, the Court of Appeals attempts to distinguish the *Bullins* pursuit from the instant case in numerous ways, including: describing the chase in this case as "a brief and relatively slow chase by police of a dangerous drunk driver"; asserting that Hill's vehicle "gave them no sign—other than the speed in which it was going—that its driver had been drinking"; and opining that "I-85 is one of the busiest roadways in the State." However, the pursuit in *Bullins* covered eighteen miles, seven to eight miles *more* than the instant case, and reached top speeds of one hundred miles per hour. Furthermore, the fact that Hill did not exhibit signs of being drunk, other than his extreme speeds and reckless driving, is beside the point. In addition, it was approximately 2:00 a.m., and as the Court of Appeals accurately stated, Lieutenant Eubanks stated he passed only ten to twelve vehicles during the entire pursuit, while Hill said it was four to five vehicles. *Parish*, 130 N.C. App. at 202, 502 S.E.2d at 642.

The Court of Appeals attempts to further distinguish *Bullins* by opining that "it was an undisputed fact in *Bullins* that the police gave up the chase as soon as dangerous conditions arose." *Id.* This is simply a misstatement of the facts. In *Bullins*, the officers never "gave up the chase," but rather "reduced their speed and increased the distance between their vehicles and the McMillan vehicle" to where they

were 100 to 125 yards behind the violator. *Bullins*, 322 N.C. at 582, 369 S.E.2d at 603. In the instant case, this was precisely the situation Lieutenant Eubanks encountered during his pursuit of Hill. There is nothing in the record to suggest that either Lieutenant Eubanks or Officer Dean "forced" Hill to have an accident. Rather, similar to the facts of *Bullins*, the uncontested facts show that Lieutenant Eubanks discontinued any attempts to stop Hill after the tractor-trailer incident and that Officer Dean never actually pursued Hill. Rather than being distinguishable, the facts of *Bullins* are strikingly similar to those in the instant case.

***2. Fowler v. N.C. Dep't of Crime Control & Public Safety*:**

Next, in *Fowler*, Master Trooper Bjorklund of the State Highway Patrol (Trooper Bjorklund) saw a vehicle traveling at approximately eighty miles per hour and, in the beginning, attempted to overtake the vehicle without activating his lights or siren. Once determining the vehicle ahead of him was in fact the vehicle he had observed earlier, Trooper Bjorklund activated his blue lights and siren. Shortly thereafter, he saw a dull orange flash on the horizon and discovered the pursued vehicle had crossed the center line and collided head on with another vehicle, killing the driver of the pursued vehicle and all three occupants of the second vehicle. *Fowler*, 92 N.C. App. at 733-34, 376 S.E.2d at 11-12.

The representatives of the decedents' estates filed a claim with the North Carolina Industrial Commission pursuant to the North Carolina Tort Claims Act seeking damages for Trooper Bjorklund's alleged negligence. The deputy commissioner concluded that Trooper Bjorklund was not negligent, and the Full Commission affirmed. On appeal, the Court of Appeals affirmed, holding that:

> Trooper Bjorklund followed a speeding vehicle for at least eight miles on a rural two-lane highway, at speeds of approximately 115 miles per hour, without activating either his siren or flashing blue light. Although we believe these facts to be more egregious than those of *Bullins*, [322 N.C. 580, 369 S.E.2d 601], we cannot say that they constitute gross negligence. The incident occurred around midnight in a sparsely populated area. [Trooper] Bjorklund testified that he encountered no vehicles [traveling] in the opposite, or westerly, direction, and saw only one vehicle other than the 1967 Chevrolet, which turned off of the highway shortly before he activated his siren and light.

> These circumstances do not exemplify the degree of conscious or reckless indifference toward the safety of others necessary to establish gross negligence.

Fowler, 92 N.C. App. at 736, 376 S.E.2d at 13.

Fowler is significant in that the chase was initiated because of a speed limit violation, and the vehicle was speeding at eighty miles per hour—the *precise* speed Lieutenant Eubanks stated in his estimation the Hill vehicle was traveling on NC 86. Defendant Hill admits he was going at least seventy-five miles per hour. In addition, *Fowler* belies any notion that it is improper to pursue for the offense of speeding, indicating it is the public policy to protect law enforcement officers who attempt to apprehend motorists who are exceeding a safe speed.

As in its discussion of the distinctions between the instant case and the *Bullins* case, with respect to *Fowler*, the Court of Appeals states: "In *Fowler*, the suspect crashed his vehicle but a few seconds after the policeman turned on his blue lights; thus, there was no issue in that case as to whether the police 'forced' the suspect to have the accident, unlike here where there is some question as to whether defendant Hill was actively fleeing the police during the entire pursuit." *Parish*, 130 N.C. App. at 203, 502 S.E.2d at 643. However, as we will discuss later, the mere fact that Lieutenant Eubanks and Officer Dean were pursuing Hill's vehicle does not mean that they forced the accident.

3. *Clark v. Burke County*:

Next, in *Clark*, Deputy James Smith (Deputy Smith) of the Burke County Sheriff's Department responded to a call claiming a man had fired shots at a local arcade. The gunman had entered his vehicle, and Deputy Smith saw the vehicle leaving and pursued it. During the pursuit, Deputy Smith remained approximately four to five car lengths behind and kept his siren and blue lights activated. Upon learning that officers were coming to assist him, Deputy Smith continued the pursuit but made no effort to stop the vehicle. The pursued vehicle entered a curve at approximately seventy-five miles per hour; the driver did not apply his brakes, crashed into an abutment, and killed all three occupants. *Clark*, 117 N.C. App. at 87, 450 S.E.2d at 747-48. There was no evidence that Deputy Smith ever pulled beside the vehicle or tried to pass it or run it off the road. *Id.* at 87-88, 450 S.E.2d at 748. Deputy Smith admitted that he had to drive across the center line to maneuver the curve onto which the driver crashed.

The personal representative of one of the passengers killed in the crash filed a complaint against Burke County and the Burke County Sheriff in which she sought damages for wrongful death. The defendants answered and filed a motion for summary judgment, which subsequently was granted by the trial court. On appeal, the Court of Appeals stated that "[i]t seems [incredible] to suggest that such evidence might show negligence on Deputy Smith's part, and it certainly does not rise to the level of gross negligence." *Id.* at 91, 450 S.E.2d at 750.

In the instant case, the Court of Appeals attempted to distinguish *Clark* by stating that "it entailed a 3 mile pursuit, over an easy road with only one major curve, lasting just a few minutes and reaching speeds of only 75 miles per hour." *Parish*, 130 N.C. App. at 203, 502 S.E.2d at 643. However, we find that these minor differences in the case do not adequately distinguish *Clark* from the instant case.

4. *Young v. Woodall*:

Finally, in *Young*, this Court offered further guidance and explanation as to the sufficiency of the evidence of gross negligence. In *Young*, Officer Christopher Allen Woodall (Officer Woodall) of the Winston-Salem Police Department saw a Chevrolet Camaro approaching him with only one headlight. Officer Woodall began following the vehicle but did not activate his blue lights or siren, stating that if he had done so, it would have given the car he was following a better chance to elude him. His intent was to activate the lights and siren when he was closer to the vehicle. Officer Woodall claimed he did not know the speed at which he was traveling, but it might have been in excess of forty-five miles per hour, which was the posted limit. However, an eyewitness stated Officer Woodall was traveling at a high rate of speed, and the witness could not definitively say whether Officer Woodall's lights were on. While a yellow caution light was flashing in Officer Woodall's direction, he entered the intersection and struck Young's vehicle, which was turning left at the intersection. *Young*, 343 N.C. at 460, 471 S.E.2d at 358.

The trial court granted the motion for summary judgment as to the Police Department, but denied the motion as to the City and Officer Woodall. On appeal, the Court of Appeals affirmed in part and reversed in part, holding that the City and Officer Woodall were entitled to summary judgment based on sovereign immunity, except for negligence claims based on N.C.G.S. § 20-145. On discretionary review, this Court reversed the Court of Appeals' conclusion that the

City and Officer Woodall could be held liable for negligence pursuant to N.C.G.S. § 20-145. After considering all the evidence presented, this Court determined that while certain of Officer Woodall's discretionary acts may have been negligent, they did not rise to the level of gross negligence, and therefore the trial court should have granted summary judgment in his favor. *Id.* at 463, 471 S.E.2d at 360.

In the instant case, the Court of Appeals again attempted to distinguish the facts from those of *Young*, stating that "*Young* is distinguishable because the pursuing officer in that case crashed into the plaintiff's vehicle *before* the suspect even knew he was being chased," thereby negating the "chase" element involved in this case. *Parish*, 130 N.C. App. at 203, 502 S.E.2d at 643. However, as will be noted later, the subjective state of mind of the fleeing suspect is not important in these types of cases.

B. Case *Sub Judice*:

The Court of Appeals appears to opine that summary judgment would no longer be proper in any police pursuit case where the suspect testified, or the evidence suggested, that he was aware of a continued pursuit at the time of the accident and was actively attempting to elude arrest. Such a holding would, in effect, shift the blame from the law violator to the law enforcer, a result which is contrary to our established jurisprudence. As the Seventh Circuit Court of Appeals has recognized:

> Death and disability haunt law enforcement. Lax law enforcement emboldens criminals and leads to more crime. Zealous pursuit of suspects jeopardizes bystanders and persons accompanying the offender. Easy solutions rarely work, and *ex post* assessments—based on sympathy for those the criminal has injured, while disregarding the risks to society at large from new restrictions on how the police work—are unlikely to promote aggregate social welfare.

Mays v. City of East St. Louis, Ill., 123 F.3d 999, 1004 (7th Cir. 1997), *cert. denied*, —— U.S. ——, 141 L. Ed. 2d 137 (1998).

The Court of Appeals also seems to suggest that the state of mind of the fleeing suspect is somehow relevant to the determination of whether the pursuing officer's conduct was grossly negligent. We find this suggestion totally without merit. What the suspect may or may not have known is quite immaterial in the determination

of whether the pursuing officer's conduct rose to the level of gross negligence.

Furthermore, the Court of Appeals insinuates that by continuing the pursuit of a fleeing suspect at high speeds, the pursuing officer is somehow "forcing the accident," regardless of his conduct during that pursuit. However, the only North Carolina case to discuss the issue of forcing the accident specifically rejects the idea. *See Clark*, 117 N.C. App. 85, 450 S.E.2d 747. As set forth above, *Clark* involved a high-speed pursuit of a vehicle, wherein the pursuing officer was only four or five car lengths behind the suspect vehicle at the time of the accident and, according to one eyewitness, was narrowing the gap. *Id.* at 90-91, 450 S.E.2d at 749-50. In *Clark*, the Court of Appeals was unwilling to entertain a "forced" pursuit theory, stating: "It seems [incredible] to suggest that such evidence might show negligence on Deputy Smith's part, and it certainly does not rise to the level of gross negligence." *Id.* at 91, 450 S.E.2d at 750.

In the instant case, Lieutenant Eubanks and Officer Dean pursued defendant over a stretch of approximately ten miles of roadway, during a time of the day when traffic was very light. At no time did they attempt to overtake defendant's vehicle or force defendant's vehicle from the roadway. In fact, when defendant's vehicle crashed on US 70 on its way to Durham, Lieutenant Eubanks and Officer Dean were well behind defendant's vehicle and were traveling at a reduced speed.

In determining whether Lieutenant Eubanks' and Officer Dean's actions in the instant case rose to the level of gross negligence, it is important to remember the purpose behind such high-speed pursuits. As the United States Court of Appeals for the Seventh Circuit has stated:

> Political society must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee—and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders.

Mays, 123 F.3d at 1003. Furthermore, the United States Supreme Court has recently spoken on the subject:

> [T]he police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore

> and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." [(quoting *Whitley v. Albers*, 475 U.S. 312, 320, 89 L. Ed. 2d 251, 261 (1986))]. A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.

County of Sacramento v. Lewis, 523 U.S. 833, ——, 140 L. Ed. 2d 1043, 1061-62 (1998).

After a careful review, we conclude that plaintiff has failed to demonstrate either how the conduct of Lieutenant Eubanks or Officer Dean breached a duty owed to plaintiff's decedent, or the existence of a causal connection between the conduct and the accident. The fact remains that after Lieutenant Eubanks witnessed Hill driving his vehicle at an excessive speed on NC 86, he attempted to pursue Hill. When Hill saw that he was being followed, he attempted to evade arrest by increasing his speed. After Hill had already broken the law by exceeding the legal speed limit, he then attempted to flee from Lieutenant Eubanks' lawful pursuit. *See* N.C.G.S. § 20-141.5(a) (Supp. 1997) (effective 1 December 1997) (making such flight from law enforcement a new crime). While it certainly can be said that Hill increased his speed because of the pursuit by Lieutenant Eubanks and Officer Dean, the blame cannot be borne solely by the pursuing officers unless gross negligence is shown. We find it implausible to suggest that either Lieutenant Eubanks' or Officer Dean's conduct rose to the level of "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603.

In summary, we conclude that plaintiff has failed to demonstrate any negligence on the part of Lieutenant Eubanks and Officer Dean, and certainly has not shown the degree of gross negligence required in order to hold the officers liable for the decedent's death. Therefore, there is no genuine issue of any material fact, and summary judgment was proper as a matter of law on behalf of Lieutenant Eubanks and Officer Dean in their official capacities. This case is remanded to the Court of Appeals with instructions to that court to

remand to the trial court for reinstatement of summary judgment in favor of defendants.

REVERSED.

STATE OF NORTH CAROLINA v. WILLIAM CHRISTOPHER GOODE

No. 40A98

(Filed 9 April 1999)

1. Arrest— probable cause for warrantless arrest

Officers had probable cause to arrest defendant where an officer observed three black males at the scene of two murders before they fled; one of the males had on a jacket with bright yellow showing at the collar and sleeve; defendant's brother was arrested near the scene with the wallet of one of the victims in his pocket; defendant thereafter arrived at the scene, indicated that his brother lived there, and inquired as to what had happened; an officer noticed that defendant had a large bloodstain on the cuff of his bright yellow, long-sleeved shirt; and other officers noticed bloodstains on defendant's tennis shoes.

2. Search and Seizure— bloodstained clothing—item from victim—seizure incident to lawful arrest

Bloodstained clothing and shoes taken from defendant at the sheriff's office and the murder victim's partial dental plate removed from defendant's pocket were seized incident to a lawful arrest and were admissible in defendant's murder trial.

3. Constitutional Law, North Carolina— unrecorded bench conferences—defendant in courtroom—constitutional rights not violated

The trial court did not violate defendant's state constitutional right to be present at every stage of his capital trial by holding unrecorded bench conferences with the prosecutor and defense counsel but without defendant himself before excusing two prospective jurors for hardship reasons where defendant was present in the courtroom at all times.

4. Jury— challenge for cause—death penalty views—life imprisonment sentence

Defendant was not prejudiced by the trial court's excusal of a prospective juror for cause because of her death penalty views where the jury recommended life imprisonment. Furthermore, the trial court did not err in excluding this juror for cause where, after the prosecutor's challenge for cause and a brief attempt at rehabilitation by defense counsel, the trial court questioned the prospective juror and she stated unequivocally that she would be unable to render the death penalty.

5. Jury— denial of challenge for cause—prerequisites for appeal

In order to preserve the right to appeal a denial of a challenge for cause, a defendant must have exhausted his peremptory challenges, renewed his challenge for cause, and had his renewed motion denied. N.C.G.S. § 15A-1214(h).

6. Evidence— photographs—murder victims while alive—crime scene—victims' bodies at scene and autopsies

The trial court did not err by admitting photographs of two murder victims while alive. Nor did the trial court abuse its discretion in the admission of color photographs of the crime scene, the victims' bodies at the crime scene, and the victims' bodies during the autopsies where the photographs illustrated the testimony of various witnesses, including the first responder, law officers, and the forensic pathologist who performed the autopsies; the crime scene contained many pieces of evidence that required documentation; and the record does not show that these photographs were used excessively and solely to inflame the passion and prejudice of the jury against defendant.

7. Aiding and Abetting— presence at scene—encouragement or assistance

A person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission; to be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission. The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators; furthermore, when the bystander is a friend of the perpetrator

and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.

8. Aiding and Abetting— first-degree murder—premeditation and deliberation—sharing of criminal intent

Where a defendant aids and abets the perpetrator in the commission of a first-degree murder based on premeditation and deliberation, he shares the criminal intent of the perpetrator and thus possesses the requisite mens rea and specific intent for that crime.

9. Aiding and Abetting— first-degree murder—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of two first-degree murders based on the theory of aiding and abetting where it tended to show that defendant was the younger brother of one perpetrator and a friend of the second perpetrator; defendant was present with his brother and the friend when the male victim arrived at the brother's mobile home to ask about the rent and when the friend began an assault on the male victim and his brother joined in the attack; when the friend went into the mobile home, leaving defendant's brother alone fighting with the male victim, defendant kicked the victim in order to aid his brother; defendant remained nearby when his friend and his brother stabbed the male victim to death; when the female victim arrived and the friend said that he had to "take her out too," defendant knew that the friend meant that he would kill her; defendant stood only ten feet away as he watched the friend throw the female victim down, beat her, and stab her to death; defendant assisted the friend in moving the bodies to the back of the male victim's truck; and defendant also helped clear the area of evidence.

10. Aiding and Abetting— first-degree murder—friend exception to mere presence rule—instruction supported by evidence

The trial court did not err by instructing the jury in a prosecution for two first-degree murders on the "friend" exception to the mere presence rule under the theory of aiding and abetting where the evidence indicated that defendant was the brother of one perpetrator and the friend of the second perpetrator; defendant was present when the friend began an assault on the male vic-

tim and when his brother joined in the attack; when the friend left, leaving defendant's brother alone fighting with the male victim, defendant kicked the victim in order to aid his brother; defendant remained nearby when his brother and the friend stabbed the male victim to death; when the female victim arrived and the friend said that he had to "take her out too," defendant knew that the friend meant that he would kill her; defendant stood only ten feet away and watched the friend throw the female victim down, beat her, and stab her to death; defendant assisted the friend in moving the bodies; and defendant also helped clear the area of evidence. Not only did defendant know that his presence would be taken as an encouragement and protection to his brother and his friend, his presence was in fact relied upon by both the brother and the friend when defendant provided them with active assistance and protection.

11. Jury— individual poll of jurors—showing in record

Contrary to defendant's contention that the trial court failed to individually poll all twelve members of the jury concerning their assent to verdicts finding defendant guilty of two first-degree murders, the record reflects that each juror was individually polled and that each assented to the guilty verdicts where the record shows that the trial court stated that it would have each of the jurors stand individually and ask if each juror still assented or agreed with the verdict announced in open court; the record indicates that the court individually polled the foreman as to each verdict and then went back to juror number one and repeated the process; the record contains a parenthetical by the court reporter that the jury was polled in open court and that each juror answered that the verdict returned by the foreman was his or her verdict and each still assented thereto; and the trial court, in finding that the announced verdict was a unanimous verdict of all jurors, stated that the jurors had been polled individually.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review judgments imposing consecutive sentences of life imprisonment and fourteen years' imprisonment entered by Stephens (Ronald L.), J., at the 28 November 1994 Criminal Session of Superior Court, Lee County, upon jury verdicts of guilty of two counts of aiding and abetting first-degree murder and one count of aiding and abetting robbery with a dangerous weapon. Heard in the Supreme Court 14 January 1999.

Michael F. Easley, Attorney General, by Teresa L. Harris, Assistant Attorney General, for the State.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, P.A., by Jonathan Silverman, for defendant-appellant.

PARKER, Justice.

Defendant William Christopher Goode was indicted on 30 March 1992 for first-degree murder in the killing of victim Margaret Batten and for first-degree murder and robbery with a dangerous weapon in the killing and robbery of victim Leon Batten. His first capital trial resulted in a mistrial. He was tried capitally a second time, and the jury found him guilty of two counts of aiding and abetting first-degree murder and one count of aiding and abetting robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended a sentence of life imprisonment with respect to the first-degree murders, and the trial court entered judgment accordingly. On the robbery with a dangerous weapon conviction, the trial court sentenced defendant to a consecutive sentence of fourteen years' imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error.

The evidence presented at trial tended to show that on the evening of Saturday, 29 February 1992, defendant and his older brother, George Goode, went out driving in George's wife's car with two friends, Eugene DeCastro and Glenn Troublefield. At one point, George and DeCastro got out of the car and robbed a man named Lamont Wiggins of a gold chain and a Champion jacket. Back behind the wheel, George started driving wildly and "playing chicken" with oncoming traffic; eventually, he lost control and drove the car into a ditch. After some men helped them pull the car out of the ditch, defendant and the others went to a store and bought wine. While driving again, George began taking his hands off the wheel and dancing to music; again he lost control of the car and drove into a ditch. This time the four could not move the car out of the ditch; so they left it there. Troublefield left the others at this point, walking or running down the road. The other three went on foot a short distance through some fields to George's mobile home in the Dallas Mobile Home Park in Bentonville.

A neighbor who saw the car in the ditch went to George's mobile home and asked if everyone was all right. Shortly after the neighbor left, Leon Batten, George's landlord, happened to drive up in his tan

Toyota pickup to ask about unpaid rent that was due. Batten had gone by earlier in the day and had left a note on the door about the rent. George, DeCastro, and defendant went outside with Batten; and Batten and George began discussing or arguing about the rent. When Batten turned around, DeCastro struck him with his fist in the back of the head, staggering him; George joined in, beating and kicking Batten. A short while after this assault began, DeCastro went inside the mobile home, momentarily leaving George fighting with Batten alone. The two were rolling around on the ground. Although George was in the United States Marine Corps and Batten appeared to defendant to be in his fifties, defendant testified that, at one point, Batten was "getting the best of my brother"; so defendant kicked Batten, thereby allowing his brother to get up off of the ground. Batten came up to his knees. At this point DeCastro came out of the mobile home with a nine-inch long butcher knife and began stabbing Batten. George also began stabbing Batten, but defendant could not see what weapon George was using. Defendant was standing six to seven feet away while George and DeCastro stabbed Batten to death.

The medical examiner found, in addition to multiple bruises, abrasions, and stab wounds on the body, neck, and head, a large stab wound in the middle of Mr. Batten's chest which fractured the left fourth and fifth ribs and cut through the heart and lower portion of the right lung. This wound which caused bleeding within the pericardial sac and in both chest cavities was the probable cause of death with the injuries to the head serving a contributing role.

Margaret Batten, Leon Batten's wife, had been told by a neighbor that there was a fight in the trailer park; and she immediately got in her car and drove there, pulling up beside her husband's truck at George's mobile home. DeCastro said, "I got to take her out too." Mrs. Batten got out and began walking toward Mr. Batten's prostrate body. DeCastro threw her to the ground by her neck; kicked her; and stabbed her for two or three minutes, ultimately killing her, while defendant stood ten feet away.

The autopsy revealed twelve closely spaced stab wounds in the middle of Mrs. Batten's chest, three of which went completely through the heart and eleven of which went through the lungs. There were also stab wounds to her lower chest, side, and buttocks; cuts through the stomach, spleen, liver, and kidney; and cuts to the esophagus. Mrs. Batten received a minimum of twenty-three stab wounds, several of which were so deep that after going through the organs,

they actually pierced the back of the chest cavity. She also had cuts on her right hand and fingers and multiple abrasions and lacerations on her head. The cause of death was the multiple stab wounds to the chest and abdomen.

DeCastro then asked defendant to help move the bodies into the back of Mr. Batten's truck, which defendant did. Defendant helped clear the area of evidence and picked up Mr. Batten's partial dental plate, putting it in his pocket. Defendant, DeCastro, and George had started to go through Mr. Batten's wallet when Detective Michael Bass arrived at the scene in his patrol car.

When Detective Bass pulled up, he saw three men. One, who turned out to be George, had on dark-colored coveralls and was kneeling, going through credit cards. The other two were standing beside him: One, DeCastro, was wearing a camouflaged jacket; and the other, defendant, had on a jacket with bright yellow showing at the collar and sleeve. When they saw the police car, they fled behind the mobile home and into a wooded area. Detective Bass then saw the blood-strewn area and discovered the bodies of Mr. and Mrs. Batten in the back of the pickup truck.

George, making his way from the scene on a nearby road, was stopped shortly thereafter by Lieutenant Ron Reynolds, who was responding to a call from Detective Bass. Lt. Reynolds drove George back to the scene of the crime, where Detective Bass identified him as one of the suspects who had fled. When George was searched, Leon Batten's wallet was found in his front pocket.

Defendant, meanwhile, ran out to a road, and while walking away from the direction of the crime scene, hitched a ride from a man named Clarence Atkinson. Atkinson asked defendant where he was going; and defendant named a place which was apparently in the opposite direction, that is, back toward the crime scene. Atkinson turned the car around. At that point Atkinson saw the flashing lights of the police cars at the mobile home park and said he wanted to see what was going on; so he pulled into the mobile home park. Defendant got out of the car, went over to the crime scene, and, indicating that his brother lived at the cordoned-off mobile home, asked the officers, "Where's my brother at (sic)?"

Lt. Reynolds noticed that defendant was wearing a bright yellow, long-sleeved shirt and that there was a bloodstain around the cuff of his sleeve. Lt. Reynolds handcuffed defendant, told him he

was under arrest, and turned him over to Detective Tommy Beasley. Detectives Bass and Beasley noticed blood spatters on defendant's white K-Swiss tennis shoes in addition to the large spot of blood on his left cuff.

Detective Beasley gave defendant his *Miranda* warnings while driving him to the sheriff's office in his patrol car at 9:36 p.m. Shortly after they left, Clarence Atkinson, who had found defendant's blood-stained jacket in the front seat of his car, brought it to the officers at the crime scene.

At the sheriff's office Detective Beasley asked defendant to remove everything from his pockets; one of the things defendant removed was Mr. Batten's partial dental plate. Detective Ned Summerlin then again read defendant the *Miranda* warnings. Defendant signed a waiver of his rights, and at 10:00 p.m. he gave a statement relating the events as they had occurred that evening.

Other officers found Eugene DeCastro with the help of an SBI airplane and infrared tracking devices.

PRETRIAL ISSUES

In defendant's first two assignments of error, he argues that he was unlawfully arrested without probable cause and that the trial court erred in failing to suppress the clothing and partial dental plate seized from him without a warrant and in the course of an unlawful arrest.

Initially we note that defendant has not properly preserved for appellate review the issue of the lawfulness of the arrest. Defendant did not object to the legality of the arrest either in his pretrial motion to suppress the clothing and dental plate or at the hearing on the motion to suppress. At the hearing the prosecutor began by saying, "It appears the defense does not challenge the constitutionality of the arrest in his motion." Defense counsel did not respond to this with any clarity. Later, in closing argument at the hearing, the prosecutor again noted that "defendant in his motion does not . . . address the question of the legalities of his arrest." Defense counsel was thereafter invited by the trial court to respond; and counsel simply said, "No response to that, your honor." Nevertheless, the trial court addressed the legality of the arrest in its conclusions of law as a necessary part of determining whether the seizure of the clothes and dental plate was lawful.

[1] This Court must likewise address the lawfulness of the arrest as part of its analysis of the legality of the seizure of the clothing and dental plate. We conclude that the officers had probable cause to arrest defendant, and that the arrest was lawful. The uncontroverted evidence presented at the hearing showed that Detective Bass had observed three black males at the scene before they fled and had communicated this information to Detective Beasley and Lt. Reynolds. George Goode had then been arrested with the wallet of one of the victims in his front pocket. Defendant thereafter arrived at the scene, indicated that his brother lived there, and inquired as to what was happening and his brother's whereabouts. Lt. Reynolds, noticing that defendant had a large bloodstain on the cuff of his bright yellow, long-sleeved shirt, handcuffed him and told him he was under arrest. Other officers also noticed bloodstains on defendant's tennis shoes. In sum, the officers at the scene of the crimes were presented with a person who potentially fit the general description of the black males who fled the scene; who identified himself as the brother of a man found with the victim's wallet on his person; and who, most importantly, had bloodstains on his clothing. These circumstances amply supported the officers' reasonable belief that defendant played some part in the crime. *See State v. Farmer*, 333 N.C. 172, 181-89, 424 S.E.2d 120, 124-30 (1993) (officers had probable cause to make arrest where the defendant was seen with blood on his pants, shirt, arms, and face, and with scratches on his face and neck, and where he gave officers a false name); *State v. Small*, 293 N.C. 646, 654-55, 239 S.E.2d 429, 435 (1977) (officers had probable cause to make arrest where the defendant was seen wearing bloody clothing within two hundred feet of the place in which the victim was discovered, and officers saw the bloody clothing later in the defendant's home). Thus, even if the issue of the legality of the arrest had been properly preserved by defendant, he could not prevail in his contention that probable cause to arrest him did not exist.

[2] Defendant next argues that the clothing taken from him at the sheriff's office and the partial dental plate removed from his pocket must be suppressed since they were seized as a result of an unlawful arrest without probable cause. We conclude, however, that since the arrest of defendant was lawfully made, the search of defendant's person and the seizure of both his clothing and the dental plate were also lawful. A search without a search warrant may be made incident to a lawful arrest. *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980). " 'In the course of [a] search [incident to arrest], the officer

may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof.' " *State v. Harris*, 279 N.C. 307, 310, 182 S.E.2d 364, 366-67 (1971) (quoting *State v. Roberts*, 276 N.C. 98, 102, 171 S.E.2d 440, 443 (1970)). In this case defendant was under lawful arrest at the time he was asked by Detective Beasley to empty his pocket containing the dental plate and at the time his clothing and tennis shoes, stained with blood from the crimes, were taken from him. Therefore, these items were lawfully seized; and the trial court did not err in allowing their admission into evidence. Defendant's assignments of error are overruled.

JURY SELECTION

[3] In defendant's next assignment of error, he argues that the trial court erroneously excused prospective jurors Wilma Diven and Robert Harmon without defendant's consent and without motion from either party. The gist of defendant's argument seems to be that the trial court violated defendant's state constitutional right to be present at every stage of his capital trial by holding unrecorded bench conferences with the prosecutor and defense counsel but without defendant himself. We have addressed this issue recently, and at length. *See State v. White*, 349 N.C. 535, 545-47, 508 S.E.2d 253, 260-61 (1998); *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. The transcript in this case reveals that the trial court was questioning jurors on the record to determine whether they could foresee any hardships that would compromise their obligations as jurors. At a certain point in each colloquy, the trial court called the prosecutor and defense counsel to the bench and held a conference with them off the record. Then, back on the record, the court excused Diven and Harmon, stating the grounds for each hardship excusal and noting that counsel had no objection. The prosecutor and defense counsel were then invited to state anything further for the record and both declined. Defendant was present in the courtroom at all times. In accordance with our prior holdings, we overrule defendant's assignment of error.

[4] Defendant next assigns error to the trial court's granting of the prosecutor's challenge for cause as to prospective juror Darlene

Adams. Defendant contends that by excusing Adams, the trial court abused its discretion in violation of *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), since Adams did not unequivocally state that she would be unable to render the death penalty and indicated that she could follow the law. First, even if it was error for the trial court to excuse this prospective juror, the excusal did not prejudice defendant since the jury recommended not the death sentence, but life imprisonment. *See State v. Rannels*, 333 N.C. 644, 655-56, 430 S.E.2d 254, 260 (1993). Had the jury not recommended life imprisonment, we nevertheless could not conclude that the trial court abused its discretion. After the prosecutor's challenge for cause and a brief attempt at rehabilitation by defense counsel, the trial court questioned the prospective juror about her ability to impose the death penalty, concluding ultimately with the following exchange:

> THE COURT: All right. So no matter what I say to you as far as the law and what charge I gave to you or what facts are shown, right now you'll recommend the life sentence if this defendant is convicted of first-degree murder, is that correct?
>
> [PROSPECTIVE] JUROR ADAMS: Yeah.

Adams thus unequivocally stated that she would be unable to render the death penalty. This assignment of error is overruled.

[5] Defendant next contends that the trial court erred by denying his challenge for cause as to prospective juror Helen McDuffie based upon her inability to follow the law. Defendant argues that because the trial court denied his challenge for cause, he was forced to use one of his peremptory challenges to dismiss the prospective juror and was thereby prejudiced. Defendant, however, has not preserved his right to appeal the denial of his challenge for cause as he did not satisfy the statutory requirements during jury selection. In order to preserve the right to appeal a denial of a challenge for cause, a defendant must have exhausted his peremptory challenges, must have renewed his challenge for cause, and must have had his renewed motion denied. N.C.G.S. § 15A-1214(h) (1997). "The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986). This assignment is overruled.

GUILT-INNOCENCE PHASE

[6] Defendant next assigns error to the admission into evidence of photographs of the victims and of the crime scene. Defendant argues that the numerous and duplicative photographs were inflammatory, gruesome, and unfairly prejudicial. Defendant specifically objects to (i) the photograph of Leon and Margaret Batten taken some time prior to their deaths; (ii) the numerous color photographs of the crime scene, including shots of the victims' beaten and bloody bodies and various parts of their bodies; and (iii) photographs of the bodies taken during the autopsies.

Whether to admit photographic evidence requires the trial court to weigh the probative value of the photographs against the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403 (1992); *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). This determination lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Id.* at 284, 372 S.E.2d at 526.

With respect to the photograph of the Battens when alive, defendant has failed to preserve his contention for appellate review; he neither raised an objection in the trial court, *see State v. Rush*, 340 N.C. 174, 179-80, 456 S.E.2d 819, 822-23 (1995), nor assigned plain error to the photograph's admission, *see State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998). Even if he had preserved the issue, defendant's argument would fail. This Court has previously held that it is not error to admit the photograph of a victim when alive. *State v. Bishop*, 346 N.C. 365, 388, 488 S.E.2d 769, 781 (1997); *State v. Norwood*, 344 N.C. 511, 532, 476 S.E.2d 349, 358 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). Furthermore, this photograph was introduced during the examination of the Battens' daughter to illustrate her testimony about her parents' appearance and health prior to their deaths.

Regarding the photographs of the crime scene, the victims' bodies at the crime scene, and the victims' bodies during the autopsies, we conclude that the trial court did not abuse its discretion in ad-

mitting the photographs. The record does not support that these photographs were used excessively and solely to inflame the passions and prejudices of the jury against defendant. The crime scene photographs at issue depicted the condition and location of the victims' bodies at the time they were found, and each photograph showed a unique perspective or contained some subject matter or detail unique to that photograph. Further, these photographs illustrated the testimony of various witnesses, including Douglas Batten, a "first responder" who examined and identified the two bodies; SBI Special Agent David McDougall, who conducted the crime scene search; and Lt. Kenneth Eatman, the chief investigator. The large number of photographs, in itself, is not determinative. This particular crime scene contained many pieces of evidence that required documentation: the multiple wounds to various parts of the bodies, one of Mrs. Batten's shoes, identification cards and papers belonging to Mr. Batten, a wrist watch, a one hundred dollar bill, a wine bottle, a plastic card with blood on it, the position of the two vehicles, and the bloody trail between the two vehicles.

The autopsy photographs illustrated the testimony of Dr. Deborah Radisch, the forensic pathologist who performed the autopsies on the two bodies. Dr. Radisch used these photographs to illustrate her testimony about the multiple injuries inflicted on the victims, the weapons or implements that may have caused such injuries, and the injuries that most likely were the cause of death. In sum, we cannot say that the trial court's decision to admit these photographs was so arbitrary that it could not have been supported by reason. This assignment of error is overruled.

Defendant next assigns error to the trial court's denial of defendant's motion to dismiss all charges at the close of all the evidence. However, defendant has abandoned review as to the robbery with a dangerous weapon charge, since he makes no argument on that charge in his brief. N.C. R. App. P. 28(b)(5). Defendant argues with respect to the first-degree murder charges that no substantial evidence, direct or circumstantial, supported a reasonable inference either of premeditation and deliberation or that defendant possessed the requisite specific intent. Defendant maintains that there is no evidence that he personally inflicted the victims' wounds or that he aided and encouraged George Goode and Eugene DeCastro in murdering the victims.

[7],[8] In ruling on a motion to dismiss a charge of first-degree murder, the trial court must consider the evidence in the light most favor-

able to the State and give the State every reasonable inference to be drawn therefrom. *State v. Elliott*, 344 N.C. 242, 266, 475 S.E.2d 202, 212 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). A person is guilty of a crime by aiding and abetting if (i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person. *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). A person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission; to be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission. *State v. Lemons*, 348 N.C. 335, 354, 501 S.E.2d 309, 321 (1998). The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators. *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976). Furthermore, when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement. *Lemons*, 348 N.C. at 355, 501 S.E.2d at 321; *State v. Gaines*, 345 N.C. 647, 679, 483 S.E.2d 396, 415, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997). Where a defendant aids and abets the perpetrator in the commission of a first-degree murder based on premeditation and deliberation, he shares the criminal intent of the perpetrator and thus possesses the requisite *mens rea* and specific intent for that crime. *See Gaines*, 345 N.C. at 677, 483 S.E.2d at 414; *State v. Buckner*, 342 N.C. 198, 226-27, 464 S.E.2d 414, 429-30 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996); *State v. Allen*, 339 N.C. 545, 557-60, 453 S.E.2d 150, 156-58 (1995), *overruled on other grounds by Gaines*, 345 N.C. at 676, 483 S.E.2d at 414.

[9] Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, we conclude that substantial evidence exists that defendant aided and abetted George Goode and Eugene DeCastro in the murders of Mr. and Mrs. Batten.

Defendant is the younger brother of George Goode and a friend of Eugene DeCastro. When Mr. Batten arrived at George's mobile home to ask about rent, defendant was present with George and DeCastro when DeCastro hit Mr. Batten in the back of the head. Defendant was there as George and DeCastro began beating and kicking Batten. Defendant testified that when DeCastro went inside the mobile home, leaving George fighting with Batten alone, Batten was "getting the best of my brother." Defendant also testified that because Batten was gaining some advantage over George, defendant kicked Batten. This allowed George to get up off the ground. Mr. Batten then came up to his knees. Directly after this, defendant saw DeCastro come out of the mobile home with a nine-inch butcher knife and watched, from six to seven feet away, as DeCastro and George stabbed Batten to death. When Mrs. Batten drove up, defendant heard DeCastro say, "I got to take her out too," knowing that DeCastro meant that he was going to kill Mrs. Batten. Then, standing just ten feet away, defendant watched as DeCastro went over to Mrs. Batten, threw her to the ground, kicked her, and stabbed her to death. Defendant then helped DeCastro move the bodies into the back of Mr. Batten's truck and remove evidence from the scene. Defendant picked up Mr. Batten's partial dental plate and put it in his pocket. In sum, the evidence demonstrates that defendant intended to assist George and DeCastro, that he in fact assisted them, and that George and DeCastro knew of and relied upon defendant's support and aid. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss the charges of first-degree murder under the theory of aiding and abetting. Defendant's assignment of error is overruled.

[10] Defendant next argues, in a related assignment of error, that the trial court erred in instructing the jury on the "friend" exception to the mere-presence rule under the aiding and abetting theory. Defendant contends that the evidence was insufficient to support the friend exception to the mere-presence rule since there was no evidence either that defendant encouraged or intended to assist George and DeCastro or that George and DeCastro knew of defendant's support and encouragement. The trial court instructed as follows:

> Now ladies and gentlemen, I have just indicated the State must prove all these things to you beyond a reasonable doubt from the evidence, including that the defendant knowingly encouraged or aided the actual perpetrator or perpetrators in the commission of a crime. However, members of the jury, I instruct

you that a person is not guilty of a crime merely because he is present at the scene of the crime even though he may secretly approve of the crime or silently approve of the crime or secretly intend to assist in its commission. To be guilty, he must aid or actively encourage the person committing the crime or in some way communicate to that perpetrator his intention to assist in its commission if assistance is needed.

In further explanation of these legal principles, the North Carolina Supreme Court has stated with regard to this matter that the mere presence of a defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of an offense which was committed by another in his presence. For the defendant to be guilty of such a crime committed in his presence by another, the State's evidence must prove beyond a reasonable doubt that the defendant was, one, actually present with the intent to aid the perpetrator in the commission of that crime should the defendant's assistance become necessary and, two, that the defendant's intent to aid was communicated to the actual perpetrator in some manner.

Now, ladies and gentlemen of the jury, I charge you that this communication of the defendant's intent to aid, if needed, does not have to be shown by expressed words of the defendant to the perpetrator. It may be inferred from the defendant's actions and from his relation to the actual perpetrator. When a bystander is a friend of the actual perpetrator and when that bystander knows that his presence will be regarded and relied upon by the actual perpetrator as an encouragement and as a protection and assistance of the perpetrator, then presence alone, under those circumstances, may be regarded under our law as encouragement to commit a crime.

First, the trial court's instruction is in accordance with our holdings. *See Gaines*, 345 N.C. at 679, 483 S.E.2d at 415; *State v. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 185 (1973). We have consistently held that "communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *Sanders*, 288 N.C. at 291, 218 S.E.2d at 357. Moreover, presence alone may be regarded as an encouragement when the defendant " 'is a friend of the perpetrator[,] and knows that his presence will be

regarded by the perpetrator as an encouragement and protection.' " *State v. Haywood*, 295 N.C. 709, 719, 249 S.E.2d 429, 435 (1978) (quoting *State v. Holland*, 234 N.C. 354, 358, 67 S.E.2d 272, 275 (1951)).

In this case the evidence indicated that defendant was George Goode's brother and Eugene DeCastro's friend. Defendant was present when DeCastro began the assault on Mr. Batten and when George joined in the attack. When DeCastro left, leaving George alone fighting with Mr. Batten, defendant kicked Mr. Batten in order to aid his brother. Defendant remained nearby when DeCastro and George stabbed Batten to death. When Mrs. Batten arrived and DeCastro said that he had to "take her out too," defendant knew DeCastro meant that he would kill her. Defendant stood and watched DeCastro throw her down, beat her, and stab her to death. Defendant was only ten feet away. When DeCastro asked him to help move the bodies, defendant assisted. Defendant also helped clear the area of evidence, including Mr. Batten's dental plate. We conclude that this evidence was sufficient to support the friend exception to the mere-presence rule. Not only did defendant know that his presence would be taken as an encouragement and protection to George and DeCastro, his presence was in fact relied upon by both George and DeCastro when defendant provided them with active assistance and protection. We overrule defendant's assignment of error.

[11] In defendant's final assignment of error, he contends that the trial court erred by not individually polling all twelve members of the jury concerning their assent to each verdict. The record indicates that the following occurred:

> [THE COURT:] Ladies and gentlemen, what the court is going to do right now is poll you individually in regards to your verdict at the request of the defendant to insure that this is a unanimous verdict. The manner in which this will be done, as the court will do it, I will have each of you stand individually as I call your names. I'll indicate what you said in regards to your verdict in open court previously and ask if you still assent to or agree with that verdict individually.

The court individually polled the foreperson as to each verdict and then went back to juror number one and repeated the process. The record indicates in a parenthetical by the court reporter, "Upon motion by the defendant, the jury was polled in open court. Each juror answered that the verdict returned by the foreman was his or her verdict and each still assented thereto." The court then said,

"Ladies and gentlemen, having polled the jury now, I'm going to ask that you step back into the jury deliberation room for just a moment. . . . The jury having been polled individually by—at the request of the defendant by the court, the court finds that this is a unanimous verdict of all jurors and is proper in all respects." Defendant did not object at any time to the manner of individual polling, but now maintains that the record is silent as to whether each juror assented to each verdict. We disagree with defendant that the record is silent; the record in fact reflects that each juror was individually polled and that each assented to the guilty verdicts. We overrule defendant's final assignment of error.

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

NO ERROR.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. TONI M. FORTIN AND BRUCE ALLEN FORTIN

No. 296PA98

(Filed 9 April 1999)

1. Insurance— automobile—UIM coverage—rejection invalid

A rejection of UIM coverage was no longer effective following the 1991 amendment of N.C.G.S. § 20-279.21(b)(4). Consistent with the language and intent of that statute, an insurer is required to offer its insureds the opportunity to select UIM coverage limits in an amount between $25,000 and $1,000,000 and to obtain a valid rejection or selection of different UIM coverage limits under this new option, notwithstanding that the policy is a renewal policy.

2. Insurance— automobile—UIM coverage—renewal form

Plaintiff-insurer did not satisfy the requirements of N.C.G.S. § 20-279.21(b)(4) by providing defendants with its version of a renewal form which defendant Bruce Fortin executed and which purportedly rejected UIM coverage. Defendant's version of

renewal form NC0186 was not the form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance, and did not require the rejection to be made in writing, as the statute specifically provides, but by contacting a State Farm agent. The language of the statute is mandatory and the rejection was not in accord with the statute.

3. Insurance— automobile—UIM coverage—amount

An insured's UIM coverage was $100,000 per person and $300,000 per accident where the version of N.C.G.S. § 20-279.21(b)(4) in effect on the date of the last renewal of the policy and on the date of the accident provided that, if the insured did not reject underinsured coverage or select different limits, the amount of underinsured motorist coverage would be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy; the limits on the dates of the last renewal and the accident were $100,000 per person and $300,000 per accident; and there was neither a valid rejection of UIM coverage nor a selection of different coverage limits.

Justice PARKER dissenting.

Chief Justice MITCHELL joins in this dissenting opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a unanimous decision of the Court of Appeals, 129 N.C. App. 839, 501 S.E.2d 351 (1998), affirming an order of summary judgment in favor of defendants signed by Barnette, J., on 18 July 1997, in Superior Court, Durham County. Heard in the Supreme Court 12 February 1999.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for plaintiff-appellant.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., for defendant-appellees.

FRYE, Justice.

In a case of first impression before this Court, we must decide whether there was a valid rejection of underinsured motorist (UIM) coverage for a renewal of a personal auto policy issued subsequent to the effective date of the 1991 amendments to N.C.G.S. § 20-279.21(b)(4), the UIM provision of the Motor Vehicle Safety and Financial Responsibility Act (the Act). The Court of Appeals, affirm-

ing the trial court in this case, held that there was not. For the reasons stated herein, and by our Court of Appeals in *Maryland Cas. Co. v. Smith*, 117 N.C. App. 593, 452 S.E.2d 318, *disc. rev. denied*, 340 N.C. 114, 456 S.E.2d 316 (1995), we agree.

On 18 November 1994, defendant Toni Fortin was injured in an automobile accident. At the time of the accident, Toni Fortin was a passenger in a vehicle operated by her husband, defendant Bruce Fortin. Mrs. Fortin filed a civil suit and obtained a jury verdict of $218,000 against Vincente Jaimes, the operator of the other vehicle. Jaimes had insufficient liability coverage to fully satisfy the judgment. The vehicle operated by Mr. Fortin was insured under a policy issued by plaintiff State Farm Mutual Automobile Insurance Company (State Farm). Toni Fortin made a demand of plaintiff for payment of UIM benefits under the policy. Plaintiff declined to make any payment, contending that the policy provided no UIM benefits.

At the time of the collision, the Fortins' State Farm policy provided personal injury liability limits of $100,000/ $300,000 and uninsured motorist (UM) coverage of $100,000/ $300,000 per person per accident. On 15 July 1991, Bruce Fortin, a named insured, executed a selection/rejection form, selecting the option: "I choose to reject Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of [Bodily Injury] 100/300; [Property Damage] 100." The policy had a renewal date of 16 January 1992. At the time for renewal, plaintiff forwarded to defendants, and Bruce Fortin executed, a selection/rejection form that included the following language: "If you wish to make a change or select other limits contact your State Farm Agent. YOUR CURRENT U BODILY INJURY LIMITS ARE $100,000/$300,000." There is no evidence in the record that Bruce Fortin contacted his insurance agent to select any different coverage than that which existed at the time of renewal.

Plaintiff filed this action on 2 April 1997 seeking a declaratory judgment that there was no UIM coverage available to its insured defendants under any policy issued by State Farm. The trial court entered summary judgment in favor of defendants. The Court of Appeals affirmed, holding that at the time of the accident, on 18 November 1994, the State Farm policy issued to defendants included UIM coverage. Plaintiff appealed from this decision, and on 5 November 1998, this Court granted plaintiff's petition for writ of certiorari.

[1] The issue before this Court, whether the State Farm policy provides UIM coverage to defendants, is dependent upon whether there was a valid rejection of UIM coverage by Bruce Fortin for a renewal of the policy subsequent to 5 November 1991, the effective date of the 1991 amendments to N.C.G.S. § 20-279.21(b)(4). Absent a valid rejection, a policy that includes UM coverage and contains bodily injury liability limits exceeding the statutory minimums must provide UIM coverage. N.C.G.S. § 20-279.21(b)(4) (1993 & Supp. 1998); *see also Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 263-64, 382 S.E.2d 759, 762 (1989). We conclude that there was no valid rejection of UIM coverage in this case.

Prior to the amendment of N.C.G.S. § 20-279.21(b)(4) in 1991, an automobile liability insurance policy with bodily injury liability limits in excess of the statutory minimum was required to provide UIM coverage equal to the policy's bodily injury liability limits, absent an effective rejection. N.C.G.S. § 20-279.21(b)(4) (1989); *see also Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 147, 400 S.E.2d 44, 50 (1991). Effective 5 November 1991, the General Assembly amended the Act to allow an insured to select UIM coverage "in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 [$25,000 and $50,000] nor greater than one million dollars." N.C.G.S. § 20-279.21(b)(4) (1993 & Supp. 1998). This amendment created a significant new choice for insureds regarding their options for UIM coverage. Instead of offering only two choices, rejection of UIM coverage or UIM coverage at the same limits as bodily injury liability coverage, the statute, as amended, permits insureds to select any UIM coverage limit from $25,000 to $1,000,000.

After its 1991 amendment, N.C.G.S. § 20-279.21(b)(4) also provided, in part, as follows:

> An insured named in the policy may select different coverage limits as provided in this subdivision. Once the named insured exercises this option, the insurer is not required to offer the option in any renewal . . . policy unless the named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured is valid and binding on all insureds and vehicles under the policy.
>
> If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the cover-

> age in any renewal . . . policy unless the named insured makes a written request for the coverage.

N.C.G.S. § 20-279.21(b)(4) (effective 5 November 1991).[1]

We agree with the reasoning of the Court of Appeals in *Maryland Casualty Co. v. Smith* when it addressed the effect of these 1991 statutory amendments on an insured's earlier rejection of UIM coverage. 117 N.C. App. 593, 452 S.E.2d 318. In *Maryland Casualty*, the insured, Ralph Smith, executed a selection/ rejection form NC0185 rejecting UIM coverage on 29 September 1991. The Smiths renewed their policy in March 1992 but did not request that UIM coverage be added at that time. Holding that the rejection executed on 29 September 1991 was no longer valid and effective after the 1991 amendment of N.C.G.S. § 20-279.21(b)(4), the Court of Appeals stated:

> By providing that the insurer is *not* required to offer the option to select different policy limits once the named insured has exercised that option, the legislature in effect provided that the insured must be given the opportunity to exercise that option initially. . . .
>
> . . . [A]t the time of the renewal, the insureds should have been permitted to make a fresh choice as to whether they wished to purchase underinsured coverage or reject it.

Id. at 598, 599, 452 S.E.2d at 321. We likewise conclude that, consistent with the language and intent of N.C.G.S. § 20-279.21(b)(4), an insurer is required to offer its insureds the opportunity to select UIM coverage limits in an amount between $25,000 and $1,000,000 and to obtain a valid rejection or selection of different UIM coverage limits under this new option, notwithstanding that the policy is a renewal policy. Accordingly, Bruce Fortin's July 1991 rejection of UIM coverage under the previous option was no longer effective following the 1991 amendment of N.C.G.S. § 20-279.21(b)(4).

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1. The statute was further amended in 1992 as follows:

> Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal . . . policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.

N.C.G.S. § 20-279.21(b)(4) (effective 1 October 1992).

[2] The Act governs not only the coverage options which must be made available to insureds, but also specifies the manner in which the choice must be offered and made. We now consider whether, in this case, plaintiff satisfied the requirements of N.C.G.S. § 20-279.21(b)(4) by providing defendants with the State Farm version of renewal form NC0186 which Bruce Fortin executed in January 1992. On that date, the statute provided, in pertinent part, "[r]ejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance." N.C.G.S. § 20-279.21(b)(4) (Supp. 1991). We note first that the State Farm version of renewal form NC0186 that Bruce Fortin executed in January 1992 was not the "form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance." We note further that the statute specifically provides that rejection "shall be made in writing" on the approved form. The State Farm renewal form required that the rejection be made, not "in writing" on the form, but by contacting the State Farm agent. Thus, the rejection was not in accord with the statute.

In what appears to have been a clarifying amendment, the General Assembly amended this portion of the statute, effective 1 October 1992, to read as follows:

> Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C.G.S. § 20-279.21(b)(4) (1993 & Supp. 1998).[2] The language of this provision is mandatory. An insurer is obligated to obtain the insured's selection or rejection of UM or UM/UIM coverage in writing and on a form promulgated by the Rate Bureau and approved by the Commissioner.

Rate Bureau form NC0185 for selection or rejection of UM and UM/UIM coverage was used for new automobile liability insurance policies issued prior to 5 November 1991 or policies renewed prior to that date. It was a version of this form that Bruce Fortin executed on 15 July 1991. Pursuant to the 1991 amendments to N.C.G.S. § 20-279.21(b)(3) and (b)(4), the UM and UM/UIM coverage

2. N.C.G.S. § 20-279.21(b)(3) contains a similar provision regarding selection/rejection of UM coverage.

selection/rejection form was redrafted by the Rate Bureau, and two new forms approved by the Department of Insurance became effective 5 November 1991. The revised form NC0185 contains an explanation of the UM and UM/UIM options available to an insured and, at the bottom of the form, provides the following three choices:

> ___ I choose to reject Combined Uninsured/ Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of:
>
> Bodily Injury ____; Property Damage ____
>
> ___ I choose Combined Uninsured/Underinsured Motorists Coverage at limits of:
>
> Bodily Injury ____; Property Damage ____
>
> ___ I choose to reject both Uninsured and Combined Uninsured/Underinsured Motorists Coverages.

Form NC0186 was approved for use by insurance companies for renewal policies. Form NC0186 contains the same explanation of coverage options as form NC0185, but it does not provide the insured with the three clear choices from which to exercise a rejection of UIM coverage or a selection of different limits. In order to make a change from existing coverage, or to select other coverage limits, the insured is instructed to contact the insurer.

Plaintiff contends that the selection/rejection form provided to defendants and signed by Bruce Fortin on 16 January 1992 contained all of the language of the Rate Bureau form NC0186; that it informed defendants of the new law; and therefore, that rejection of UIM coverage was made on a proper form. Defendants contend, *inter alia*, that the State Farm renewal form executed by Bruce Fortin on 16 January 1992 necessarily contemplated a renewal of previously selected coverage and did not offer defendants a fresh choice to reject UIM coverage or select different coverage limits as provided by the amended statute. Therefore, because the 15 July 1991 rejection of UIM coverage was rendered invalid by the intervening 1991 amendment of N.C.G.S. § 20-279.21(b)(4) and because plaintiff failed to provide defendants with the proper selection/rejection form, form NC0185, at the time of the policy's renewal on 16 January 1992, there was no valid rejection of UIM coverage under the State Farm policy.

We agree with defendants that plaintiff did not offer them the opportunity to make a new choice regarding UIM coverage as required by N.C.G.S. § 20-279.21(b)(4), and therefore, there was no valid rejection of UIM coverage for the renewal policy. Because there was no valid rejection of UIM coverage on the revised form NC0185, at the time of the Fortins' accident, UIM coverage was included in the policy in accordance with the provisions of N.C.G.S. § 20-279.21(b)(4) as amended in 1991.

[3] We now address the amount of UIM coverage provided by the State Farm policy. While the Court of Appeals, in affirming the trial court, held that the policy did include UIM coverage, neither court below addressed the amount of UIM coverage provided. Defendants contend that they have UIM coverage in the amount of $1,000,000, citing *Metropolitan Property & Cas. Ins. Co. v. Caviness*, 124 N.C. App. 760, 478 S.E.2d 665 (1996), *disc. rev. denied*, 345 N.C. 642, 483 S.E.2d 710 (1997). We disagree. In *Caviness*, an earlier version of N.C.G.S. § 20-279.21(b)(4) was in effect, and the Court of Appeals determined that the statute was ambiguous as to the amount of UIM coverage available to an insured who failed to select or reject UIM coverage. *Id.* at 763, 478 S.E.2d at 667. Because the Act must be liberally construed to give effect to its remedial purpose of providing innocent victims of financially irresponsible motorists with the fullest possible protection, the Court of Appeals in *Caviness* concluded that the insured was entitled to $1,000,000 in UIM coverage, the highest available limit of UIM coverage under the Act at that time. *Id.* at 763-65, 478 S.E.2d at 668.

However, effective 1 October 1992, N.C.G.S. § 20-279.21(b)(4) was amended to provide that "[i]f the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy." Act of July 2, 1992, ch. 837, sec. 9, 1991 N.C. Sess. Laws 322, 339-40, 342. This was the version of the statute in effect on the date of the last renewal of the policy prior to and on the date of defendants' accident, 18 November 1994. On each of these dates, the highest limit of bodily injury liability coverage for any one vehicle in the State Farm policy was $100,000 per person and $300,000 per accident. Therefore, because there was neither a valid rejection of UIM coverage nor a selection of different coverage limits, defendants' UIM coverage is $100,000 per person and $300,000 per accident.

For the foregoing reasons, we hold that the State Farm policy provides defendant Toni Fortin with $100,000 in UIM coverage. The decision of the Court of Appeals is therefore affirmed as modified.

MODIFIED AND AFFIRMED.

Justice PARKER dissenting.

I respectfully dissent. The record includes the affidavit of Bernard Cox, Assistant Deputy Commissioner in the Property and Casualty Division of the North Carolina Department of Insurance, which states: "Form NC 01 86 (Ed. 7/91) was approved by the Department of Insurance for use by companies for renewal business."

Form NC 01 86 as revised in conjunction with the 1991 amendments to N.C.G.S. § 20-279.21(b)(4) provides:

SELECTION/REJECTION FORM
UNINSURED MOTORISTS COVERAGE
COMBINED UNINSURED/UNDERINSURED
MOTORISTS COVERAGE

Uninsured Motorists Coverage (UM) and Combined Uninsured/Underinsured Motorists Coverage (UM/UIM) and coverage options are available to me. I understand that:

1. the UM and UM/UIM limits shown for vehicles on this policy may not be added together to determine the total amount of coverage provided.

2. UM and UM/UIM bodily injury limits up to $1,000,000 per person and $1,000,000 per accident are available.

3. UM property damage limits up to the highest policy property damage liability limits are available. Coverage for property damage is applicable only to damages caused by uninsured motor vehicles.

4. my selection or rejection of coverage below will apply to any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy with this company, or affiliated company, unless a named insured makes a written request to the company to exercise a different option.

5. my selection or rejection of coverage below is valid and binding on all insureds and vehicles under the policy, unless a

named insured makes a written request to the company to exercise a different option.

Having been given the opportunity to select other limits, I hereby select the Uninsured Motorists Coverage or Combined Uninsured/Underinsured Motorists Coverage limits, if any, as shown on the enclosed renewal notice, and reject any other such coverage or limits.

(If you wish to make a change or select other limits contact company/agent/telephone number)

A Named Insured _____ Policy/ App. Number _____

Signature _____ Agent _____

Date _____

The only difference between Form 01 86 and Form 01 85 is that on Form 01 85 the unnumbered paragraphs after paragraph five are deleted and the following is inserted:

(CHOOSE ONLY ONE OF THE FOLLOWING)

____ I choose to reject Combined Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of:

Bodily Injury_____; Property Damage_____

____ I choose Combined Uninsured/Underinsured Motorists Coverage at limits of:

Bodily Injury_____; Property Damage_____

____ I choose to reject both Uninsured and Combined Uninsured/Underinsured Motorists Coverages.

A Named Insured _____ Policy/ App. Number_____

Signature _____ Agent _____

Date _____

The form sent to the insureds and executed by Bruce Fortin at the time for renewal of the policy in January 1992 provided:

URGENT NOTICE

State Farm Mutual Automobile Insurance Company

Selection/Rejection Form
Uninsured Motorists Coverage
Combined Uninsured/Underinsured Motorists Coverage

North Carolina law states that, unless rejected, no policy of motor vehicle liability insurance shall be issued or deferred unless it contains coverage for the persons insured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. (Coverage for property damage is subject to an exclusion of the first $100,000. In addition to Uninsured Motorists Coverage (Coverage U), an optional Combined Uninsured/Underinsured Motorists Coverage (Coverage U1) must be made available. Coverage U1 also includes underinsured motorists protection. A motor vehicle is underinsured if the liability limits of the at-fault owner or driver are less than the Uninsured/Underinsured limits of the insured's policy. Coverage U1 can only be purchased if your liability insurance limits are greater than the minimums required by North Carolina law.

Coverage U and Coverage U1 are available with limits up to $1,000,000 per accident for bodily injury and up to the policy property damage liability limits for property damage. Coverage for property damage is applicable only to damages caused by uninsured motor vehicles.

Uninsured Motorists Coverage (UM) and Combined Uninsured/Underinsured Motorists Coverage (UM/UIM) and coverage options are available to me. I understand that:

1. the UM and UM/UIM limits shown for vehicles on this policy may not be added together to determine the total amount of coverage provided.

2. UM and UM/UIM bodily injury limits up to $1,000,000 per person and $1,000,000 per accident are available.

3. UM property damage limits up to the highest policy property damage liability limits are available. Coverage for property damage is applicable only to damages caused by uninsured motor vehicles.

4. my selection or rejection of coverage below will apply to any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy with this company, or affiliated company, unless a named insured makes a written request to the company to exercise a different option.

5. my selection or rejection of coverage below is valid and binding on all insureds and vehicles under the policy, unless a named insured makes a written request to the company to exercise a different option.

Having been given the opportunity to select other limits, I hereby select the Uninsured Motorists Coverage or Combined Uninsured/Underinsured Motorists Coverage limits, if any, as shown on the enclosed renewal notice, and reject any other such coverage or limits.

If you wish to make a change or select other limits contact your State Farm Agent.

YOUR CURRENT U BODILY LIMITS ARE $100,000/$300.000.

A Named Policy/
Insured FORTIN, TONI C. & BRUCE A. App. Number 246-7674-A26-33I

Signature _____ Agent CHUCK FINKLEA Jr.

Date _____

SEE REVERSE SIDE FOR IMPORTANT INFORMATION

The reverse side of the form alerted the recipient in bold letters "ACTION NEEDED"; further explained what the law required, how UM/UIM coverage protected the insured, and what options were available; and provided a table showing the premium for coverages.

In my view, the State Farm form, which included the exact same language as NC Form 01 86 and was sent to the Fortins with the policy renewal, satisfied the statutory requirements in effect in January 1992 that "[r]ejection of this coverage for policies after October 1, 1986 shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance." N.C.G.S. § 20-279.21(b)(4) (Supp. 1991).

Further, I cannot agree with the majority that "plaintiff did not offer [defendants] the opportunity to make a new choice regarding

UIM coverage as required by N.C.G.S. § 20-279.21(b)(4)." The explanation of the options on NC Form 01 86 is exactly the same as on NC Form 01 85. The statute only requires that the insured be given the opportunity to select or reject other limits. Nothing in the statute suggests that the only way the opportunity to make this decision can be validly offered is by giving the insured the opportunity to fill in the blanks on a form. Like the panel of the Court of Appeals in *Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 452 S.E.2d 318, *disc. rev. denied*, 340 N.C. 114, 456 S.E.2d 316 (1995), the majority of this Court ignores the substance of paragraphs one through five on NC Form 01 86 and the language which states:

> Having been given the opportunity to select other limits, I hereby select the Uninsured Motorists Coverage or Combined Uninsured/Underinsured Motorists Coverage limits, if any, as shown on the enclosed renewal notice, and reject any other such coverage or limits.
>
> If you wish to make a change or select other limits contact your State Farm Agent.

How the language offering insureds the opportunity to select or reject different options could be any clearer is difficult to understand.

As a practical matter when a person applies for a new policy, an insurance agent is usually involved in taking the application and assisting the proposed insured in filling out the necessary forms. Hence, NC Form 01 85 with blanks to be checked and blanks where numbers are to be written is feasible. However, policy renewals are usually handled through the mail without the involvement of the insurance agent. Hence, a form which explains the options and then tells the insured in plain, easily-understood language, "[i]f you wish to make a change or select other limits contact your State Farm Agent," is far less likely to confuse and mislead the insured. The average person, unschooled in the terminology and complexities of insurance contracts, would not be confident in filling in the blanks on NC Form 01 85 without the assistance of the individual's insurance agent.

Finally, under the majority's interpretation of the statute, NC Form 01 86, promulgated by the Rate Bureau and approved by the Commissioner of Insurance, would have been unnecessary. Irrespective of how long the policy had been in force, an insured could not validly reject underinsured motorist coverage after the 1991 amendments without having first been furnished NC Form 01 85.

In sum, in my opinion, the form furnished by plaintiff to defendants in the instant case complied in all respects with N.C.G.S. § 20-279.21(b)(4), as amended, by informing defendants, in language about as simple as the statute can be explained, of the coverage they had, the new options available, and the procedure to select or reject those options. Insured's execution of the form on 11 January 1992 constituted a valid rejection of underinsured motorist coverage. Accordingly, I vote to reverse.

Chief Justice MITCHELL joins in this dissenting opinion.

JULIENE McCLELLAN GOINS v. JOEL G. PULEO, M.D., ELLEN A. PULEO, M.D., AND PINEHURST WOMEN'S CLINIC, P.A.

No. 279A98

(Filed 9 April 1999)

Discovery— request for admissions—plaintiff's failure to respond—admission established—summary judgment for defendants

Where the pro se plaintiff failed to respond to defendants' request for admissions in this medical malpractice action, including an admission that all health care provided by defendants was in conformity with the applicable standard of care, plaintiff did not move the court, expressly or impliedly, to withdraw or amend her admissions, and the record shows that the trial court did not in any manner undertake to allow plaintiff to withdraw or amend her admissions, the admissions became conclusively established facts in the case pursuant to N.C.G.S. § 1A-1, Rule 36(a) and constituted a valid basis for summary judgment. Because plaintiff's admission that defendants did not breach the applicable standard of care was before the trial court, the trial court should have granted defendants' motion for summary judgment in their favor.

Justice FRYE dissenting.

Appeal of right by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 28, 502 S.E.2d 621 (1998), reversing one order and affirming another order, both of which were entered 29 January 1997 by

Burke, J., in Superior Court, Moore County. Heard in the Supreme Court 11 January 1999.

Gill & Dow, by Douglas R. Gill, for plaintiff-appellee.

Walker Barwick Clark & Allen, L.L.P., by Robert D. Walker, Jr. and Jeffrey T. Ammons, for defendant-appellants.

MITCHELL, Chief Justice.

The sole question presented for review before this Court is whether the Court of Appeals erred by affirming the trial court's order denying defendants' motion for summary judgment based on their contention that plaintiff had failed to timely respond to their request for admissions as required by N.C.G.S. § 1A-1, Rule 36. For the reasons that follow, we conclude that plaintiff did not comply with Rule 36 of the North Carolina Rules of Civil Procedure and that the trial court erred by entering the order denying summary judgment in favor of defendants on that basis. Accordingly, we reverse that part of the decision of the Court of Appeals which affirmed this order.

This appeal arises from plaintiff's claim of medical negligence against defendant health-care providers. Plaintiff alleged that she was treated for menorrhagia at the Pinehurst Women's Clinic from 1988 until late August 1990 by defendant Dr. Joel Puleo, an obstetrician and gynecologist. In August 1990, plaintiff began to experience significant menorrhagia and blurred vision. Plaintiff alleged that as a result of medical negligence on the part of defendants, she developed diabetic ketoacidosis, pancreatitis, and an extremely elevated glucose level that ultimately left her in a diabetic coma for several days.

Based upon the foregoing allegations, plaintiff originally filed an action, with the benefit of counsel, against defendants Joel and Ellen Puleo, Pinehurst Women's Clinic, and Moore Regional Hospital on 23 August 1993. On 11 September 1995, plaintiff, acting *pro se*, voluntarily dismissed that action without prejudice. On 10 September 1996, plaintiff, again acting *pro se*, brought this action against the Puleos and Pinehurst Women's Clinic, making essentially the same allegations as in her first action.

Defendants served plaintiff with their answer and a request for admissions by certified mail. One request asked plaintiff to admit that all health care provided by all defendants was in conformity with the applicable standards of medical care. Plaintiff did not respond to defendants' request for admissions.

At a pretrial hearing, defendants contended that they were entitled to judgment in their favor on two grounds. The first was that the action was barred by the applicable statute of limitations. The second was that plaintiff had failed to respond to their request for admissions and therefore, by operation of law, had admitted that defendants had complied with the applicable standard of care. Plaintiff, appearing *pro se* at the hearing, denied receiving the request for admissions. In response, defendants presented an affidavit and return receipt tending to show that the request for admissions was sent to plaintiff's home and was received and signed for by plaintiff's husband on 7 October 1996. Plaintiff made no motion and did not otherwise request that the trial court allow her to withdraw or amend her admissions. She relied instead upon the mere allegations of negligence contained in her complaint. Nevertheless, the trial court stated that summary judgment was an "extreme measure" and entered an order denying defendants' motion that summary judgment be granted in their favor because of plaintiff's failure to respond to the request for admissions. However, the trial court entered a separate order concluding that plaintiff's claim was barred by the statute of limitations and dismissing the action on that basis. Plaintiff appealed.

The Court of Appeals unanimously reversed the trial court's order dismissing plaintiff's action for failure to comply with the statute of limitations, concluding that the continuing-course-of-treatment doctrine tolled the running of the statute. Defendants have not sought to have us review that holding by the Court of Appeals, and no issue concerning it is before us.

The majority in the Court of Appeals, with Judge John C. Martin dissenting, affirmed the trial court's separate order denying defendants' motion seeking summary judgment in their favor because of plaintiff's failure to respond to their request for admissions. Defendants now appeal to this Court, based upon Judge Martin's dissent below, and contend that the Court of Appeals erred in affirming this order denying summary judgment.

In support of their single assignment of error, defendants again contend that because plaintiff never responded to their request for admissions, she admitted all facts as requested. Defendants further contend that since plaintiff failed to move that the trial court permit her to withdraw or amend the admissions, the admissions have become conclusively established facts in the case and constitute a valid basis for summary judgment. We agree.

Rule 36(a) of the North Carolina Rules of Civil Procedure provides in pertinent part that when a written request for admissions is properly served upon a party to a lawsuit,

> *[t]he matter is admitted unless, within 30 days after service of the request*, or within such shorter or longer time as the court may allow, *the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter*, signed by the party or by his attorney.

N.C.G.S. § 1A-1, Rule 36(a) (1990) (emphasis added). Moreover, "[a]ny matter admitted under this rule is conclusively established unless the court *on motion* permits withdrawal or amendment of the admission." N.C.G.S. § 1A-1, Rule 36(b) (1990) (emphasis added). Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment. *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637, *disc. rev. denied*, 306 N.C. 386, 294 S.E.2d 211 (1982).

In reaching its decision, the majority in the Court of Appeals relied upon *Balson v. Dodds*, 62 Ohio St. 2d 287, 405 N.E.2d 293 (1980). In *Balson*, the Supreme Court of Ohio considered the language of Ohio's Rule 36(b) and concluded that a trial court has discretion to decide whether a party has made a motion to withdraw or amend admissions in the absence of a formal written motion. Because the language of our Rule 36(b) is identical to the language of the Ohio rule, the majority of the Court of Appeals similarly concluded that the issue of whether a party has made a motion for withdrawal or amendment of admissions is a matter to be decided by the trial court in its discretion and that the trial court could have reasonably concluded here that plaintiff moved the court to withdraw or amend the admissions. We disagree. Without addressing or deciding the question of whether a trial court has the discretion to determine whether a party has made a "motion," we conclude that the trial court could not have reasonably concluded that plaintiff made any motion in this case to withdraw or amend her admissions. Further, it is clear from the record on appeal that the trial court concluded that plaintiff had not made any such motion in this case.

In the instant case, defendants presented the trial court with a copy of the return receipt signed by plaintiff's husband and an affidavit of service, thereby raising a presumption that plaintiff received the request for admissions. N.C.G.S. § 1A-1, Rules 4(j2)(2) and 5(b)

(1997). Even though plaintiff denied receiving the request for admissions, she acknowledged that defendants had mailed the document to the correct address, and she made no attempt to rebut the presumption of receipt when questioned by the trial court. Therefore, we must presume that plaintiff was properly served with defendants' request for admissions. *Id.*

In the request for admissions, defendants requested that plaintiff admit: (1) all health care provided by defendants was in conformity with the applicable standards of medical care; (2) as of the date plaintiff instituted this action, neither she nor any attorney on her behalf had consulted with a medical expert who expressed an opinion that the care provided by defendants failed to conform to the applicable medical standards; and (3) as of the date plaintiff instituted this action, no expert witness had evaluated any medical records relating to the medical attention given plaintiff by defendants. The record reveals that plaintiff did not respond to the request. Moreover, plaintiff did not move the court, expressly or impliedly, to withdraw or amend her admissions. Rather, plaintiff merely denied receiving defendants' request for admissions; she never contested the substance of the request. The record further shows that the trial court did not in any manner undertake to allow plaintiff to withdraw or amend the admissions. Therefore, the facts are deemed admitted by plaintiff pursuant to Rule 36(a).

Whether to grant summary judgment was not a decision resting in the discretion of the trial court. Summary judgment is properly entered in favor of the moving party if the movant establishes that an essential element of the opposing party's claim is nonexistent. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff. Because plaintiff's admission that defendants did not breach the applicable standard of medical care was before the trial court in the present case, the trial court was required to grant defendants' motion and enter an order of summary judgment in their favor.

The entry of summary judgment in favor of defendants in this case may appear to lead to a harsh result. Nevertheless, the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them. Therefore, the rules must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.

For the foregoing reasons, we conclude that the trial court erred by entering the order denying summary judgment for defendants based upon plaintiff's admissions. Therefore, the decision of the Court of Appeals affirming that order, over Judge Martin's dissent, is reversed, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Moore County, for entry of summary judgment for defendants.

REVERSED IN PART AND REMANDED.

Justice FRYE dissenting.

The law is clear that the trial court would not have erred by relying on plaintiff's default admissions and granting defendants' motion for summary judgment in this case. *See, e.g., Rahim v. Truck Air of the Carolinas, Inc.*, 123 N.C. App. 609, 473 S.E.2d 688 (1996); *Overnite Transp. Co. v. Styer*, 57 N.C. App. 146, 291 S.E.2d 179 (1982); *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637, *disc. rev. denied*, 306 N.C. 386, 294 S.E.2d 211 (1982). However, that is not the question this Court must decide. The sole question presented to this Court, by virtue of a division on the Court of Appeals' panel, is whether the trial court abused its discretion by denying defendants' motion for summary judgment based on plaintiff's failure to respond to the request for admissions. I would hold that the trial court did not abuse its discretion.

Rule 36(a), as the majority here correctly notes, provides that if a party fails to respond to a request for admission within thirty days after service of the request, or within such time as the court may allow, then the matter is deemed admitted. N.C.G.S. § 1A-1, Rule 36(a) (1990). The rule goes on to provide:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, *the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.*

N.C.G.S. § 1A-1, Rule 36(b) (emphasis added). The majority focuses on the first part of this section, which provides that any matter ad-

mitted is conclusively established unless the court "on motion" permits a withdrawal or amendment of the admission. However, the latter part of the rule, which concerns preservation of the merits of the action, must also be considered.

In this case, the first of defendants' three requests went to the central issue of whether defendants had violated the standard of care; this issue was obviously in dispute since it was the essence of plaintiff's lawsuit. I believe the trial court acted within its discretion in denying defendants' motion for summary judgment, in effect allowing plaintiff to withdraw her default admissions in order to "subserve" the merits of the case. Defendants do not argue that they would be prejudiced in maintaining their defense on the merits if the admissions were withdrawn. Defendants contend only that plaintiff did not make a "motion" to withdraw or amend her admissions, and therefore, the trial court had no choice but to rule against her on a motion for summary judgment.

"The North Carolina Rules of Civil Procedure are modeled after the federal rules. In most instances they are verbatim copies with the same enumerations." *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970) (citation omitted). This is certainly true of N.C. R. Civ. P. 36, which is virtually identical to the Federal Rule 36. Because the Federal Rules of Civil Procedure are the source of the North Carolina Rules of Civil Procedure, this Court has said that we will look to decisions under the federal rules "for enlightenment and guidance as we develop 'the philosophy of the new rules.' " *Id.* at 101, 176 S.E.2d at 165.

This Court should heed its own words and look to the body of case law pertaining to Federal Rule 36 for guidance in resolving the present issue. In *Kosta v. Connolly*, 709 F. Supp. 592 (E.D. Pa. 1989), the court reasoned as follows:

> Defendants argue that because plaintiffs have not answered defendants' request for admissions, under F.R. Civ. P. 36(a) we should consider the statements admitted. . . . Accepting these statements in the requests for admission as conclusively proven facts, defendants argue that plaintiffs have admitted to violating [the statute].
>
> *The purpose of F.R. Civ. P. 36(a) is to expedite trial by eliminating the necessity of proving undisputed and peripheral*

issues. We should not employ the rule to establish facts which are obviously in dispute or to answer questions of law.

In the case at bar, the question whether the plaintiffs violated the statute is neither undisputed nor peripheral. . . . Moreover, the question of plaintiffs' guilt is central to this case. If plaintiffs admitted to violating the statute, they would effectively resolve the disputed issues of selective enforcement, malicious prosecution, violation of constitutional rights, etc. *Clearly, that is not the plaintiffs' position, and Rule 36 is not intended to make it so.*

Id. at 594 (emphasis added) (citations omitted) (footnote omitted).

Likewise, in *Bergemann v. United States*, 820 F.2d 1117 (10th Cir. 1987), the court upheld the district court judge's discretion to deny a motion for partial summary judgment and give relief from an admission achieved by default. The court stated:

Bergemann's position in this court is basically that because the United States failed to answer the requests for admission . . . the United States, under Fed. R. Civ. P. 36(a), is deemed to have admitted that there was a common law marriage between Bergemann and Dunkle, and that such admission, under the circumstances of this case, is conclusive and continues to this date. We disagree.

. . . Bergemann's rejoinder to Rule 36(b) is that any withdrawal or amendment of an admission may only be "on motion," and that the United States did not file any motion.

We think Bergemann's argument is overly technical and does not recognize the reality of the situation. . . .

The district judge, after reflection and careful analysis of the matter, denied the motion for partial summary judgment, and, in so doing, necessarily granted the United States relief from any admission that there was a common law marriage between Bergemann and Dunkle. In this latter regard, *we find no abuse of discretion as Rule 36(b) permits withdrawal where it promotes a decision on the merits while not prejudicing the party who obtained the admission.* We find no prejudice in this case. Bergemann clearly knew defendants challenged the existence of a common law marriage. . . . The prejudice contemplated by Rule

now has to convince the jury of its truth. Something more is required.

Id. at 1120-21 (citations omitted) (emphasis added).

"The canon of interpretation of the Federal Rules is one of liberality, and it has been held in numerous decisions that the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits." *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E.2d 420, 421 (1972). We should not in this case elevate form over substance in the interpretation of North Carolina's rules, thereby depriving the trial court of the discretion to preserve the merits of a case, based on the lack of a "motion" by the *pro se* plaintiff where there is no evidence that the other party would suffer any prejudice in the presentation of its defense.

For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. ALFRED MILTON RIVERA

No. 1A98

(Filed 9 April 1999)

1. Evidence— hearsay—state of mind exception—conversation with codefendant—plan to frame defendant

In a prosecution of defendant for two first-degree murders based upon premeditation and deliberation and the felony murder rule, testimony by a prison inmate about a conversation he had with a codefendant in jail in which the codefendant claimed to have "two dudes" who were going to say it was defendant who committed the murders was admissible under the state-of-mind exception to the hearsay rule and was improperly excluded by the trial court. The testimony tended to show the codefendant's intent to direct or assist the two men in executing the plan to identify defendant as the shooter and was thus admissible as evidence of the codefendant's then-existing intent to engage in a future act.

2. Criminal Law— prosecutor's closing argument—disparagement of opposing counsel—impropriety

In a prosecution for two first-degree murders in which testimony by the obstetrician of defendant's girlfriend that he examined her on the afternoon of the murders conflicted with her testimony that defendant spent the entire day of the murders at her home and that she and defendant never left the house, the prosecutor's statement during closing argument that defense counsel "displayed one of the best poker faces as we introduced [the obstetrician] in the history of this courthouse" was an improper comment that disparaged opposing counsel in violation of the standard of "dignity and propriety" required of all trial counsel by Rule 12 of the General Rules of Practice for the Superior and District Courts. The trial court's remark, after overruling defendant's objection, that the jury would decide the case based upon the evidence and not the personalities of the lawyers was insufficient to cure this impropriety.

3. Homicide— felony murder—specific intent for underlying felonies—*Blankenship* rule applicable

Because two murders with which defendant was charged occurred after the decision of *State v. Blankenship*, 337 N.C. 543 (1994), but before the nonretroactive decision of *State v. Barnes*, 345 N.C. 184 (1997), the acting-in-concert rule applied in Blankenship applies to defendant's trial. Therefore, the trial court must charge the jury in defendant's new trial that before it can render a verdict of guilty of felony murder on the basis of defendant's acting in concert with regard to the underlying specific intent felonies of armed robbery and kidnapping, it must first find that defendant himself possessed the requisite specific intent.

Justices MARTIN and WAINWRIGHT 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 two sentences of death entered by Eagles, J., on 24 October 1997 in Superior Court, Forsyth County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 17 November 1998.

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

J. Clark Fischer for defendant-appellant.

MITCHELL, Chief Justice.

On 7 October 1996, defendant was indicted for two counts of first-degree murder. Defendant was tried capitally at the 6 October 1997 Criminal Session of Superior Court, Forsyth County. The jury found defendant guilty of both counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for each first-degree murder conviction. The trial court sentenced defendant accordingly.

The State's evidence tended to show, *inter alia*, that on the evening of 22 March 1996, defendant, Alfred Milton Rivera, also known as "Heavy," and his codefendants, Milton "Shorty" Hauser, JaHen Marlin, and Antonio "Sunshine" Bryant, went to the apartment of Michael Nicholson and his stepbrother James Smith to rob them. Bryant, Nicholson, and defendant were drug dealers, and Nicholson allegedly owed Bryant more than $2,000 on a drug debt. While inside the apartment, defendant shot both Nicholson and Smith in the head at close range. Nicholson was dead when police arrived on the scene, and Smith died in the hospital shortly thereafter.

Marlin and Hauser testified against defendant at his capital trial. According to their testimony, they entered the victims' apartment with defendant on the evening of 22 March 1996. Bryant waited for them outside in a minivan the four men had "rented" in exchange for crack cocaine. Shortly thereafter, defendant and Marlin pulled guns on the victims in the kitchen, and Hauser began to tie Nicholson's hands with a belt. Nicholson was on his knees begging the men to stop when defendant shot him in the back of the head at close range. Marlin and Hauser attempted to leave, but defendant stopped them. Smith tried to escape into the back of the apartment, but Marlin struck him in the head with a gun. Defendant then forced Smith into a back bedroom to search for something, presumably drugs. Smith ransacked the room while defendant screamed obscenities at him. Finally, defendant shot Smith in the head at point-blank range. Marlin, Hauser, and defendant then returned to the minivan, and the four codefendants drove away. Several prosecution witnesses testified that all four codefendants had been in Nicholson and Smith's

apartment at least twice on the afternoon of 22 March 1996 and that defendant was one of the men who had entered prior to the shootings.

The theory of the defense at trial was that Bryant, Hauser, and Marlin committed the murders with no involvement by defendant. Defendant presented alibi evidence for the entire day of 22 March 1996. Defendant also presented the testimony of John Howard Brown, an inmate at Central Prison, regarding a conversation he allegedly overheard between Hauser and Marlin. According to Brown's testimony, both men acknowledged that defendant was not present when the victims were killed but that defendant would have to "take the fall" for the murders because they did not like him and because defendant was from New York.

In addition, defendant called James Calvin Segers, an inmate in federal prison in Missouri, to testify about a conversation he had with Bryant in the Forsyth County jail in which Bryant claimed to have "two dudes" who were going to say it was defendant who committed the murders. Following a *voir dire*, the trial court concluded that Segers' testimony regarding the conversation with Bryant was inadmissible hearsay. The trial court also weighed the probative value of the testimony against the danger of unfair prejudice under Rule 403 of the North Carolina Rules of Evidence and further concluded that the testimony was likely to confuse the issues needlessly and should thus be excluded. N.C.G.S. § 8C-1, Rule 403 (1997).

[1] By an assignment of error, defendant contends that the trial court erred by prohibiting him from introducing Segers' testimony about Bryant's plan to frame defendant for the murders. We agree. Defendant argues that Segers' testimony concerning Bryant's statements is admissible under exceptions to the hearsay rule: specifically, exceptions provided for in Rules 803(3) (statements of a declarant's then-existing state of mind), 804(b)(3) (statements against penal interest), and 804(b)(5) (residual or "catchall" exception). Without deciding whether the testimony is admissible as a declaration against penal interest or under the residual or "catchall" exception, we conclude that the testimony is admissible under the state-of-mind exception.

" '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) (1997). In general, hearsay evidence is not admissible. *State v. Wilson*, 322

N.C. 117, 367 S.E.2d 589 (1988). However, Rule 803(3) of the North Carolina Rules of Evidence allows the admission of hearsay testimony into evidence if it tends to show the declarant's then-existing state of mind. N.C.G.S. § 8C-1, Rule 803(3) (1997).

Defendant in the case *sub judice*, relying on *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990), argues that the excluded testimony is admissible as evidence of Bryant's then-existing state of mind under Rule 803(3). In *Sneed*, the defendant was charged with the first-degree murder of a service-station owner. On *voir dire*, the defendant sought to introduce hearsay testimony which indicated that a third party had expressed his intention to rob the service station where the victim was killed. The State argued that the proffered testimony was inadmissible hearsay. This Court concluded that the excluded testimony was relevant and admissible because " 'Rule 803(3) allows the admission of a hearsay statement of a then-existing intent to engage in a future act.' " *Id.* at 271, 393 S.E.2d at 534 (quoting *State v. McElrath*, 322 N.C. 1, 17-18, 366 S.E.2d 442, 451 (1988)).

In this case, the following exchange occurred during defendant's *voir dire* of Segers:

> Q. What did he [Bryant] tell you about the murders?
>
> A. I said, Sunshine, I just talked to somebody and they told me that you knew about those murders that you were talking to me about a gun for or something. He said, Pop, I'm up on that, but it ain't going to be shit to that because I got these two dudes here and if anything go down, they going to say it was this dude named Heavy. I said, Heavy who? He said, The guy you remember seeing on that green motorcycle with me out by Lakeside that time. I said, Yeah, I saw him then, and I saw him talking to you down by 15th Street. He said, Well, these dudes said we going to lay on Heavy everything because those guys from New York, they do stuff like that, and people, they will believe he done that. Would do that.
>
> Q. Did you ask Mr. Bryant if Heavy had anything to do with it?
>
> A. Yes. I said, I thought you told me when you asked him about a gun he said he didn't have nothing to do with that. He said, Pop, you know he didn't say, but we got it taken care of if anything come up. It ain't nothing up on it right now. He said, I'm trying to get out of this what I'm into now, is when he told me that.

The State argues that the Rule 803(3) exception is inapplicable here because Bryant's purported statements do not establish his intent to engage in a future act. Rather, the statements, at best, convey Bryant's belief that two other men intended to identify defendant as the shooter. Furthermore, because defendant was tried for each homicide on a theory of felony murder, the central factual issue at trial was simply whether defendant took part in the actions that led up to the murders, regardless of who pulled the trigger. Therefore, the State argues, even if Segers' testimony had been allowed, Bryant's alleged statements would not have established that defendant was absent from the scene when the killings took place. We disagree.

Bryant's alleged statements that "*I* got these two dudes here" (emphasis added) who were to "lay on [defendant] Heavy everything" tend to show Bryant's intent to direct or assist the two men in executing the plan. Thus, Segers' testimony concerning Bryant's statements was admissible as evidence of Bryant's then-existing intent to engage in a future act. Moreover, the testimony of Segers would have added weight and credibility to Brown's testimony, which tended to show that defendant did not take part in the robbery or homicides. The credibility of Segers and Brown as witnesses and the weight to be given their testimony are issues for the trier of fact. Based upon the foregoing, we conclude that the trial court erred to defendant's prejudice by excluding Segers' testimony regarding the alleged conversation with Bryant. Therefore, defendant is entitled to a new trial.

[2] By another assignment of error, defendant claims that during the State's closing argument at the trial, the prosecutor made improper comments that amounted to a personal characterization of defense counsel. Although this issue is not determinative in light of the aforementioned error requiring a new trial, we nonetheless note our agreement with defendant that the prosecutor made an improper comment.

At trial, defendant's girlfriend, Lakisha Daniels, testified that defendant spent the entire day of 22 March 1996 at her home and that she and defendant never left the house. However, Ms. Daniels' obstetrician, Dr. Steve Bissett, testified that he examined Ms. Daniels on the afternoon of 22 March 1996. Furthermore, medical records indicated that laboratory tests had been performed on Ms. Daniels that afternoon. During his closing argument, the prosecutor remarked, over defendant's objection, that defense counsel "displayed one of

the best poker faces as we introduced Dr. Bissett in the history of this courthouse." Defendant contends that this comment by the prosecutor improperly implied that defense counsel had personal knowledge of both the validity and the damaging nature of the State's evidence concerning Ms. Daniels' whereabouts on 22 March 1996 and was attempting to conceal this knowledge by not reacting to the presentation of Dr. Bissett's testimony.

It is well established that the jury arguments of trial counsel are left largely to the control and discretion of the trial court, and counsel will be granted wide latitude in the argument of hotly contested cases. *State v. Robinson*, 346 N.C. 586, 488 S.E.2d 174 (1997). Nevertheless, "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)); *see also* Gen. R. Pract. Super. and Dist. Ct. 12, 1999 Ann. R. N.C. 10 ("All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.").

Here, after overruling defendant's objection, the trial court remarked that the jury would decide the case based upon the evidence and not the personalities of the lawyers. However, we conclude that the trial court's comments were not enough. Although the comment of the prosecutor in this case was not extreme, it did not meet the standard of "dignity and propriety" required of all trial counsel by Rule 12 of the General Rules of Practice for the Superior and District Courts. Gen. R. Pract. Super. and Dist. Ct. 12, 1999 Ann. R. N.C. 10 ("Counsel are at all times to conduct themselves with dignity and propriety."). We have viewed with concern the apparent decline in civility in our trial courts. This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to insure that the mandates of Rule 12 are strictly complied with in all cases and to impose appropriate sanctions if they are not.

[3] Defendant next argues that the trial court committed plain error by instructing the jury that defendant could be convicted of felony murder based upon the specific intent of another as to the underlying felonies of robbery with a dangerous weapon and kidnapping, contrary to this Court's holdings in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), and its progeny. *See, e.g., State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996). Because we are granting defendant a new trial on other grounds, we need not address this argument. However, because of the likelihood of this issue arising at a new trial, we choose to address defendant's argument.

In *Blankenship*, this Court held that when an accused is charged with acting in concert in relation to a specific-intent crime, the prosecution must prove that each individual defendant possessed the requisite *mens rea* to commit the specified crime. 337 N.C. at 558, 447 S.E.2d at 736. Although *Blankenship* was subsequently overruled by this Court in *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 134, and *cert. denied*, — U.S. —, 140 L. Ed. 2d 473 (1998), this case is controlled by *Blankenship*. We indicated in *Barnes* that our decision with respect to the rule of acting in concert in that case would not be applied retrospectively. *Id.* at 234, 481 S.E.2d at 72. Because the crimes with which defendant was charged occurred after our decision in *Blankenship* but before our decision in *Barnes*, the acting-in-concert rule applied in *Blankenship* also applies to the instant case. Therefore, the trial court must charge the jury at defendant's new trial that before it can properly render a verdict of guilty on the basis of defendant's acting in concert with regard to any of the specific-intent crimes, it is first required to find that defendant himself possessed the requisite specific intent.

For the reasons stated herein, we hold that the trial court erred by excluding admissible testimony and that defendant is entitled to a new trial.

NEW TRIAL.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

CONLEY v. EMERALD ISLE REALTY, INC.

[350 N.C. 293 (1999)]

CHARLES E. CONLEY AND WIFE, ANNA M. CONLEY, CHARLES W. CONLEY AND WIFE, REGINA M. CONLEY, ROBERT D. CONLEY AND WIFE, PATRICIA A. CONLEY, WILLIAM V. CONLEY AND WIFE, JANET L. CONLEY, KATHERINE M. CONLEY, BRIAN Z. TAYLOR, GUARDIAN AD LITEM FOR STEPHANIE A. CONLEY, JAMES M. AYERS, II, GUARDIAN AD LITEM FOR MICHAEL W. CONLEY v. EMERALD ISLE REALTY, INC., HENRY B. INGRAM, JR., AND WIFE, LUCY G. INGRAM, KATHERINE J. INGRAM, ANNE M. INGRAM, HENRY B. INGRAM, III, ELIZABETH L. INGRAM

No. 358PA98

(Filed 9 April 1999)

1. **Landlord and Tenant— Residential Rental Agreements Act—inapplicability to vacation rental**

   The North Carolina Residential Rental Agreements Act, which obligates landlords to "make repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition," does not apply to a rented beach cottage that is not the primary residence of the tenants. N.C.G.S. § 42-42(a)(2).

2. **Landlord and Tenant— common law—no duty by landlord to repair**

   Under the common law, a landlord is under no duty to make repairs and is not liable for personal injury caused by the failure to repair.

3. **Landlord and Tenant— vacation rental—suitable for occupancy—no implied warranty in North Carolina**

   North Carolina will not impose an implied warrant of suitability for occupancy on landlords and their agents who lease a furnished residence for a short term. Therefore, a landlord and its rental agent were not liable for injuries received by tenants and their guests when a deck collapsed at a beach cottage rented by the tenants for a two-week period.

   Justice FRYE concurring.

   Justice MARTIN 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, 130 N.C. App. 309, 502 S.E.2d 688 (1998), reversing and remanding an order entered by DeRamus, J., on 19 August 1997 in Superior Court, Carteret County. Heard in the Supreme Court 9 February 1999.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Scott C. Hart, for plaintiff-appellees.

Dunn, Dunn, Stoller & Pittman, LLP, by David A. Stoller and Andrew D. Jones, for defendant-appellant Emerald Isle Realty, Inc.

Mason & Mason, P.A., by L. Patten Mason, for defendant-appellants Henry Jr., Lucy, Katherine, Anne, Henry III, and Elizabeth Ingram.

LAKE, Justice.

The question presented for review is whether the Court of Appeals erred in reversing the trial court's order entering summary judgment for all defendants. In support of its decision, the Court of Appeals ruled that plaintiffs' forecast of the evidence could support a finding that defendants breached their implied warranty affirming that the premises was suitable for tenant occupancy. Since we decline to impose an implied warranty of suitability on landlords who lease a furnished residence for a short period, we reverse the decision of the Court of Appeals.

Plaintiffs made the following basic allegations in the complaint filed in this action. Plaintiffs are Charles and Anna Conley; their three sons, Charles, Robert and William; their sons' spouses, Regina, Patricia and Janet; and three of Charles and Anna's grandchildren. Defendants are the Ingram family (hereinafter "defendants Ingram") and also Emerald Isle Realty, Inc., a real-estate company located in Emerald Isle, which is in the business of renting beach condominiums and cottages. The subject property is the "Janus Cottage," an oceanfront house located in Emerald Isle and owned by defendants Ingram. Defendants Ingram listed their cottage for weekly rental through defendant Emerald Isle Realty. Defendant Emerald Isle Realty provided defendants Ingram with an itemized list of all maintenance work and repairs and consulted with defendants Ingram before the beginning of each tourist season with regard to recommended repair work for the cottage.

Plaintiffs William and Janet Conley rented the Janus Cottage through defendant Emerald Isle Realty for a two-week period during the summer of 1994. The rental was for the purpose of a family vacation. Even though only William and Janet Conley signed the rental agreement, all of the plaintiffs Conley were vacationing at the cot-

tage. After dinner on the night of 30 July 1994, the plaintiffs went onto the second-story deck on the sound side of the cottage to have their picture taken. Anna Conley had the camera and stood closest to the house. As the remaining members of the Conley family gathered for the photograph, the deck separated from the house. The deck then collapsed, causing the plaintiffs to fall from the second floor to a first floor deck, which also collapsed.

On 22 February 1996, plaintiffs instituted this action against defendant Emerald Isle Realty and defendants Ingram to recover damages for plaintiffs' injuries which resulted from the collapsed deck. On 6 August 1997, defendant Emerald Isle Realty and defendants Ingram filed separate motions for summary judgment. The motions were heard at the 18 August 1997 Civil Session of Superior Court, Carteret County. On 19 August 1997, the trial court entered an order granting both motions for summary judgment. Plaintiffs then appealed to the Court of Appeals.

The Court of Appeals reversed the trial court's order granting summary judgment. *Conley v. Emerald Isle Realty, Inc.*, 130 N.C. App. 309, 502 S.E.2d 688 (1998). Defendant Emerald Isle Realty and defendants Ingram each petitioned this Court for discretionary review. On 5 November 1998, this Court entered orders allowing discretionary review for all defendants.

Defendant Emerald Isle Realty and defendants Ingram contend that the Court of Appeals erred in reversing the trial court's order of summary judgment for defendants on the grounds that North Carolina has never imposed an implied warranty of suitability upon the lessor of a short-term leasehold. For the reasons stated herein, we agree.

[1] In the decision below, the Court of Appeals correctly noted that the North Carolina Residential Rental Agreements Act (the Act), codified at chapter 42, article 5 of the North Carolina General Statutes, does not apply to the facts of this case. *Conley*, 130 N.C. App. at 312, 502 S.E.2d at 690. The Act obligates landlords to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C.G.S. § 42-42(a)(2) (Supp. 1998). However, the scope of the Act extends only to premises which are "normally held out for the use of residential tenants who are using the dwelling unit as their primary residence." N.C.G.S. § 42-40(2) (1994). The parties to the case at bar do not dispute that the rented beach cottage was not plaintiffs' primary residence.

[2] Since the Act specifically does not apply to short-term vacation rentals such as the one involved here, North Carolina's common law rules concerning the landlord-tenant relationship control. This Court has long applied the enactment of our legislature in this regard:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986); *see Gwathmey v. State*, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995); *State v. Hampton*, 210 N.C. 283, 285, 186 S.E. 251, 252 (1936). The "common law" which we have held is 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." *Gwathmey*, 342 N.C. at 296, 464 S.E.2d at 679. Historically, North Carolina has applied the rule of *caveat emptor* to landlord-tenant relations. *Robinson v. Thomas*, 244 N.C. 732, 736, 94 S.E.2d 911, 914 (1956). Therefore, under the common law, the "landlord is under no duty to make repairs." *Id.* In addition, "[t]he owner is not liable for personal injury caused by failure to repair." *Id.*

In the decision below, the Court of Appeals modified the common law by adopting an implied warranty of suitability as an exception to the common law rule. After noting that a landlord-tenant relationship exists when there is a short-term lease of furnished premises, the Court of Appeals stated:

> In recognizing this landlord-tenant relationship, however, [other] courts have rejected the common law rule absolving the landlord from all liability for unknown dangerous defects in the premises. [*Presson v. Mountain States Properties, Inc.*, 18 Ariz. App. 176, 501 P.2d 17 (1972); *Horton v. Marston*, 352 Mass. 322, 225 N.E.2d 311 (1967)]. Instead, these courts hold that the landlord who leases a furnished residence for a short period "impliedly warrants that the furnished premises will be initially suitable for tenant occupancy." 5 *Thompson on Real Property* § 40.23(a)(2)(i)

> [(David A. Thomas ed., 1994)]. We agree with this exception to the common law rule.

Conley, 130 N.C. App. at 312, 502 S.E.2d at 691. The Court of Appeals then reasoned that since a jury could conclude that the Ingrams breached this implied warranty of suitability, summary judgment for the Ingrams was improper. *Id.* Further, with regard to defendant Emerald Isle Realty, the Court of Appeals concluded that there was a genuine issue of fact as to whether Emerald Isle Realty, acting as the Ingrams' agent, agreed to assume part or all of the Ingrams' duty to repair or maintain the premises. We disagree as to both conclusions.

[3] This Court has never adopted an implied warranty of suitability doctrine as an exception to our traditional landlord-tenant law, and we decline to do so now. Therefore, because the Act does not control in this case and because defendants Ingram owe no duty to plaintiffs under North Carolina's common law, summary judgment for the defendants Ingram was appropriate. Also, since North Carolina does not recognize the implied warranty of suitability and since the defendants Ingram did not owe a duty to the plaintiffs, we conclude that defendant Emerald Isle Realty is also free from liability.

Finally, we address the defendants' argument suggesting that there is some distinction between defendants' duty to plaintiffs William and Janet Conley as opposed to the rest of the Conley family. As stated by the Court of Appeals:

> The basis for the defendants' argument is that the vacation home was leased only to William and Janet Conley and thus there was no landlord-tenant relationship with the remainder of the Conley family. It follows, the defendants contend, that the members of the Conley family were licensees and that "absent some active negligence" on the part of the defendants, their recourse is against William and Janet Conley.

Conley, 130 N.C. App. at 314, 502 S.E.2d at 692. The Court of Appeals disagreed with this argument and held that any guests of the tenants should also enjoy the protection provided under the implied warranty of suitability. *Id.*

It is important to note that the facts of this case present a unique situation which does not appear to have been contemplated by our legislature. Since we have held that North Carolina does not recog-

nize the implied warranty of suitability, defendants Ingram and defendant Emerald Isle Realty owe the guests of William and Janet Conley the same duty that exists under the common law. Therefore, because the controlling law imposes no duty upon the landlord to repair or maintain the leased premises for the short-term tenants' benefit, we cannot conclude that the landlord failed to reasonably maintain the premises for the protection of the tenants' visitors.

Unless the General Assembly amends the Residential Rental Agreements Act to cover short-term leases which do not serve as the tenants' "primary residence," landlords and rental agencies providing leases in this context must continue to be subject to our common law and are thus absolved from liability for personal injury caused by a failure to repair.

For the foregoing reasons, we conclude that the trial court correctly ordered summary judgment in favor of all defendants on the ground that North Carolina will not impose an implied warranty of suitability on landlords and their agents who lease a furnished residence for a short term. Therefore, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Superior Court, Carteret County, for reinstatement of the order granting summary judgment in favor of all defendants.

REVERSED AND REMANDED.

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

Justice FRYE concurring.

As this Court and the Court of Appeals recognizes, courts in other states have held that a landlord who leases a furnished residence for a short period impliedly warrants that the furnished premises will be initially suitable for tenant occupancy. This represents a change in the common law. In my opinion, it is a good change. The question is, who should make the change for North Carolina, this Court or the General Assembly. While this Court can certainly change the common law, we have been reluctant to do so when the General Assembly has enacted pervasive legislation essentially preempting the field. Because our General Assembly has legislated so pervasively in the area of landlord-tenant relations, I join the majority in declining to

make what I consider to be a badly needed change in this area of landlord-tenant liability. This area of the law is ripe for legislative action.

ELMER TRIVETTE AND NANCY TRIVETTE, AS CO-ADMINISTRATORS OF THE LATE RANDY JAMES TRIVETTE, AND NANCY TRIVETTE, INDIVIDUALLY v. NORTH CAROLINA BAPTIST HOSPITAL, INC.

No. 448A98

(Filed 9 April 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 73, 507 S.E.2d 48 (1998), affirming an order of summary judgment entered for defendant by Steelman, J., on 8 October 1997 in Superior Court, Forsyth County. On 3 December 1998, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 9 March 1999.

Moore & Brown, by B. Ervin Brown II and James S. Gibbs, Jr., for plaintiff-appellants.

Kilpatrick Stockton LLP, by J. Robert Elster and Richard S. Gottlieb, for defendant-appellee.

PER CURIAM.

We affirm the Court of Appeals' majority opinion as to the issue of whether there was an appropriate medical screening examination as required by the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (1994). Also, we allowed petition for discretionary review as to the additional issue of whether there was a discharge of the patient before stabilization of the medical condition as required by the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd(a) and (b1) (1994). Upon review, we find that review was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

DEPARTMENT OF TRANSPORTATION v. CHARLES G. IRVING, JR., INDIVIDUALLY AND AS EXECUTOR UNDER THE WILL OF CHARLES G. IRVING, SR.; VIVIAN E. IRVING, INDIVIDUALLY AND AS EXECUTRIX UNDER THE WILL OF CHARLES G. IRVING, SR.; FLORENCE IRVING FRANCIS, INDIVIDUALLY AND AS EXECUTRIX UNDER THE WILL OF CHARLES G. IRVING, SR.; WAYNE BRASWELL MANUFACTURING HOMES CORPORATION, LESSEE; COUNTY OF WAKE; AND TOWN OF GARNER

No. 454PA98

(Filed 9 April 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 130 N.C. App. 759, 508 S.E.2d 847 (1998), affirming an order entered by Thompson, J., on 21 March 1997 in Superior Court, Wake County. Heard in the Supreme Court 9 March 1999.

Wood & Francis, PLLC, by Charles T. Francis and Alan D. Woodlief, Jr., for defendant-appellees Irving.

Kirk, Kirk, Gwynn & Howell, L.L.P., by Joseph T. Howell, for defendant-appellant Wayne Braswell Manufacturing Homes Corporation.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE BAILEY

[350 N.C. 301 (1999)]

IN THE MATTER OF: DANIEL BAILEY

No. 317A98-2

(Filed 9 April 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 130 N.C. App. 340, 505 S.E.2d 923 (1998), affirming in part and reversing in part an order filed 26 March 1997 by O'Neal, J., in District Court, Durham County. On 8 October 1998, the Supreme Court granted discretionary review of an additional issue. Heard in the Supreme Court 8 March 1999.

S.C. Kitchen, County Attorney, and Wendy C. Sotolongo, Assistant County Attorney, for petitioner-appellant Durham County Department of Social Services.

Janice Perrin Paul for respondent-appellee Durham County Guardian Ad Litem Program.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion of Lewis, J., we affirm the decision of the Court of Appeals. We conclude the petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA v. JULIUS WAYNE WHITE

No. 154A98

(Filed 9 April 1999)

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. 52, 496 S.E.2d 842 (1998), affirming the judgment entered by Allen (J.B., Jr.), J., on 10 October 1996 in Superior Court, Alamance County, revoking defendant's probation and sentencing him to a term of imprisonment. On 8 July 1998, the Supreme Court granted defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 17 November 1998.

Michael F. Easley, Attorney General, by Bruce S. Ambrose and M. Janette Soles, Assistant Attorneys General, and Robert Hargett, Special Deputy Attorney General, for the State.

Daniel H. Monroe for defendant-appellant.

PER CURIAM.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. BILL EDWARD HALL

No. 533A98

(Filed 9 April 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 427, 508 S.E.2d 8 (1998), finding no error in defendant's trial and the judgments entered by Caviness, J., at the 8 September 1997 Criminal Session of Superior Court, Gaston County. Heard in the Supreme Court 10 March 1999.

Michael F. Easley, Attorney General, by Joyce S. Rutledge, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

MORRIS v. US AIRWAYS, INC.

[350 N.C. 304 (1999)]

RICHARD K. MORRIS, EMPLOYEE v. US AIRWAYS, INC., EMPLOYER; AND PLANET INSURANCE COMPANY, CARRIER; ALEXSIS, INC., SERVICING AGENT

No. 532A98

(Filed 9 April 1999)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 131 N.C. App. 554, 512 S.E.2d 97 (1998), affirming an opinion and award of the North Carolina Industrial Commission entered 11 June 1997. Heard in the Supreme Court 10 March 1999.

Walden & Walden, by Daniel S. Walden and Margaret D. Walden, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Robert H. Stevens, Jr., Bambee N. Booher, and Joy H. Brewer, for defendant-appellants.

PER CURIAM.

AFFIRMED.

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

LORA WILLIAMSON v. FOOD LION, INC.

No. 531A98

(Filed 9 April 1999)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 365, 507 S.E.2d 313 (1998), finding no error in the entry of summary judgment for defendant entered by Zimmerman, J., on 10 October 1997 in Superior Court, Guilford County. Heard in the Supreme Court 10 March 1999.

Michael R. Nash for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Douglas M. Martin and S. Mujeeb Shah-Khan, for defendant-appellee.

PER CURIAM.

AFFIRMED.

GASPAR ORTIZ, PETITIONER v. CASE FARMS OF N.C., INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. 456PA98

(Filed 9 April 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 130 N.C. App. 759, 508 S.E.2d 845 (1998), affirming an order entered by Beal, J., on 30 October 1997 in Superior Court, Burke County. Heard in the Supreme Court 10 March 1999.

Phyllis A. Palmieri & Associates, by Phyllis A. Palmieri, and Estelle McKee for petitioner-appellee.

C. Coleman Billingsley, Jr., for respondent-appellant Employment Security Commission; Edwards, Ballard, Clark, Barrett, and Carlson, P.A., by Terry A. Clark and J. Andrew Williams, for respondent-appellant Case Farms of N.C.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ALWART v. STATE FARM FIRE AND CASUALTY CO.

No. 5P99

Case below: 131 N.C.App. 538

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

ASHLEY v. BLACK AND DECKER CORP.

No. 64P99

Case below: 131 N.C.App. 556

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

BROWN v. TERRY

No. 534P98

Case below: 131 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

COLEMAN v. HANSEN

No. 541P98

Case below: 131 N.C.App. 334

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

CUTLER v. WINSLOW

No. 40P99

Case below: 131 N.C.App. 556

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

FALLIS v. WATAUGA MEDICAL CTR., INC.

No. 83P99

Case below: 131 N.C.App.43

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

FIELDS v. DERY

No. 8P99

Case below: 131 N.C.App. 525

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

GASTON COUNTY DYEING MACH. CO. v. NORTHFIELD INS. CO.

No. 10PA99

Case below: 131 N.C.App. 438

Petition by defendant (Northfield Ins.) for discretionary review pursuant to G.S. 7A-31 allowed 8 April 1999. Petition by intervenor (United Capitol) for discretionary review pursuant to G.S. 7A-31 allowed 8 April 1999. Justice Martin recused.

GRIFFIN v. FONVILLE MORISEY REALTY

No. 133P99

Case below: 132 N.C App. 396

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

HARVELL v. N.C. ASS'N OF EDUCATORS, INC.

No. 57P99

Case below: 132 N.C.App. 115

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

IN RE WILL OF COLE

No. 113P99

Case below: 132 N.C.App. 235

Petition by caveator (Cole) for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

JONES v. COKER

No. 538P98

Case below: 131 N.C.App. 556

Motion by defendants to withdraw petition for discretionary review allowed 8 April 1999. Petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 April 1999.

KNIGHT PUBLISHING CO. v. CHASE MANHATTAN BANK

No. 523A98

Case below: 131 N.C.App. 257

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 April 1999.

MELVIN v. ST. LOUIS

No. 58P99

Case below: 132 N.C.App. 42

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

N.C. INS. GUAR. ASS'N v. BURNETTE

No. 25P99

Case below: 131 N.C.App. 840

Petition by defendants (Burnette and Liptow) for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

PITTMAN v. INTERNATIONAL PAPER CO.

No. 86A99

Case below: 132 N.C.App. 151

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 April 1999.

SMITH v. N.C. MOTOR SPEEDWAY, INC.

No. 62P99

Case below: 132 N.C.App. 132

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

SPRUILL v. LAKE PHELPS VOL. FIRE DEP'T, INC.

No. 87PA99

Case below: 132 N.C.App. 104

Petition by defendant (Lake Phelps Volunteer Fire Dept.) for discretionary review pursuant to G.S. 7A-31 allowed 8 April 1999. Petition by defendant (Creswell Volunteer Fire Dept.) for discretionary review pursuant to G.S. 7A-31 allowed 8 April 1999.

STATE v. BAKER

No. 30P99

Case below: 131 N.C.App. 879

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 April 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

STATE v. BEALE

No. 59P99

Case below: 132 N.C.App. 132

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 April 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999. Justice Martin recused.

STATE v. BECK

No. 60P99

Case below: 131 N.C.App. 879

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

STATE v. BOYD

No. 177A83-3

Case below: Surry County Superior Court

Motion by defendant (Boyd) for temporary stay of Warden's order scheduling execution allowed 8 April 1999.

STATE v. BUCK

No. 525P98

Case below: 131 N.C. App. 336

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 8 April 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

STATE v. COZART

No. 508P98

Case below: 131 N.C. App. 199

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

STATE v. DAVIDSON

No. 519P98

Case below: 131 N.C. App. 276

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

STATE v. DAYAN

No. 384A95-4

Case below: Greene County Superior Court

Motion by defendant, by and through next friends Marshall Dayan and Connie Robinson, for stay of execution denied 26 March 1999. Petition by defendant, by and through next friends Marshall Dayan and Connie Robinson, for writ of certiorari to review the order of the Superior Court, Greene County, denied 26 March 1999.

STATE v. FRYE

No. 511A93-2

Case below: Catawba County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Catawba County, denied 8 April 1999.

STATE v. GARY

No. 65P99

Case below: 132 N.C.App. 40

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

STATE v. JAMES

No. 117A99

Case below: 132 N.C.App. 398

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 8 April 1999.

STATE v. JARVIS

No. 70P99

Case below: 131 N.C.App. 702

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999.

STATE v. JOHNSTON

No. 518A97-2

Case below: 127 N.C.App. 563

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 April 1999. Motion by defendant to amend petition for writ of certiorari denied 8 April 1999. Justice Martin recused.

STATE v. SPELLER

No. 61P99

Case below: 132 N.C.App. 135

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 April 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

STRICKLAND v. BD. OF TRUSTEES OF FORSYTH TECH.

No. 82P99

Case below: 132 N.C.App. 136

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 April 1999.

TIMMONS v. N.C. DEP'T OF TRANSP.

No. 470PA98-2

Case below: 130 N.C.App. 745

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 April 1999.

WATSON v. DIXON

No. 103A99

Case below: 130 N.C.App. 47

Motion by defendants (Duke University and Dixon) for temporary stay allowed 8 March 1999.

PETITIONS TO REHEAR

FRYE REG'L MED. CTR. v. HUNT

No. 613PA97

Case below: 350 N.C. 39

Petition by plaintiff to rehear pursuant to Rule 31 denied 8 April 1999.

NEAL v. CAROLINA MGMT.

No. 310A98

Case below: 350 N.C. 63
130 N.C. App. 228

Petition by plaintiff to rehear pursuant to Rule 31 denied 8 April 1999.

STATE OF NORTH CAROLINA v. WALIC CHRISTOPHER THOMAS

No. 435A96

(Filed 7 May 1999)

1. Constitutional Law, Federal— effective assistance of counsel—denial of motion by counsel to withdraw

The trial court did not abuse its discretion or violate defendant's constitutional right to the effective assistance of counsel by denying the motion of his two attorneys to withdraw prior to the start of his capital trial because defendant had refused to cooperate with defense counsel during trial preparation, became disruptive at the beginning of the trial, was ordered by the trial court to be handcuffed, shackled and gagged, and threatened counsel with physical violence, where the record shows that during the hearing on the motion to withdraw and throughout the trial, defendant was rational, conferred with defense counsel, and did not exhibit any more violent behavior or threaten defense counsel in any way; defendant's earlier outburst did not adversely affect the representation of defendant by his attorneys at trial; and defendant was cooperative and never requested that defense counsel be removed.

2. Criminal Law— shackling of defendant—findings by trial court

The reasons given by the trial court for ordering defendant shackled during his first-degree murder trial were sufficient to permit appellate review of the trial court's ruling and complied with the requirements of N.C.G.S. § 15A-1031.

3. Criminal Law— shackling of defendant—defendant as witness—refusal to unshackle

In a first-degree murder trial in which the trial court ordered that defendant be shackled because of outbursts in the courtroom and his threats to defense counsel at the beginning of trial, the trial court did not abuse its discretion in refusing to unshackle defendant before he took the witness stand so that defendant could step in front of the jury with photographs illustrating his testimony, although the trial court acknowledged that defendant had been well behaved throughout the trial, where the trial court determined that keeping defendant restrained was the most prudent way by which to maintain an orderly courtroom

and ensure courtroom security. In addition, the trial court's ruling did not deprive defendant of a fair trial where defendant was present in the courtroom when his case was tried, the shackles were concealed from the jury, and the photographs about which defendant testified were passed to the jury for its viewing.

4. Jury— peremptory challenges—race-neutral reasons

The prosecutor in a first-degree murder trial stated sufficient race-neutral reasons for his peremptory challenge of a black prospective juror where he stated that the juror was challenged because she was the only juror who had read anything about the case, the juror had lived in the community for only a short period of time, and he was looking for jurors who were solid, stable members of the community and who had a stake in the community. Defendant's rebuttal that the State had passed a number of jurors who had lived in the county a very short time was insufficient to show discriminatory intent.

5. Jury— excusal for cause—capital punishment views—rehabilitation denied

The trial court did not abuse its discretion in disallowing rehabilitation questions of several prospective jurors who were excused for cause because of their capital punishment views where each of the prospective jurors unequivocally stated that he or she would refuse to consider the death penalty under any circumstances.

6. Indigent Defendants— capital case—two appointed attorneys—absence of one attorney from courtroom—no statutory or constitutional violation

The absence of one of an indigent defendant's court-appointed defense attorneys several times during his capital trial did not violate defendant's right under N.C.G.S. § 7A-450(b1) to be represented by two attorneys in a capital case or prevent defendant's two appointed attorneys from effectively defending him since (1) the statute does not require, either expressly or impliedly, that both of a capital defendant's attorneys be present at all times for all matters, and (2) although one attorney left the courtroom during the questioning of a prospective juror, during defendant's testimony, during the instruction conference in the guilt and sentencing phases, and during arguments of the prosecutor, the longest of those absences was just four minutes, the court was in recess or held at ease during several of those

absences, and the other appointed attorney was present in the courtroom during each of those absences.

7. Evidence— hearsay—statements by witness's attorney—admission for limited purpose—attorney-client privilege not violated

In a prosecution for first-degree murder in which a witness testified that defendant threatened him while the two were in jail and coerced him into signing a note indicating that another person had threatened him, further testimony by the witness that his attorney told him that defendant's attorneys wanted him to find out what the witness would say if he was called by the State to testify in defendant's murder trial and asked his permission to reveal any information the witness gave him to defendant's attorneys was proper nonhearsay evidence when admitted for the limited purpose of explaining why the witness reacted to the note as he did and his subsequent conduct in testifying for the State rather than for defendant. Furthermore, defendant suffered no prejudice from this testimony where there was no evidence that defendant's counsel tried to influence the witness to give false testimony, and there was no evidence that the witness's attorney violated the attorney-client privilege by revealing any information concerning the witness to defendant's attorneys.

8. Discovery— crime records of witnesses—provision by State not required

Defendant was not denied due process when the trial court denied his motion to require the State to provide him with the criminal records of all of the prosecution witnesses in his first-degree murder trial where the record discloses that defense attorneys successfully elicited testimony from the witnesses on cross-examination about their various criminal convictions, including possession and sale of drugs, breaking and entering, and larceny; and any additional impeaching evidence gleaned from the criminal records of these witnesses would not have created a reasonable doubt of defendant's guilt which did not otherwise exist.

9. Criminal Law— mistrial—reference to unrelated robbery—denial not abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion for a mistrial in a first-degree murder trial when a State's witness referred to an unrelated armed robbery charge

against defendant where any error was cured by the trial court's action in sustaining defendant's objection and giving a curative instruction.

10. Criminal Law— mistrial—mistaken reference to prior murders—denial not abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion for a mistrial when the prosecutor, during cross-examination of defendant concerning his convictions for two prior robberies, mistakenly referred to the prior convictions as "two murders," although the trial court did not issue a curative instruction to the jury, where defendant failed to request a curative instruction, defendant denied that he had pled guilty to "two murders," and the prosecutor quickly corrected himself.

11. Robbery— armed robbery—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of armed robbery and felony murder based upon the felony of armed robbery where it tended to show that the victim was bound, gagged and stabbed to death in his own home; defendant was seen at a sports bar located just a couple of hundred feet from where the victim lived on the night of the victim's murder; defendant's palm print was found on the stove in the victim's home; defendant was seen driving the victim's car and using the victim's automatic-teller machine card shortly before the victim's body was discovered; and the victim's clothing and other items stolen from the victim were seized from defendant's room.

12. Sentencing— capital sentencing—aggravating circumstance—felony murder—underlying felony—conviction also based on premeditation

The felony underlying a conviction for felony murder may be submitted as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5) if the defendant is also convicted of first-degree murder on the basis of premeditation and deliberation.

13. Kidnapping— restraint separate from armed robbery

There was sufficient evidence of restraint not inherent in the armed robbery of the victim to support defendant's conviction of kidnapping where the evidence showed that the victim was found lying on the floor of his home with his hands tied behind his back; the victim also had an apron tied around his neck and several

towels and a stuffed toy around his mouth and face; and the victim was repeatedly stabbed and cut while he was restrained. The elements of armed robbery do not require that defendant bind and gag the victim in such a manner, and the victim was subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.

14. Burglary— constructive breaking—modus operandi—sufficiency of evidence

Sufficient evidence was presented of a constructive breaking accomplished by deception or trick to support defendant's conviction of first-degree burglary where the State relied on the testimony of a witness who had been assaulted and robbed by defendant after he tricked his way into her house to establish defendant's modus operandi; the witness testified that defendant rang her doorbell and asked to use the phone to get help because his car had broken down; once inside the kitchen, defendant asked for the telephone book and a glass of water; in the present case, defendant testified that, although he did not know the victim, he had been in the victim's kitchen because he had asked the victim for a drink of water; a cab company had received a call at about the time of the murder of the victim requesting that a cab come to the victim's address, and police found a telephone book opened to the taxicab pages; the witness testified that defendant had stabbed her in the neck with a knife taken from her kitchen, and in the present case, the victim was stabbed in the neck with a knife taken from his kitchen; in both offenses, the victim's wallet or pocketbook had been stolen; and defendant's palm print was found on the stove in the victim's kitchen. This evidence permitted the inference that defendant tricked his way into the victim's house in the same manner that he tricked his way into the witness's house.

15. Homicide— first-degree murder—instruction on second-degree not warranted

The trial court did not err by refusing to instruct the jury on second-degree murder as a lesser included offense of first-degree murder because the jury could not have reasonably concluded that defendant killed the victim without premeditation and deliberation where the evidence tended to show that defendant entered the victim's home by trick and attacked him without provocation; the victim was bound and helpless during the murder; the victim suffered thirty-six stab wounds to his body

inflicted with a butcher knife, many of which had been inflicted while the victim was still alive; and the only evidence offered by defendant to negate first-degree murder was his own testimony denying his involvement in the crime.

16. Burglary— first-degree burglary—occupancy—failure to instruct on second-degree burglary—not plain error

The trial court did not commit plain error in a first-degree burglary prosecution by failing to instruct the jury on the lesser included offense of second-degree burglary where the State presented evidence tending to show that the victim had returned to and was occupying his home when defendant broke into the victim's home and entered it to rob and murder him.

17. Evidence— fingerprint or palm print—probative value—instructions

In this murder, burglary, armed robbery and kidnapping prosecution in which the State presented evidence that defendant's palm print was found on a stove in the victim's kitchen and defendant testified that he had been inside the victim's house to get a drink of water on the night of the crimes but left while the victim was still alive, the trial court's instruction that if the jury found "substantial evidence of circumstances that the fingerprints were impressed at or about the time these crimes were committed, then it would be evidence which logically tends to show that the accused was present and participated in the commission of these crimes" was correct based on the evidence presented where the trial court also gave defendant's requested instruction that a fingerprint or palm print of the defendant is without probative force unless it could only have been impressed at the time the crime was committed; in addition to defendant's palm print, the State presented substantial circumstantial evidence tending to prove defendant's guilt, including defendant's proximity to the victim's house on the night of the crimes, a telephone call to a cab company placed from the victim's house, the victim's car and other personal items found in defendant's possession, and a videotape of defendant using the victim's automatic teller machine card; and defendant initially denied being in the victim's house but changed his story only after the evidence of the palm print was presented by the State. It was a matter for the jury to decide whether to believe the State's or defendant's explanation of how and when defendant's palm print was left in the victim's kitchen.

18. Criminal Law— circumstantial evidence—instructions

The trial court did not err by refusing to instruct the jury that, in order to support a conviction, circumstantial evidence must be inconsistent with innocence; rather, the trial court properly instructed the jury that the law makes no distinction between the weight to be given either circumstantial or direct evidence and that "[a]fter weighing all the evidence if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty."

19. Burglary— possession of recently stolen property—inference of guilt—instructions

The trial court's instructions in a burglary case did not imply that defendant's mere physical proximity or the mere fact that an article is found in a place under the dominion and control of the defendant would be sufficient to trigger the inference of guilt from the doctrine of the possession of recently stolen property; rather, the trial court properly instructed the jury that such an inference requires other circumstances in addition to defendant's physical proximity to or control over the place where the stolen property is found.

20. Kidnapping— first-degree kidnapping—restraint of victim—failure to release in safe place

The first-degree kidnapping element of failure to release the victim in a safe place applies to a kidnapping by restraint and confinement and not just to kidnapping by removal. Therefore, the element of failure to release the victim in a safe place was supported by evidence that the kidnapping was accomplished by restraint of the victim in his own house, and that the victim was found in his house stabbed to death with his hands tied behind his back.

21. Constitutional Law, Federal— double jeopardy—first-degree kidnapping—felony murder—failure to release in safe place—not murder element

Defendant's convictions and sentencing for both first-degree kidnapping and felony murder did not subject him to double jeopardy where his first-degree kidnapping conviction was based on the element that he did not "release the victim in a safe place" and not on the element of "serious injury." Furthermore, since defendant's first-degree murder conviction was based not only on the felony murder rule but also on premeditation and delibera-

tion, proof of the underlying felony was not an essential element of the State's homicide case, and defendant could be sentenced for both the murder and the felony.

22. Criminal Law— prosecutor's closing argument—reading excerpt from appellate opinion

The trial court did not err by allowing the prosecutor to read an excerpt from a North Carolina Supreme Court opinion in another case during closing argument where this argument accurately stated the law of North Carolina and related to principles of law which were relevant to the evidence and issues of the case concerning the constructive breaking element of burglary.

23. Evidence— prior crime or act—modus operandi—proof of relevant facts

In this prosecution for first-degree murder, first-degree burglary, armed robbery and first-degree kidnapping, testimony by a witness that defendant had previously tricked his way into her house and assaulted her with a kitchen knife was properly admitted into evidence where the trial court found that the similarities between the assault on the witness and the crimes for which defendant was being tried had probative value, and tended to prove relevant facts, including the motive for the burglary, the method of nonforceable entry into the home, the intent of the killer to commit a robbery, the specific intent to kill, a specific plan or design to commit the burglary, robbery, and murder, and a pattern of behavior tending to show that defendant committed both crimes. Furthermore, the trial court did not err by ruling that the probative value of this testimony outweighed any prejudicial effect. N.C.G.S. § 8C-1, Rules 404(b), 403.

24. Evidence— admission of testimony—error cured by court's actions

Any error in the admission of testimony in this capital sentencing proceeding by the mortician who prepared the victim's body for burial to show that the victim had been forcibly gagged in order to establish the especially heinous, atrocious, or cruel aggravating circumstance was cured when the trial court properly addressed defense counsel's objections to the testimony by requiring the prosecutor to provide additional evidence to establish the probative value of the mortician's testimony, granted defendant's motion to strike the testimony because the prosecu-

tor failed to do so, and instructed the jury to disregard the testimony. In addition, the especially heinous, atrocious, or cruel aggravating circumstance was supported by properly admitted evidence that the victim was bound and stabbed repeatedly and that many wounds were inflicted while he was still alive.

25. Evidence— prior crime or act—stipulation—description of manner—prior violent felony aggravating circumstance

Testimony of a robbery victim's description of the manner in which the robbery took place was properly admitted in this capital sentencing proceeding to support the (e)(3) aggravating circumstance that defendant had been convicted of a prior violent felony even though defendant stipulated to the conviction and judgment for the robbery. N.C.G.S. § 15A-2000(e)(3).

26. Criminal Law— defendant's closing argument—capital sentencing—individual responsibility of each juror

There was no abuse of discretion or prejudice to defendant when the trial court prevented defense counsel from arguing to the jury in a capital sentencing proceeding that the ultimate decision as to the sentence recommendation was the individual responsibility of each juror.

27. Criminal Law— prosecutor's closing argument—capital sentencing—applicable principles

The principles that trial counsel are granted wide latitude in the scope of jury argument and that control of closing arguments is in the discretion of the trial court apply not only to ordinary jury arguments but also to arguments made in capital sentencing proceedings, and the boundaries for jury argument at the capital sentencing proceeding are more expansive than at the guilt phase.

28. Criminal Law— prosecutor's closing argument—absence of objection—standard of review

Where there has been no objection during the closing argument, the proper standard of review is whether the argument was so grossly improper as to require the trial court to intervene ex mero motu, not whether the argument constitutes plain error.

29. Criminal Law— prosecutor's closing argument—capital sentencing—mitigating circumstances—not gross impropriety

The prosecutor's closing argument in a capital sentencing proceeding that in order for the mitigating circumstances to have value to weigh against the aggravating circumstances, they had to "justify," "excuse," or "offset" the first-degree murder did not amount to a gross impropriety requiring intervention by the trial court on it own motion.

30. Criminal Law— prosecutor's closing argument—defendant as cold-bloodied killer—inference from evidence

The prosecutor's closing argument in a capital sentencing proceeding that "[defendant] is a cold-bloodied, arrogant killer, who would take your life and my life" drew reasonable inferences from the evidence and was not improper considering the evidence of the brutality of the premeditated and deliberate murder committed by defendant. Further, the phrase that defendant would "take your life and my life" was no more than a figure of speech for this defendant's willingness to murder a stranger for money.

31. Criminal Law— prosecutor's closing argument—capital sentencing—death penalty as deterrence

The prosecutor's closing argument in a capital sentencing proceeding that "if you impose life imprisonment . . . the State will do everything they can to make sure he stays in prison for the rest of his life, but . . . nothing is final" and that "the only way you can make sure that . . . this man does not assault, rob, and kill someone else is to impose the death penalty" was not an improper argument addressing parole but was a proper argument that only the death penalty would deter defendant from committing future crimes.

32. Sentencing— capital sentencing—death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the jury found defendant guilty of first-degree murder under theories of both premeditation and deliberation and felony murder; the evidence tended to show that defendant repeatedly stabbed the victim in his own home while he was bound and helpless, and while he was still conscious; and the jury found as aggravating circum-

stances (1) that defendant had been previously convicted of a felony involving the use or threat of violence to the person, (2) that this murder was committed while defendant was engaged in the commission of a robbery, burglary, or kidnapping, and (3) that this murder was especially heinous, atrocious, or cruel.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., on 9 August 1996 in Superior Court, Guilford 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 12 May 1997. Heard in the Supreme Court 11 January 1999.

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

James R. Parish for defendant-appellant.

MITCHELL, Chief Justice.

On 2 October 1995, defendant was indicted for first-degree murder. On 19 February 1996, he was also indicted for first-degree burglary, robbery with a dangerous weapon, and first-degree kidnapping. Defendant was tried capitally at the 22 July 1996 Criminal Session of Superior Court, Guilford 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 first-degree burglary, robbery with a dangerous weapon, and first-degree kidnapping. Following a separate capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. On 9 August 1996, the trial court sentenced defendant to death. Defendant was sentenced to consecutive terms of imprisonment on his convictions for burglary, robbery, and kidnapping. Defendant appealed his conviction for first-degree murder and death sentence to this Court as of right. On 12 May 1997, this Court granted defendant's motion to bypass the Court of Appeals on his appeal of the robbery, burglary, and kidnapping convictions.

The State's evidence tended to show that defendant, Walic Christopher Thomas, entered the home of the victim, Kenneth Dale Tuttle, Jr., bound and gagged him, robbed him, and stabbed him to death. On the evening of 10 September 1995, defendant asked

Carmichael Wilson to give him a ride so that he could get some money from his supervisor. Wilson had his friend, William Thomas Warren (known as "Rabbit"), drive them to where defendant wanted to go. Rabbit parked his car on a side street around the corner from the intersection of Spring Garden Road and Holden Road in Greensboro. While Wilson and Rabbit waited in the car, defendant walked to J.P. Looney's, a sports bar located at that same intersection. A bartender working that night later identified defendant as the man who came into the bar sometime "around midnight" and asked for free food. Several times Wilson checked on defendant, who assured him that he would have the money soon. Finally, at approximately 1:30 a.m., Wilson talked to the bartender, who told him that defendant had left the bar a short time before.

That same night, Tuttle went to the home of a friend to watch a football game. At about 11:30 p.m., Tuttle left the friend's house to return to his own house located at 707 South Holden Road, a few hundred feet from J.P. Looney's. At 1:41 a.m. on 11 September 1995, a dispatcher for Daniel Keck Cab Company received a call requesting a taxi to come to Tuttle's address. The dispatcher testified that the caller called a second time to find out why the cab had not arrived. At 2:10 a.m., a driver was dispatched to 707 South Holden Road. The driver testified that when he arrived no one came outside and that he noticed a light blue or gray car parked in the driveway.

At 4:30 a.m., Tuttle's roommate arrived home. As he was starting to open the back door, he looked in the window and saw Tuttle on the floor, against the door. The roommate went to a neighbor's house and called the police.

The first officer on the scene determined that Tuttle was dead. Tuttle was found with a towel, a rag, and a stuffed toy around his head, an apron around his feet, and his hands tied behind his back with a telephone cord. An autopsy revealed that he had bled to death from thirty-six stab wounds to his neck, chest, and abdominal area, most of which were inflicted while Tuttle was still alive. According to the testimony of Dr. Thomas Clark of the Chief Medical Examiner's Office, Tuttle's wounds "could have been inflicted by a butcher knife."

Tuttle's roommate went through the house and discovered that several items of personal property were missing, including two knives from a knife block in the kitchen, Tuttle's clothing, a television set, a stereo, and Tuttle's wallet. Also missing was Tuttle's car, a

silver-gray Nissan Sentra. One of the prints lifted from the stove door handle in the home was later determined to have been made by the left palm of defendant. The investigating officer also found a telephone book opened to the taxicab pages and an ice tray and plastic cup next to the kitchen sink.

After Wilson had returned to his house on Martin Luther King Drive, he saw defendant, who lived two houses away from him, arrive in a car. Defendant told Wilson that his supervisor had let him keep the car and that his supervisor had also given him the clothes which were in the car. Defendant asked Wilson to help him carry the clothes upstairs to defendant's room. Wilson then drove with defendant to a bank where defendant was videotaped attempting to withdraw cash using Tuttle's automatic-teller machine card at 4:20 a.m. on 11 September 1995. While waiting in the car, Wilson noticed a wallet containing a white man's driver's license on the seat.

On 11 September 1995, a member of the Greensboro Police Department stopped Tshamba Wynn while he was driving Tuttle's car on Julian Street. James Harold Edwards testified that he saw defendant give the keys to the stolen car to Wynn. Edwards directed the officers to defendant's address at 707 Martin Luther King Drive. When the police knocked on the door, defendant answered. Defendant gave his consent for a search of his room. On a couch, officers found a stack of men's clothes still on plastic hangers. These clothes were later identified as belonging to Tuttle. Defendant was arrested. At the time of his arrest, defendant was wearing a shirt and a pair of pants belonging to Tuttle. The stereo and television set stolen from Tuttle's house were later recovered from a crack house where Wilson testified he had gone with defendant.

Defendant testified on his own behalf, admitting that he had been in Tuttle's home with Wilson and Rabbit on the night of the murder. According to defendant, Wilson came to him asking for a ride to a "white dude's house" to settle a drug debt. Defendant testified that when he left the house with Rabbit, Wilson stayed behind, and Tuttle was still alive.

PRETRIAL AND JURY SELECTION

[1] By his first assignment of error, defendant contends that the trial court erred by denying the motion of his two attorneys to withdraw. Just prior to the start of the trial, defendant threatened to tip over a table and refused to come into the courtroom voluntarily. The trial

court ordered that he be handcuffed and shackled. After returning to the courtroom, defendant became very disruptive and refused to be quiet. The trial court then directed a bailiff to remove defendant and gag him.

Defense counsel met with defendant in the holding cell in an effort to get him to cooperate. During this meeting, defendant threatened defense counsel with physical violence, stating, "I'll have my people on the street take care of you." Defendant also threatened a deputy sheriff. In addition, during trial preparation, defendant had refused to cooperate or to speak to defense counsel. Defense counsel informed the court that they feared for their safety and could no longer effectively represent defendant. They moved to withdraw pursuant to N.C.G.S. § 15A-144. Defendant argues that this created an actual conflict of interest and that forcing defense counsel to represent him violated his constitutional right to the effective assistance of counsel and his due process right to a fair trial.

N.C.G.S. § 15A-144 provides that "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel. *State v. Cole*, 343 N.C. 399, 411, 471 S.E.2d 362, 367 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 624 (1997). To establish ineffective assistance of counsel, defendant must satisfy a two-prong test which was promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). We reviewed the operation of this test in the recent case of *State v. Lee*:

> [D]efendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. [*State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985).] . . . Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. [*Strickland*, 466 U.S.] at 695, 80 L. Ed. 2d at 698. Thus, defendant must show that the error committed was so grave that it deprived him of a fair trial because the result itself is considered unreliable. *Id.* at 687, 80 L. Ed. 2d at 693.

348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998).

In the present case, a careful review of the record and transcript reveals that during the hearing on the motion to withdraw and throughout the trial, defendant was rational, conferred with defense counsel, and did not exhibit any more violent behavior or threaten defense counsel in any way. We find no indication that defendant's earlier outburst adversely affected the representation of defendant by his attorneys at trial. Defendant was cooperative and never requested that defense counsel be removed. At the hearing on the motion to withdraw, defendant stated, "I don't have a problem with them at all." At most, defendant indicated to the trial court that his only dissatisfaction with defense counsel was their handling of certain statements of several individuals. However, disagreements over trial tactics generally do not make the assistance of counsel ineffective. *See State v. Gary*, 348 N.C. 510, 515, 501 S.E.2d 57, 61 (1998). Defendant has failed to show that the experienced defense counsel's representation of him in this case was anything less than professional. Therefore, the first prong of the *Strickland* test is not satisfied. As a result, we conclude that the trial court did not abuse its discretion in denying defense counsel's motion to withdraw. Accordingly, this assignment of error is overruled.

[2] Defendant next contends that the trial court violated N.C.G.S. § 15A-1031 by failing to make necessary findings in support of its initial decision to shackle him and that the trial court abused its discretion in refusing to unshackle him before he took the witness stand, denying him a fair trial. After defendant's outburst in the courtroom and his threats to defense counsel, the trial court ordered him restrained. At the request of the trial court, defendant was examined by a psychiatrist, Dr. Rollins, who testified at the competency hearing that defendant was competent to stand trial. Following this testimony, defendant was questioned by the trial court and said that he would be quiet and cooperative and would follow all of the court's rules. The trial court continued to have defendant shackled. At trial, before defendant took the stand, defense counsel again requested that the shackles be removed so that defendant could step in front of the jury with photographs illustrating his testimony. The trial court denied the request, despite the fact that the court acknowledged that defendant's conduct had been "exemplary" since the initial outburst. The photographs were, however, passed to the jury. Defendant argues that this procedure was in sharp contrast to the procedure used with the other witnesses, who were allowed to step down from the witness box and approach the jury to illustrate their testimony, and prejudiced defendant in the jury's eyes. This argument is without merit.

The restraint of a defendant in the courtroom is governed by N.C.G.S. § 15A-1031, which provides in part:

> 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.

N.C.G.S. § 15A-1031 (1997). The statute further provides that if the judge orders a defendant or witness restrained, he must enter in the record the reasons for his actions, give the restrained person an opportunity to object, and, unless there is an objection, inform the jurors not to consider the restraint in weighing evidence or determining guilt. "If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact." *Id.*

The transcript and record reveal that the reasons given by the trial court in ordering defendant shackled are sufficient to permit our appellate review of the trial court's ruling. At the time the trial court initially ordered that defendant be shackled, it stated that the restraints were necessary in order to have defendant in the courtroom to begin the trial, and "I'm not going to have this case prejudiced from the get-go, for him making some sort of scene." Following defendant's continued violent behavior and threats to counsel, the trial court made the following findings of fact in a safekeeping and evaluation order signed that very same afternoon:

2. That at 2:00 p.m. courtroom bailiffs warned all parties that the Defendant had indicated that he would become violent and tip over a table.

3. That at 2:00 p.m. the case was called for trial and the Defendant refused to come to the courtroom from the holding cell.

4. That the court ordered the courtroom bailiffs to take whatever measures necessary to bring Defendant to the courtroom.

5. That the Defendant was shackled and it still took five bailiffs to bring him to the courtroom, and the Defendant still caused a disturbance which prevented further proceedings in court.

6. That the Court ordered the Defendant be taken to a small office out of the presence of the court to confer with his attor-

> neys. That the Defendant at that time threatened his attorneys and one of the bailiffs with physical injury.

Two days later, out of the presence of the jury, the trial court stated for the record its reasons for ordering that defendant's legs would remain shackled during trial:

> [I]t's my feeling . . . that from what occurred on Monday, at this time, I'm going to continue to have the defendant shackled at this point. [A]ny reocurrence of what occurred Monday would endanger the court personnel, would endanger, . . . maybe endanger the jury. And from what the court observed on Monday, a situation could arise that just couldn't be stopped in an amount of time that someone could get hurt, and probably the defendant. And so, I don't—because of that, I'm going to have the shackles there. And I'll have curtains put on the tables, to make sure that nobody can see the shackles in this case.

We find that these reasons adequately explain the trial court's actions regarding the restraint of defendant and that the trial court complied with the statute.

Furthermore, at the time that defendant was to take the stand, the trial court once again stated its reasons for denying counsel's request to remove defendant's shackles:

> I just want the record to reflect that I just—the observation I saw on the first day of this trial was that I felt like that to unshackle him would put at risk the jury and the court personnel, if he decided to change his mind. And also, [let] the record reflect that his behavior since that time has probably been the best that I've seen a defendant in a capital case, in the eight that I've—or nine that I've tried. But that first day put me on alert that I'd be putting people at risk.

[3] Although the trial court acknowledged that defendant had been well behaved throughout the trial, it is clear that in light of defendant's earlier violent outbursts and disruptions, the trial court determined that keeping him restrained was the most prudent way by which to maintain an orderly courtroom and ensure courtroom security. *See State v. Atkins*, 349 N.C. 62, 92, 505 S.E.2d 97, 116 (1998). We conclude that the trial court did not abuse its discretion. In addition, the trial court's ruling did not deprive defendant of a fair trial. Defendant was present in the courtroom when his case was tried, the shackles were concealed from the jury, and the photographs about

which defendant testified were passed to the jury for their viewing. Therefore, we reject this assignment of error.

[4] 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 a black prospective juror 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). Article I, Section 26 of the North Carolina Constitution also prohibits such discrimination.

A defendant making a *Batson* objection must establish a *prima facie* case of discrimination by showing that he is a member of a cognizable racial minority whose members the State has peremptorily excused from the venire under circumstances which raise an inference of racial motivation. *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990). "[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." *State v. Locklear*, 349 N.C. 118, 136, 505 S.E.2d 277, 287 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 1999 WL 118758 (Apr. 19, 1999) (No. 98-8310). If a defendant is successful in making a *prima facie* showing of discrimination, the burden then shifts to the State to offer a race-neutral reason for the peremptory strike. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991). The trial court must then make appropriate findings as to whether the prosecution's stated reasons provide a credible, non-discriminatory basis for the challenges or are simply a pretext. *Id.* Finally, the trial court must "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). "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); *see also State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996).

In this case, defendant is black and the victim was white. Defendant made his *Batson* challenge when the prosecutor peremptorily challenged prospective juror Dandridge, a black female. In sup-

port of his objection, defendant noted that the prosecutor had previously exercised three peremptory challenges, excusing two black females and one white female. Because the white female juror had indicated that she could not sit in judgment and consider the death penalty, the trial court noted that she could have been excused for cause. Despite the fact that the State had previously accepted three black jurors, the trial court then stated, "I feel like I'm going to be tighter than I normally would." Then the trial court ruled that a *prima facie* case had been established and required the State to give its reasons for excusing Ms. Dandridge. Thereafter, the following exchange took place:

> [PROSECUTOR]: Your honor, of the 65 or 70 jurors we have come across so far, this is the only juror that has ever indicated that she read anything in the media. . . .
>
> Secondly, she has lived in the community for only four years. And her background is not, based upon the questionnaire, based upon the questions I asked her, there's insufficient information about her background for me to determine that she's the type of juror that I want. And what I want is a juror who has lived in the community for a substantial period of time, who has roots in the community, who is employed, and is a solid member of our community. And I just don't have sufficient information about her, based upon her questions and answers, based upon the questionnaire, to make that determination. Those are my two reasons.
>
> [DEFENSE COUNSEL]: Well, we have made the observation that there are a number of jurors who have been passed by the State that have lived in Guilford County a very short period of time. And we would ask the Court, through the questionnaires, to take note of the fact that that is not a legitimate reason, in that there are other jurors that have already been seated, passed by the State, that have lived here a very short period of time.

Defendant now contends that the prosecutor's questioning of Ms. Dandridge was "perfunctory at best" and that the explanation that she was not "the type" of juror he wanted was racially motivated.

At the outset, we note that "the issue is the validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406. Furthermore, so long as the motive is not racial discrimination, the

prosecutor may exercise peremptory challenges on the basis of "legitimate 'hunches' and past experience." *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988).

Here, the prosecutor stated as his criteria for selecting jurors that they be solid, stable members of the community. We have found this to be a legitimate, race-neutral reason for exercising a peremptory challenge. *See State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). Moreover, in its brief, the State points out that the prosecutor in this case consistently sought jurors who had an established stake in the community. We also conclude that the prosecutor's explanation that Ms. Dandridge was the only juror who had read anything about the case was a statement of a legitimate and nondiscriminatory reason for the exercise of a peremptory challenge. These reasons given by the prosecutor are supported by Ms. Dandridge's responses during jury *voir dire*.

Defendant's rebuttal was that the State had passed a number of jurors who have lived in Guilford County a very short time. However, we have previously rejected a defendant's attempt to show discriminatory intent by "finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor." *Porter*, 326 N.C. at 501, 391 S.E.2d at 152. The prosecutor in this case pointed to the fact that Ms. Dandridge was the only juror out of sixty-five or seventy questioned who had read about the case, as well as her lack of a stake in the community as a basis for the challenge.

After the prosecutor articulated his reasons for dismissal and after listening to defendant's arguments, the trial court rendered its conclusion, as follows:

> THE COURT: That is a racially neutral reason, though, and he can exclude—so I'm going to deny the motion. The object—I'm going to overrule the objection. I feel like that is a racially neutral reason. . . . I feel like you're sincere, and that's what you're looking for.

Defendant contends that this ruling by the trial court on the *Batson* claim was incomplete and that the cause must be remanded for the entry of specific findings of fact. We do not agree with defendant.

We note that "[s]uch findings are not necessary when there is no *material* conflict in the evidence." *Id.* at 502, 391 S.E.2d at 153. A

review of the record here discloses that the facts are not in dispute. As stated above, the record contains the transcript of the explanations offered by the prosecutor. The trial judge found those explanations to be adequate, race neutral, and sufficient to rebut defendant's *prima facie* case under *Batson*. "Since the trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. Therefore, we conclude that the trial court did not err in denying defendant's *Batson* claim as to Ms. Dandridge.

[5] Next, defendant contends that the trial court erred in disallowing rehabilitation questions of several prospective jurors concerning their views on capital punishment, thereby denying him his rights to a fair and impartial jury. While defendant refers to four pages in the transcript involving four different prospective jurors, we note that in his brief defendant discusses only two of these prospective jurors, McDonald and Blackard. However, defendant was allowed to ask rehabilitation questions of McDonald and Blackard. Furthermore, all four of these prospective jurors were unequivocal in their refusal to consider the death penalty under any circumstances. They made such statements as, "I cannot consider the death penalty," "I would probably always vote for life imprisonment," and "There's no question I would select life in prison." These jurors were all excused for cause. Although a defendant has the right to question prospective jurors about their views on capital punishment,

> judges are not required to allow a defendant to attempt to rehabilitate jurors challenged for cause. A trial court in its sound discretion may refuse a defendant's request to attempt to rehabilitate certain jurors challenged for cause by the State.

State v. Skipper, 337 N.C. 1, 18, 446 S.E.2d 252, 261 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). We conclude that the trial court did not abuse its discretion by refusing to allow rehabilitation questions of these prospective jurors. This argument is meritless.

In a related assignment of error, defendant contends that the trial court erred in excusing prospective jurors McDonald and Blackard for cause. Initially, Mr. McDonald stated to the trial court, "I've tried not to make a determination about whether I would or would not vote for or against the death penalty." After explaining the law to Mr. McDonald, the trial court ended by asking him, "Are you saying at this

time you could not say that you could fairly and impartially consider both of these [sentences], even though that is the law?" Mr. McDonald responded, "Yes, sir." Following defendant's attempted rehabilitation of Mr. McDonald, the trial court again questioned Mr. McDonald as follows:

> THE COURT: . . . [I]f you were given the option between life imprisonment and the death penalty, would you always vote against the death penalty or would you consider it fairly and objectively?
>
> MR. MCDONALD: I think, to sum this up, I would probably always vote for life imprisonment.

The next juror, Mr. Blackard, first stated, "I suspect I would have a problem of deciding and voting for the death penalty." After questioning by the trial court, Mr. Blackard indicated that he would always vote for life imprisonment if it was an option. During questioning by defense counsel and the prosecutor, Mr. Blackard said he believed that he could consider both options, but continued to express his doubts about his ability to vote for the death penalty. Finally, in response to the last question by the prosecutor asking him whether he could impose the death penalty "if the State proved beyond a reasonable doubt that the death penalty is the appropriate punishment in this case," Mr. Blackard said, "I doubt it very seriously."

Defendant argues that these two jurors should not have been excused for cause because they indicated that they could consider life imprisonment *and* the death penalty as options in sentencing. He says that their preference for life imprisonment as a punishment was because they "believed they had to give an opinion as to whether they could or could not consider and vote for the death penalty without having heard any of the evidence." Defendant argues that further questioning to clarify this issue "would likely have produced different answers and made them inappropriate jurors to be challenged."

The standard for determining whether a prospective juror may properly be excused for cause 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). The decision to excuse a prospective juror is within the discretion of the trial court because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faith-

fully and impartially apply the law." *Id.* at 425-26, 83 L. Ed. 2d at 852. Applying the *Wainwright* standard here, we conclude that the trial court did not abuse its discretion in excusing prospective jurors McDonald and Blackard for cause.

GUILT-INNOCENCE PHASE

[6] By another assignment of error, defendant contends that the repeated absences during the trial of one of his court-appointed defense attorneys infringed upon his right to the assistance of two attorneys in a capital case as provided by N.C.G.S. § 7A-450(b1). Mr. Wallace C. Harrelson was appointed by the trial court to represent defendant. Mr. Harrelson left the courtroom during the questioning of a prospective juror, during defendant's testimony, during the instructions conference in the guilt and sentencing phases, and during arguments of the prosecutor. Defendant argues that the trial court's failure to halt the proceedings during Mr. Harrelson's absences prevented his two appointed attorneys from effectively defending him and that the presence of both appointed attorneys is required at all times in the capital trial of an indigent defendant. This argument is without merit.

The governing statute provides in relevant part:

> An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner. If the indigent person is represented by the public defender's office, the requirement of an assistant counsel may be satisfied by the assignment to the case of an additional attorney from the public defender's staff.

N.C.G.S. § 7A-450(b1) (1995). This statute "states simply but unequivocally that an indigent facing a possible death penalty may not be tried unless an assistant counsel has been appointed in a timely manner." *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988). It does not require, either expressly or impliedly, that *both* of a capital defendant's attorneys be present at *all* times for *all* matters.

In this case, Mr. Harrelson was appointed to assist Mr. Fred Lind at the time of the Rule 24 hearing, seven months before trial, at which it was determined that defendant was to be tried capitally. Gen. R. Pract. Super. and Dist. Ct. 24, 1999 Ann. R. N.C. 22. The appointment of Mr. Harrelson at that early stage ensured that both attorneys representing the indigent defendant would have enough time to effec-

tively prepare for trial. Thus, the trial court properly complied with the statute and did not err by permitting the trial to continue when one of the appointed attorneys left the courtroom.

Furthermore, while our careful examination of the transcript reveals that Mr. Harrelson left the courtroom several times throughout the trial, the longest of these absences was just four minutes. During several of these absences, court was in recess or held at ease; during every absence of Mr. Harrelson, defendant was represented by Mr. Lind, who was present in the courtroom. This assignment of error is feckless.

[7] By another assignment of error, defendant contends that the trial court erred in allowing Tshamba Wynn to testify about what Wynn's attorney, Robert O'Hale, told him regarding defendant, the pending murder trial, and defendant's counsel. Shortly after the murder, Wynn was arrested while driving the victim's car. He testified that defendant had given him the keys to the stolen car. Several months later, Wynn was arrested on an unrelated charge and was placed in the same Guilford County jail cell as defendant. Wynn testified that while he was in the jail cell, defendant threatened him and then coerced him into signing a note prepared by defendant, which indicated that a third person had threatened Wynn.

Wynn testified that the next time he saw the note was when he met his court appointed attorney, Mr. O'Hale, who had the note with him when they met for the first time. During their meeting, they discussed Wynn's case briefly and then spent the remainder of the time talking about this murder case. Wynn testified that Mr. O'Hale told him that he was a friend of defendant's attorneys. Mr. O'Hale said that defendant's attorneys wanted him to find out what Wynn would say if he was called to testify for the State. Wynn also testified that Mr. O'Hale asked his permission to reveal any information Wynn gave him to defendant's attorneys. Defendant's objections to these statements were overruled by the trial court. However, the trial court instructed the jury not to consider Wynn's testimony about Mr. O'Hale for the truth of what was said to Wynn, but only "inasmuch as the statement showed why [Wynn] took subsequent actions." Defendant maintains that the State failed to introduce any evidence that Wynn took any subsequent actions in response to this statement. Therefore, defendant argues, this testimony was inadmissable hearsay and not subject to any exception under the hearsay rule. Defendant contends that because Wynn testified that defendant's counsel had asked

Wynn's attorney to violate the attorney-client relationship, the impact of this evidence was to portray defendant's counsel as being unethical and deceitful. Defendant says that this undermined his counsel's credibility and effectiveness in representing him, thereby denying him his due process rights to a fair trial.

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) (1992). 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. Morston*, 336 N.C. 381, 399, 445 S.E.2d 1, 11 (1994); *see also State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

In the present case, the trial court allowed Wynn's testimony for the limited purpose of explaining why Wynn reacted to the note as he did and his subsequent conduct in testifying for the State rather than for defendant. Wynn's testimony about his conversation with Mr. O'Hale was necessary to explain the coercive circumstances under which the note was signed and why Wynn refused to testify in accordance with the note. We conclude that Wynn's testimony was proper nonhearsay evidence when introduced for that limited purpose.

We also conclude that defendant suffered no prejudice from this testimony. Although, according to Wynn, defendant's counsel sought to find out what Wynn would testify to in court, there is no evidence that defendant's counsel tried to influence Wynn to give false testimony. Furthermore, contrary to defendant's contention, there is no evidence that Wynn's attorney, Mr. O'Hale, violated the attorney-client privilege by revealing any information concerning Wynn to defendant's attorneys. Thus, there was no wrongdoing that could be attributed to defendant's counsel. This assignment of error is without merit.

[8] By another assignment of error, defendant contends that he was denied due process of law when the trial court denied his motion to require the State to provide him with the criminal records of all of the prosecution witnesses. Defendant maintains that the credibility of the witnesses was crucial and that the records were necessary for impeachment purposes. Although many of the prosecution witnesses

did testify about their criminal history, defendant claims that without their criminal records, whether they testified truthfully or completely cannot be known.

We have previously decided this question in *State v. Carter*, 326 N.C. 243, 388 S.E.2d 111 (1990). In *Carter*, the defendant's counsel searched the records in the office of the Clerk of Superior Court but found no convictions that would help him in impeaching the witnesses for the State. The defendant then requested that the trial court "order the district attorney to share its allegedly unique access to the 'Police Information Network' ('P.I.N.') system." *Id.* at 253, 388 S.E.2d at 117. The trial court denied the request. This Court, finding no error, held that "defendant had neither the statutory nor the constitutional right to the information he sought." *Id.*; *see also State v. Alston*, 307 N.C. 321, 338, 298 S.E.2d 631, 643 (1983) ("The trial court is without authority to grant such a request and the failure of the court to order the disclosure of the State's witnesses' criminal records is not violative of due process."). We have said that in some cases, withholding such information can deny a defendant due process. However,

> [t]o establish a denial of due process defendant would have had to show (1) that [the witness] *had* a significant record of degrading or criminal conduct; (2) that the impeaching information sought was *withheld* by the prosecution; and (3) that its disclosure considered in light of all the evidence would have created a reasonable doubt *of his guilt* which would not otherwise exist.

State v. Robinson, 310 N.C. 530, 536, 313 S.E.2d 571, 576 (1984) (emphasis added) (quoting *State v. Ford*, 297 N.C. 144, 149, 254 S.E.2d 14, 17 (1979)).

Our careful examination of the record in this case discloses that the prosecution witnesses were cross-examined rigorously and extensively by both defense attorneys. Both successfully elicited testimony from the witnesses on cross-examination about their various past criminal convictions including drug possession and sale of drugs, breaking and entering, and larceny. There was ample evidence presented to the jury for impeachment purposes. We fail to see how any additional impeaching evidence gleaned from the criminal records of these witnesses would have created a reasonable doubt of defendant's guilt which did not otherwise exist. *Id.* We therefore conclude that defendant's due process rights were not violated. Accordingly, this assignment of error is overruled.

Defendant next argues that the trial court erred in denying his motions for a mistrial based on the testimony of one of the State's witnesses and the prosecutor's misstatement during the questioning of defendant. During cross-examination, Officer Brian Dodd referred to an unrelated armed robbery charge against defendant. Defendant's objection was sustained, and the trial court instructed the jury to disregard the statement. Later, during cross-examination of defendant concerning his convictions for two prior robberies, the prosecutor mistakenly referred to the prior convictions as "two murders." In this instance, the trial court did not issue a curative instruction to the jury. Defendant contends that pursuant to N.C.G.S. § 15A-1061, he was entitled to a mistrial because this inadmissible evidence and improper questioning by the prosecutor was highly inflammatory and prejudiced his case. We disagree.

The relevant statute here directs the trial court to declare a mistrial upon the defendant's motion if there occurs during the trial an error or conduct inside or outside the courtroom that results in substantial and irreparable prejudice to the defendant's case. N.C.G.S. § 15A-1061 (1997). It is well established that the decision as to whether substantial and irreparable prejudice has occurred lies within the sound discretion of the trial judge and that his decision will not be disturbed on appeal absent a showing of abuse of discretion. *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422 (1998). The decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine the effect of any such error on the jury. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). Applying these principles, we reject defendant's contention that the trial court erred by failing to declare a mistrial.

[9] First, regarding Officer Dodd's testimony about defendant's unrelated armed robbery charge, we note that the trial court sustained defendant's objection, allowed his motion to strike, and instructed the jury to disregard the statement. Because the trial court cured any error by its action in sustaining the objection and giving the curative instruction, we find no prejudice to defendant warranting a mistrial. *See State v. Bowie*, 340 N.C. 199, 209, 456 S.E.2d 771, 776, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 435 (1995).

[10] Next, we examine the prosecutor's questioning of defendant as follows:

Q My question to you, sir, is, why did you come back to Guilford County?

A Because I had to go to court for two common law robberies.

Q And those court dates were in fact in 1996, weren't they, sir?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A The court dates was in '95, Mr. Panosh, August the 22nd of 19— August the 17th—August the 24th of 1995, was when I had the court dates. I did not have no common-law robbery court dates in 1996.

. . . .

Q Isn't it a fact, sir, that you appeared on October the 17th of 1995—

[DEFENSE COUNSEL]: Objection.

Q —and pled guilty—

THE COURT: Overruled.

Q —to those two murders?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A I didn't never pled guilty to two murders.

[DEFENSE COUNSEL]: Move to Strike. Motion for a mistrial.

Q You pled guilty to those two—

THE COURT: Motion denied.

Q —common-law robberies?

Although no curative instruction was given by the trial court in this instance, defendant did not request that one be given. We have held that "[a] trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense." *State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992). Moreover, defendant himself denied that he had pled guilty to "two murders." We also note that it is obvious that the prosecutor simply misspoke and quickly corrected himself. Defendant has failed to show that this

slip of the tongue prejudiced his case. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motions for a mistrial and find this assignment of error to be without merit.

By four assignments of error, defendant challenges the sufficiency of the evidence presented in support of his robbery with a dangerous weapon, first-degree kidnapping, and first-degree burglary convictions. To withstand a motion to dismiss, "the trial court need only determine whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). The trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* "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). We will apply the foregoing principles to each of defendant's contentions in turn.

[11] Defendant first contends that the evidence was insufficient to prove that he committed the crime of robbery with a dangerous weapon. The elements of this offense are an unlawful taking or an attempt to take personal property from the person or in the presence of another, by use or threatened use of a firearm or other dangerous weapon, whereby the life of a person is endangered or threatened. N.C.G.S. § 14-87 (1993). Defendant argues that the evidence presented that the victim's stolen property was found in his possession is insufficient to give rise to the reasonable inference that he took the stolen items from the victim's person. Defendant further argues that the insufficiency of the evidence to support a conviction for robbery with a dangerous weapon undermines his conviction for first-degree murder based on the felony murder rule, entitling him to a new trial. Defendant also asserts that he is entitled to a new sentencing hearing because robbery was an aggravating circumstance found by the jury.

[12] The evidence at trial tended to show that defendant was seen at a sports bar located just a couple of hundred feet from where the victim lived. His palm print was found on the stove in the victim's home. He was seen driving the victim's car and using the victim's automatic-teller machine card shortly before the victim's body was discovered. Further, the victim's clothing and other items of stolen property were seized from defendant's room. Taken in the light most favorable to the State, we conclude that there was sufficient evidence to give rise

to a reasonable inference that defendant murdered Tuttle and stole the property while Tuttle was bound and bleeding to death in the kitchen. Furthermore, defendant was convicted of first-degree murder not only on the basis of the felony murder rule but also on the basis of premeditation and deliberation. We have previously held that where a defendant is convicted of murder on the theory of premeditation and deliberation supported by the law and the facts, he has suffered no prejudice by the submission to the jury of an alternate theory. *State v. Barnard*, 346 N.C. 95, 108-09, 484 S.E.2d 382, 390 (1997). Finally, the felony underlying a conviction for felony murder may be submitted as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5) if the defendant is also convicted of first-degree murder on the basis of premeditation and deliberation. *See State v. McNeill*, 346 N.C. 233, 241, 485 S.E.2d 284, 289 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 647 (1998). Since the jury found defendant guilty of first-degree murder under both theories, the trial court did not err in submitting the (e)(5) aggravating circumstance. Thus, we find no merit to defendant's argument.

[13] Next, defendant contends that the trial court erred by denying his motion to dismiss the first-degree kidnapping charge because there was insufficient evidence that the restraint of the victim was separate and apart from the restraint inherent in the commission of the armed robbery. Defendant also argues that this Court must arrest judgment on the kidnapping charge. We disagree.

N.C.G.S. 14-39(a) provides:

> (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, or any other person under the age of 16 years without the consent of a parent or legal guardian 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) (1998).

"Restraint" in our kidnapping statute "connotes a restraint separate and apart from that inherent in the commission of the other

felony. . . . The key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or 'subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)).

In this case, the victim was found lying on the floor with his hands tied behind his back. In addition, the victim had an apron tied around his neck and several towels and a stuffed toy around his mouth and face. The elements of armed robbery do not require that defendant bind and gag the victim in such a manner. Furthermore, the evidence tended to show that the victim was repeatedly stabbed and cut while he was restrained, and thus he "was subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* We conclude that there was ample evidence of restraint not inherent in the armed robbery to support the charge of kidnapping. This assignment of error is overruled.

[14] Finally, defendant contends that the trial court erred by denying his motion to dismiss the charge of first-degree burglary because there was insufficient evidence of the element of "breaking" to establish the crime of burglary. Defendant also asserts that he is entitled to a new sentencing hearing because burglary was an aggravating circumstance found by the jury. Once again, we find no merit to defendant's contention.

The indictment for burglary alleged that defendant did unlawfully and feloniously break and enter the dwelling of the victim in the nighttime with the intent to commit a felony, larceny, or robbery therein. *See* N.C.G.S. § 14-51 (1993). "A breaking may be actual or constructive." *State v. Wilson*, 289 N.C. 531, 539, 223 S.E.2d 311, 316 (1976). In this case, the State presented evidence that there was a constructive breaking accomplished by deception or trick. *See State v. Oliver*, 334 N.C. 513, 529, 434 S.E.2d 202, 210 (1993). The State relied on the testimony of Mary Blue, who had been assaulted and robbed by defendant after he tricked his way into her house, to establish defendant's *modus operandi*. She testified that defendant rang her doorbell and asked to use the phone to get help because his car had broken down. Once inside the kitchen, he asked for the telephone book and a glass of water. In the present case, defendant testified to being in the victim's kitchen to drink a glass of water. The police found a telephone book opened to the taxicab pages. A cab

company had received a call at about the time of the murder requesting that a cab come to the victim's address. Ms. Blue testified that defendant had stabbed her in the neck with a knife taken from her kitchen. In the present case, Tuttle was stabbed in the neck with a knife taken from his kitchen. Finally, in both offenses, the victim's wallet or pocketbook was stolen. Viewed in the light most favorable to the State, this evidence permitted the inference that defendant tricked his way into Tuttle's house in the same manner that he tricked his way into Ms. Blue's house.

In addition, there was other evidence that defendant had been inside Tuttle's residence. Defendant testified that he did not know Tuttle but that he had been in his home. Defendant testified that he had been in the kitchen because he had asked Tuttle for a drink of water, and defendant's palm print was found on the stove in the kitchen. Therefore, we conclude that there is sufficient evidence of a constructive breaking to sustain defendant's burglary conviction. We overrule this assignment of error.

In seven assignments of error, defendant contends that the trial court erred by refusing to give particular jury instructions which he asserts were supported by the evidence and in conformity with the law. For the following reasons, we find no error in the trial court's failure to give the instructions requested by defendant.

[15] First, defendant contends that the trial court committed reversible error by denying his request to instruct the jury on second-degree murder as a lesser included offense of first-degree murder. Because there was no confession by defendant and no eyewitness to the exact circumstances of Tuttle's murder, defendant argues the jury could have found that the State failed to prove that he killed the victim after premeditation and deliberation.

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). Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *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). "A defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support that lesser-included offense." *Id.* "If the State's evidence establishes each and every element of first-degree murder and there is no evidence to negate these elements, it is proper for

the trial court to exclude second-degree murder from the jury's consideration." *Id.*

Here, defendant contends that the jury could reasonably have concluded that defendant killed the victim with malice but without premeditation and deliberation. Premeditation involves a specific intent to kill, however short, formed before the actual killing. *Taylor*, 337 N.C. at 607, 447 S.E.2d at 367. 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. *Id.* Because premeditation and deliberation are mental processes and often are not supported by direct evidence, we have set out some of the many circumstances from which they may be inferred:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Sierra, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994).

In this case, the evidence tended to show that defendant entered Tuttle's home by trick and attacked him without provocation. The evidence also tended to show that Tuttle was bound and helpless during the murder. Tuttle suffered thirty-six stab wounds to his body inflicted with a butcher knife, many of which the coroner testified had been inflicted while Tuttle was still alive, showing the brutality of the killing. We conclude that this evidence is sufficient to satisfy the State's burden of proving premeditation and deliberation. Furthermore, the only evidence offered by defendant to negate first-degree murder was his own testimony denying his involvement in the crime, which alone does not tend to negate premeditation and deliberation. *See Morston*, 336 N.C. at 402-03, 445 S.E.2d at 13; *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986). Thus, the evidence in this case would not permit a jury to find defendant guilty of second-degree murder. Accordingly, we reject this assignment of error.

[16] Next, defendant contends that the trial court committed reversible error by failing to instruct the jury on second-degree burglary as a permissible lesser included offense of first-degree burglary. At the outset, we note that defendant did not request such an instruction at trial and therefore is entitled to review only for plain error. N.C. R. App. P. 10(c)(4). In order to prevail under the plain error rule, defendant must convince this Court that there was error and that absent the error, the jury probably would have reached a different verdict. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Defendant cannot meet this heavy burden.

Second-degree burglary has elements identical to first-degree burglary, except actual occupation of the residence at the time of the commission of the crime is not required. N.C.G.S. § 14-51. Defendant argues that the State presented no direct evidence that the victim's residence was actually occupied at the time that defendant entered. In support of his argument, defendant relies on the testimony of two witnesses. As stated earlier, Wilson drove with defendant to the sports bar the night of the murder. After waiting a long time in the car for defendant, Wilson went to the bar one last time looking for him and was told that defendant had left fifteen minutes earlier. On direct examination, when asked what time this was, Wilson responded, "I guess at least 10:00 o'clock, I guess." Wilson also testified that he saw defendant "about one hour later," driving the victim's car. Also, Robert McFayden, a friend of the victim's, testified that on the night of the murder, the victim left his house at approximately 11:30 p.m. There was no direct evidence of exactly when the victim arrived home. According to defendant, these times would indicate that he left to walk to the victim's house, which was only a few hundred feet from the sports bar, at approximately 10:00 p.m., committed the crimes and returned to see Wilson, all by 11:30 p.m., making it possible that the victim's house was not occupied at the time of the breaking and entering.

However, our careful reading of the transcript does not support defendant's argument. On cross-examination, Wilson was confronted with the conflicting statement he gave the police in which he stated that he had waited at the sports bar for defendant until 1:30 or 2:00 o'clock in the morning. He responded, "I might have said it. But like I say, nobody had no watch on, but it was pretty late when we left, because we waited and waited for [defendant]." Furthermore, Wilson's friend Rabbit, who accompanied Wilson and defendant that night, testified that he and Wilson left the bar at "probably after 12:00

a.m." Also, the bartender at the sports bar testified that defendant left the bar at about 1:30 a.m.

Moreover, the State presented evidence tending to show that Tuttle was home at the time that defendant broke into and entered his residence. Tuttle left his friend's house at 11:30 p.m. The cab driver testified that when he arrived at Tuttle's house after 2:00 a.m., there was a blue or gray car in the driveway, which was later determined to be Tuttle's car. When Tuttle's roommate returned home later that morning and discovered Tuttle's body, he noticed that Tuttle's car was gone. All of this evidence tended to show that Tuttle was actually occupying his residence when defendant broke into the victim's home and entered it to rob and murder him. In light of the foregoing evidence, we conclude that defendant cannot show that the jury probably would have reached a different verdict, even if the trial court had instructed it on the lesser-included offense of second-degree burglary. This assignment of error is meritless.

[17] Next, defendant contends that the trial court committed reversible error in failing to properly instruct the jury on the probative value of fingerprint or palm print evidence. As to how his left palm print came to be found on the stove in the victim's kitchen, defendant testified that he had been inside the victim's house the night of the murder. He said that he had impressed his palm print on the stove when he went into the kitchen to get a glass of water, but that when he left, the victim was still alive.

Prior to the charge conference, defendant made a written request for a special jury instruction to inform the jury that the fingerprint or palm print of the defendant are "without probative force unless the circumstances show that they could have only been impressed at the time the crime was committed." The State filed its own request for an instruction. During the charge conference, the trial court stated, "I believe both of them are accurate statements of the law, and I'll give them both." The combination of the two instructions was given to the jury as follows:

> Now, fingerprints or palmprints corresponding to those of the defendant are without probative force, unless the circumstances show that they could only have been impressed at the time the crime was committed. If a qualified expert finds that fingerprints found at the scene correspond with the fingerprints of the defendant, and when considered with all the other evidence of the case, you find substantial evidence of circumstances that the

> fingerprints were impressed at or about the time these crimes were committed, then it would be evidence which logically tends to show that the accused was present and participated in the commission of the crimes. Now, what the evidence proves or fails to prove . . . is a question of fact for you, the jury.

Defendant admits that the first part of the instruction was as he requested, but argues that the second part of the instruction was inconsistent with the first. Specifically, defendant complains that if the jury found from "substantial evidence of circumstances that the fingerprints were impressed *at or about* the time these crimes were committed," it would allow the jury to convict him even if the jury believed his innocent explanation for how his palm print had been impressed at the victim's house. Defendant relies on *State v. Bradley*, 65 N.C. App. 359, 309 S.E.2d 510 (1983), in support of his argument. However, the present case is distinguishable from *Bradley*.

In *Bradley*, the State relied primarily on a latent palm print of the defendant's found on a windowpane to prove that the defendant committed larceny. Despite expert testimony that the palm print could have remained on the window for six months, the trial court failed to give the jury an instruction on the limited circumstances under which the palm print would be sufficient to support a conviction. In the present case, in addition to defendant's palm print, the State presented substantial circumstantial evidence tending to prove defendant's guilt, including defendant's proximity to the victim's house on the night of the murder, the telephone call to the cab company placed from the victim's house, the victim's car and other personal items found in defendant's possession, and the videotape of defendant using the victim's automatic-teller machine card. Furthermore, here, the jury *was* instructed on the probative effect of palm print evidence, just as defendant requested. We note also that defendant initially denied being in the victim's house and changed his story only *after* the evidence of the palm print was presented by the State. It was a matter for the jury to decide whether to believe the State's or defendant's explanation of how and when defendant's palm print was left in the victim's kitchen. Based on the evidence, the trial court's instruction was proper. We find no merit to defendant's argument.

[18] Defendant next assigns as error the trial court's instructions on the use and effect of circumstantial evidence. Defendant requested the following instruction:

> Circumstantial evidence will support a conviction when, and only when, the circumstances are sufficient to exclude every reasonable hypothesis except that of guilt. To meet this requirement, the circumstantial facts must be consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent.

The trial court declined to give this instruction and instead informed the jury that the law makes no distinction between the weight to be given either circumstantial or direct evidence and that "[a]fter weighing all the evidence if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." Defendant asserts that the trial court's failure to instruct that the circumstantial evidence must be inconsistent with innocence was error. We disagree.

The instructions on circumstantial evidence given to the jury in this case were taken directly from North Carolina's pattern jury instructions. *See* N.C.P.I.—Crim. 104.05 (1986). Moreover, we have previously held that such instructions are proper. *See State v. Moore*, 335 N.C. 567, 607, 440 S.E.2d 797, 820 (instructions identical to those given in this case), *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994); *see also Stone*, 323 N.C. at 452, 373 S.E.2d at 433 ("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. Adcock*, 310 N.C. 1, 33, 310 S.E.2d 587, 606 (1984) ("Our research discloses that both state and federal courts are increasingly abandoning the requirement that there be special instructions on proof of guilt by circumstantial evidence."). We conclude that the trial court did not err in refusing to instruct the jury in the language requested by defendant.

[19] By his next assignment of error regarding jury instructions, defendant contends that the trial court committed plain error in instructing the jury on the doctrine of possession of recently stolen property. Defendant claims that during the first part of the instruction the trial court implied that "the mere physical proximity or the mere fact that an article is found in a certain place under the dominion and control of the defendant would be sufficient to merit or trigger the inference of the doctrine of possession of recently stolen property." Although defendant concedes that the trial court later recognized and corrected any error, he still contends that the effect of the instruction was to place the burden on defendant to rebut the presumption of

guilt. Defendant asserts this was a fundamental error entitling him to a new trial. We find no merit to this argument.

The relevant portion of the trial court's instructions was as follows:

> [T]he defendant's physical proximity, if any, to the article *does not by itself* permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or its use. (Emphasis added). Later, *sua sponte*, the trial court repeated:
>
> *[T]he mere fact of physical proximity* and the mere fact that an article is found in a certain place, and that the defendant exercised control over that place, *those facts alone do not merit or warrant an inference.* There must be other circumstances, in addition to that, before you can make such an inference.

(Emphasis added.) These were proper instructions, and we fail to see how they could have carried the implication that defendant now says they carried. This assignment of error is overruled.

[20] Next, defendant contends that the trial court committed plain error in instructing the jury on first-degree kidnapping by including an allegation from the indictment not supported by the evidence. In the indictment, defendant was charged, *inter alia*, with first-degree kidnapping wherein the State alleged that "[t]he victim was not released in a safe place but was killed by [defendant]." The trial court instructed that "the State must prove beyond a reasonable doubt that the person was not released by the defendant in a safe place." Defendant claims that the evidence in this case is that the victim never left his house and was in fact killed in his house. He contends that because the victim had not been removed from one place and taken to another, the element of failure to release the victim in a safe place was not supported by the evidence. We find this instruction to be proper. Kidnapping does not necessarily require that the victim be "removed"; kidnapping may also be accomplished by confining or restraining the victim. *See* N.C.G.S. § 14-39(a). A kidnapping in the first degree is committed if, *inter alia*, "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C.G.S. § 14-39(b). Further, the element of failure to release in a safe place applies to a kidnapping by restraint and confinement and not just to kidnapping by removal, as defendant seems to suggest.

In the case at bar, the evidence tended to show that kidnapping was accomplished by restraint of the victim. As the victim was found stabbed to death, with his hands still tied behind his back with a telephone cord, he most certainly was never released from this restraint in a safe place.

[21] By this same argument, defendant contends that should this Court find that the kidnapping instruction was supported by the evidence, the trial court erred in instructing on first-degree kidnapping as the underlying felony for felony murder. Defendant argues that because the murder of the victim is the only evidence to support the "serious injury" element of first-degree kidnapping, his convictions and sentencing for both first-degree kidnapping and felony murder subject him to double punishment and violate the prohibition against double jeopardy.

As noted above, defendant's conviction of first-degree kidnapping was based on the element that he did not "release the victim in a safe place," and *not*, as defendant suggests, based on the element of "serious injury." Furthermore, defendant's first-degree murder conviction was based not only on the felony murder rule, but also on premeditation and deliberation. "Where the conviction of a defendant for first-degree murder is based upon proof of malice, premeditation and deliberation, proof of an underlying felony—although that felony be part of the same continuous transaction—is *not* an essential element of the state's homicide case, and the defendant *may* therefore be sentenced upon both the murder conviction and the felony conviction." *State v. Goodman*, 298 N.C. 1, 15, 257 S.E.2d 569, 579 (1979). In addition, defendant was convicted under the felony murder rule not only on the basis of first-degree kidnapping, but also on the basis of first-degree burglary and robbery with a dangerous weapon. For these reasons, we reject defendant's arguments.

[22] In another assignment of error, defendant contends that the trial court committed reversible error by allowing the prosecutor to read facts of another, unrelated case to the jury during closing arguments. The pertinent portion of the argument follows:

> [PROSECUTOR]: 'A constructive breaking, as distinguished from an actual forcible breaking, occurs when entrance to the dwelling is accomplished through fraud, deception or threatened violence.' Quoting a case called *State v. Young* from our Supreme Court from 1985, 'In the instant case, the State presented evi-

dence that the defendant and two others went to the victim's home on the night—'

[DEFENSE COUNSEL]: Objections to facts of another case.

[PROSECUTOR]: '—8 of February 1983—'

THE COURT: Excuse me?

[DEFENSE COUNSEL]: Objection to facts of another case.

THE COURT: Overruled.

[PROSECUTOR]: '—intending to commit the felonies of armed robbery and murder. The victim was tricked into opening the door by Dwight Jackson's false statement that he and his friends had come to purchase liquor from the victim.' . . . [I]n this regard, you can consider the evidence of Ms. Mary Blue, how she was tricked by the defendant, how he said, "I need to call—" "I need to use the phone," or "I need a glass of water." And I submit to you that's exactly what happened in this case . . . [Defendant] came to Mr. Tuttle's home, and the front porch light was on. And I submit and contend to you he did exactly what he did to Ms. Blue, he knocked on the door, and he tricked Mr. Tuttle into letting him in.

Defendant argues that it was improper for the prosecutor to argue facts of another case in an effort to explain to the jury his theory that defendant entered the victim's home by trickery in the present case. Defendant contends that the trial court's failure to correct this impropriety entitles him to a new trial.

In all superior court jury trials, "the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 7A-97 (1995). We have previously reviewed the scope of a party's right under this statute:

> [This statute] grants counsel the right to argue the law to the jury which includes the authority to read and comment on reported cases and statutes. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977). There are, however, limitations on what portions of these cases counsel may relate. For instance, counsel may only read statements of the law in the case which are relevant to the issues before the jury. In other words, "the whole *corpus juris* is not fair game." *State v. McMorris*, 290 N.C. 286, 287, 225 S.E.2d 553, 554 (1976). Secondly, counsel may not read the facts contained in a published opinion together with the result to

> imply that the jury in his case should return a favorable verdict for his client. *Wilcox v.* [*Glover Motors, Inc.*], 269 N.C. 473, 153 S.E.2d 76 (1967). Furthermore, counsel may not read from a dissenting opinion in a reported case. *See Conn v.* [*Seaboard Air Line Ry.* Co.], 201 N.C. 157, 159 S.E. 331 (1931).

State v. Gardner, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986).

In support of his contention, defendant erroneously relies on *Gardner*, where this Court upheld the trial court's decision to not allow the defense to read an excerpt to the jury. However, *Gardner* is distinguishable from the present case. In *Gardner*, the material the defendant sought to read to the jury was contrary to the law in North Carolina and was quoted from sources which were not proper, including a dissenting opinion from another jurisdiction. The excerpt also involved an issue which did not arise from the evidence in the defendant's trial. In the present case, the portion of the prosecutor's argument complained of by defendant not only accurately stated the law of North Carolina, but also concerned principles of law which were relevant to an issue arising in this case, the constructive breaking element of burglary. We conclude that the trial court did not err by allowing the prosecutor to read to the jury the above mentioned excerpt since the principles contained therein were relevant to the evidence and the issues of this case.

[23] In defendant's final assignment of error in the guilt-innocence phase of his trial, he argues that the trial court denied him his due process rights to a fair trial as guaranteed by the federal and state Constitutions by allowing a witness to testify regarding a prior violent assault. As we have already discussed, Ms. Blue testified that defendant had tricked his way into her house and assaulted her. Defendant claims that this evidence was so "graphic and disturbing" that it could only have been considered by the jury for the impermissible purpose of establishing defendant's propensity to commit the crimes in the present case. Further, defendant contends that the dissimilarities between the assault on Ms. Blue and the crimes in this case were so significant that the probative value of the evidence was outweighed by the prejudicial effect.

Rule 404(b) of the North Carolina Rules of Evidence provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

> conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). Furthermore, as we have previously stated:

> "This rule is 'a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' *State v. Coffey*, 326 N.C. [268,] 278-79, 389 S.E.2d [48,] 54 [(1990)]. The list of permissible purposes for admission of 'other crimes' evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime."

State v. Pierce, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997) (quoting *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995)) (alterations in original).

We note first that the similarity between a prior crime or act and the charged crime need not "rise to the level of the unique and bizarre" in order for the evidence to be admitted under Rule 404(b). *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). As we have outlined earlier in this opinion, there were many similarities between the assault committed by defendant on Ms. Blue and the crimes for which defendant was tried in this case. After conducting a *voir dire*, the trial court found these similarities to have probative value and that the evidence tended to prove relevant facts, including the motive for the burglary, the method of nonforcible entry into the home, the intent of the killer to commit a robbery, the specific intent to kill, a specific plan or design to commit the burglary, robbery, and murder, and a pattern of behavior tending to show that defendant committed both crimes. These are all permissible purposes for which evidence may be offered under Rule 404(b).

In addition, there were four dissimilarities found by the trial court. Specifically, the victim in this case was bound with a telephone cord and Ms. Blue was not. Ms. Blue was assaulted with a handgun and the victim here was not. Ms. Blue is a middle-aged black female, and the victim in this case was a young white male. Further, the vic-

tim here was not acquainted with defendant, while Ms. Blue was. The trial court concluded that these dissimilarities were not so significant as to prevent the evidence of the prior assault from being probative and admissible under Rule 404(b). In its written order, the trial court noted that "the fact that Ms. Blue was not bound, for example, merely explains why she is able to be present and testify." We find no error in the trial court's ruling.

We also find no merit to defendant's contention that the probative value of this evidence was outweighed by the danger of unfair prejudice. Rule 403 of the North Carolina Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992). Any evidence tending to prove a defendant guilty will necessarily be prejudicial to his case; the question is one of degree. *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 512-13 (1996). The trial court must balance the probative value of the evidence against its prejudicial effect, and the determination of whether to exclude the evidence under Rule 403 is a matter within the sound discretion of the trial court. *State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 106 (1998). Here, the trial court ruled that the probative value of this evidence outweighed any prejudicial effect. We conclude that the trial court did not abuse its discretion by admitting Ms. Blue's testimony into evidence. Accordingly, we reject this assignment of error.

For the foregoing reasons, we conclude that defendant's trial on all charges against him was free of prejudicial error.

CAPITAL SENTENCING PROCEEDING

[24] By an assignment of error, defendant contends that during the separate capital sentencing proceeding held after the jury convicted him of first-degree murder, the trial court erred by allowing the testimony of Terry Ray Cook, the mortician who prepared the body of the victim for burial. The prosecutor sought to elicit testimony from Mr. Cook that the victim had been forcibly gagged to establish the especially heinous, atrocious, or cruel aggravating circumstance. Mr. Cook testified that in order to close the jaw and mouth of the victim, he had to rotate the victim's head and break the jaw. The prosecutor

sought to introduce this testimony as evidence tending to show that when rigor mortis set in, the victim's jaw was open because an object had been stuffed in his mouth. After defense counsel objected to the line of questioning, the trial court ruled that it would allow the evidence if the prosecutor could lay a foundation establishing that Mr. Cook was qualified to testify to such injuries. The prosecutor continued his questioning of Mr. Cook, who testified that the bottom jaw was out of line and that there was bruising in that area of the body. The trial court then held another bench conference and inquired as to whether the prosecutor could re-call the coroner to testify and exclude the possibility that the misalignment and injuries to the jaw which Mr. Cook described had occurred during the autopsy. The prosecutor said he could not, at which point the trial court said it would not allow Mr. Cook's testimony into evidence, granted defendant's motion to strike, and instructed the jury to disregard the testimony.

Defendant argues that this repetitive testimony was so gruesome and inflammatory that withdrawal was insufficient to cure the prejudice to defendant. Defendant further contends that in closing arguments, the prosecutor argued to the jury that the victim had been gagged, causing the jurors to recall the graphic testimony regarding the victim's jaw and affecting their recommendation that defendant be sentenced to death. We disagree.

Our review of the record reveals that the trial court properly addressed defense counsel's objections to the testimony by requiring the prosecutor to provide additional evidence to establish the probative value of the testimony of Mr. Cook concerning the victim's jaw. When the prosecutor failed to do so, the trial court granted defendant's motion to strike the testimony. Ordinarily, when objectionable evidence is withdrawn, no error is committed. *State v. Adams*, 347 N.C. 48, 68, 490 S.E.2d 220, 230 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 878 (1998). Furthermore, the trial court instructed the jury to disregard the testimony, and we must presume that the jury followed the instructions. *See Call*, 349 N.C. at 420, 508 S.E.2d at 520. In addition, there was properly admitted evidence that the victim was bound and stabbed repeatedly and that many wounds were inflicted while he was still alive. This evidence alone would have been sufficient to support the especially heinous, atrocious, or cruel aggravating circumstance. We overrule this assignment of error.

[25] Defendant next contends that the trial court erred in the capital sentencing proceeding by admitting the testimony of Detective Larry

Baulding quoting Christine Needham, a robbery victim. During his investigation of the crime, Detective Baulding interviewed Ms. Needham, the clerk at a convenience store where defendant committed a robbery on 20 February 1995. Detective Baulding testified about Ms. Needham's description of how defendant had threatened her with a gun and forced her to give him money. Because he stipulated to the conviction and judgment for the robbery, defendant argues that the State was precluded from offering additional evidence about the crime. Defendant argues that this additional testimony, offered to support the (e)(3) aggravating circumstance that he had been convicted of a prior felony involving the use or threat of violence to the person, was hearsay and therefore inadmissable. Defendant contends that admission of this evidence was in violation of the Confrontation Clause of the Sixth Amendment and Article I of the North Carolina Constitution.

We have repeatedly stated that the Rules of Evidence do not apply in capital sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Therefore, a trial court has great discretion to admit any evidence relevant to sentencing. *State v. Warren*, 347 N.C. 309, 325, 492 S.E.2d 609, 618 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998). Furthermore,

> The issue of the propriety of limiting the state in these circumstances to the introduction of the defendant's record has been settled in this jurisdiction. In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), we reaffirmed the rule in *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983), holding that the state may not be limited to the introduction of a record of prior conviction when attempting to prove a circumstance in aggravation, whether or not the defendant has stipulated to the record of conviction. In *McDougall* we noted "the state's duty [under N.C.G.S. § 15A-2000(c)(1)] to prove each aggravating circumstance beyond a reasonable doubt. . . . [T]he state cannot be deprived of an opportunity to carry its burden of proof by the use of competent, relevant evidence." 308 N.C. at 22, 301 S.E.2d at 321.

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) (alteration in original).

The testimony in question here was the robbery victim's description of the manner in which the crime took place. We find this to be

relevant evidence of the (e)(3) aggravating circumstance. We conclude that the trial court did not err by admitting this evidence and thus overrule this assignment of error.

[26] In arguing his next two assignments of error together, defendant contends that during closing arguments at the capital sentencing proceeding, the trial court improperly prevented defense counsel from arguing to the jury that the ultimate decision as to the sentence recommendation was the individual responsibility of each juror, thereby improperly limiting the scope and content of defense counsel's arguments. Defendant argues that this was in violation of several of his rights under federal and state constitutional provisions. This supervision of closing arguments was within the discretion of the trial court. *See State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). We find no abuse of discretion and no prejudice to defendant and overrule these assignments of error.

[27] Defendant next contends, based on three assignments of error, that during the capital sentencing proceeding, the trial court allowed the prosecutor to make arguments that were inflammatory, improper, and prejudicial, in violation of several of his rights under federal and state constitutional provisions. This Court has firmly established that "[t]rial 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 (1992). These principles apply not only to ordinary jury arguments, but also to arguments made in capital sentencing proceedings, and the boundaries for jury argument at the capital sentencing proceeding are more expansive than at the guilt phase. *State v. Bishop*, 343 N.C. 518, 552, 472 S.E.2d 842, 860 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). Further, "[p]rosecutors have a duty to advocate zealously that the facts in evidence warrant imposition of the death penalty." *State v. Williams*, 350 N.C. 1, 25, 510 S.E.2d 626, 642 (1999). We now apply the foregoing principles to each of defendant's contentions in turn.

[28] First, the prosecutor stated to the jury that in order for the mitigating circumstances to have value to weigh against the aggravating circumstances, they had to "justify," "excuse," or "offset" the first-degree murder. Defendant argues that this is a misstatement of the law. Defendant did not object to this argument at trial and asks this Court to review it for plain error. However, as the State notes, this is an incorrect standard of review. Where there has been no objection

during argument, the proper standard of review is whether the argument was so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998).

[29] The prosecutor's arguments complained of here were an attempt to minimize the value of the mitigating circumstances. *See State v. Billings*, 348 N.C. 169, 186-87, 500 S.E.2d 423, 434, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 431 (1998). We have previously addressed this argument and stated that " 'prosecutors may legitimately attempt to deprecate or belittle the significance of mitigating circumstances.' " *Id.* at 186-87, 500 S.E.2d at 433-34 (quoting *State v. Basden*, 339 N.C. 288, 305, 451 S.E.2d 238, 247 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995)). We conclude that this unobjected to argument did not amount to gross impropriety requiring intervention by the trial court on its own motion.

[30] Next, defendant complains about the prosecutor's comment that "[defendant] is a cold-blooded, arrogant killer, who would take your life and my life." Defendant argues that this characterization of him was based on the personal views and opinions of the prosecutor and that it prejudiced and inflamed the jury against defendant by naming him as their "potential and willing killer." The trial court overruled defendant's objection to this argument.

While we have held that it is improper for counsel to inject their personal beliefs into jury arguments, it is well settled that in argument to the jury counsel may argue all of the evidence and the reasonable inferences that arise therefrom. *See Williams*, 350 N.C. at 28, 510 S.E.2d at 644. Defendant is entitled to relief here only if the argument which was objected to " 'so infected the trial with unfairness' " as to deny defendant due process of law. *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). 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). Considering the evidence of the brutality of the premeditated and deliberated murder committed by defendant here, the argument of the prosecutor drew reasonable inferences from the evidence and was not improper. *See State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 561 (1994) (defendant was characterized as a

"maniac," a "mean, cold-blooded killer," and a "violent killer"), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). Further, as to the phrase that defendant would "take your life and my life," the State suggests, and we agree, that it was "no more than a figure of speech for this defendant's willingness to murder a stranger for money." We conclude that this argument did not exceed the broad bounds allowed in closing arguments at the capital sentencing proceeding.

[31] Finally, defendant complains of the following portion of the prosecutor's argument:

> [PROSECUTOR]: [I]f you impose life imprisonment . . . the State will do everything they can to make sure he stays in prison for the rest of his life, but, ladies and gentlemen of the jury, nothing is final—
>
> [DEFENSE COUNSEL]: Objection. Move to strike.
>
> THE COURT: Overruled at this time.
>
> . . . .
>
> [PROSECUTOR]: We submit and contend to you, ladies and gentlemen of the jury, the only way you can make sure that there is not another Ms. Blue that there is not another Mr. Tuttle, that this man does not assault, rob, and kill someone else,—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: —is to impose the death penalty in this case. Nothing is final but death. Nothing is irrevocable but death.

Defendant contends that the prosecutor implied that defendant might be paroled if sentenced to life. We disagree. We find that this argument was not addressing parole, but was an argument that only the death penalty would deter defendant from committing future crimes. *See State v. Larry*, 345 N.C. 497, 528, 481 S.E.2d 907, 925 ("[I]f you don't give him death, he's going to get life. They are going to try and convince you that that's enough punishment in this case. That that will keep him locked away. . . . [T]he only way to be sure of it is to vote for the death penalty in this case."), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 234 (1997). We have consistently held, and defendant concedes, that the specific deterrence argument is permissible. *Id.*; *see also Williams*, 350 N.C. at 28, 510 S.E.2d at 644. For the reasons stated, defendant's assignments of error with regard to the

prosecutor's arguments during the capital sentencing proceeding are overruled.

Defendant next argues that the submission to the jury of the (e)(5) aggravating circumstance that the murder was committed during the commission of a burglary, robbery with a dangerous weapon, or kidnapping, without an instruction to the jury to consider this circumstance separately from their earlier determination of defendant's guilt was error. Defendant failed to properly preserve this alleged error by objecting to it at trial or by specifically and distinctly arguing on appeal that it was plain error and has therefore waived appellate review of this issue. N.C. R. App. P. 10(c)(4); *see also Call*, 349 N.C. at 402, 508 S.E.2d 509. Accordingly, this assignment of error is dismissed.

By another assignment of error, defendant contends that the trial court erred in admitting the testimony of Donna Reich, who testified that defendant had threatened her with a gun and stolen her purse. As he argued earlier, defendant again contends that because he stipulated to his convictions and the judgments for prior felonies, the State was precluded from introducing any additional evidence to prove the (e)(3) aggravating circumstance that defendant had committed a prior felony involving the use or threat of violence to the person. For the same reasons stated above, we again find no error.

In another assignment of error, defendant contends that the submission of kidnapping as an aggravating circumstance was improper, entitling him to a new trial. Defendant again argues that the "failure to release the victim in a safe place" element, which elevates the crime of kidnapping to first-degree, was not established by the State because the victim had not been removed from his residence and was killed in his own kitchen. Defendant presented this same argument earlier with regard to the guilt phase of the trial. For the reasons we have given in rejecting that earlier argument, we find no error. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises nine additional issues which he concedes have been decided contrary to his position previously by this Court: (1) the trial court erred by instructing the jury that if it answered "yes" to sentencing Issue Three on the verdict form used in capital sentencing proceedings, it would be the jury's duty to recommend death; (2) the

trial court erred by its use of the word "may" in sentencing Issues Three and Four; (3) the trial court erred in denying his motion to declare the death penalty unconstitutional; (4) the trial court erred in defining the burden of proof applicable to mitigating circumstances by use of the words "satisfy" and "satisfaction"; (5) the trial court erred by placing on defendant the burden of proving the existence of each mitigating circumstance by a preponderance of the evidence; (6) the trial court erred in instructing on the aggravating circumstance that the murder was especially "heinous, atrocious, or cruel," as this circumstance is unconstitutionally vague; (7) the trial court erred by instructing the jury that it must render a unanimous verdict in the penalty phase; (8) the trial court erred in denying defendant's motion to prohibit death qualification of jurors and in denying defendant's motion for individual *voir dire*; and (9) the trial court erred in preventing defense counsel from arguing "residual doubt" to the jury during their closing arguments.

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

PROPORTIONALITY REVIEW

[32] Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, it is now our duty to ascertain: (1) whether the record supports the jury's finding 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 factor; 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). After a thorough review of the transcript, record on appeal, and briefs in the present case, we are convinced that the jury's findings of the three aggravating circumstances submitted are 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.

Defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. He

was also convicted of first-degree burglary, robbery with a dangerous weapon, and first-degree kidnapping. Following a capital sentencing proceeding, the jury found the three submitted aggravating circumstances: (1) that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-200(e)(3); (2) that this murder was committed while defendant was engaged in the commission of a robbery, burglary, or kidnapping, N.C.G.S. § 15A-2000(e)(5); and (3) that this murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). Of the thirteen mitigating circumstances submitted, the jury found four to exist and have mitigating value.

We begin our proportionality analysis by comparing this case to those cases in which this Court has determined the death penalty to be disproportionate. "One purpose of proportionality review 'is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v.* Atkins, 349 N.C. 62, 114, 505 S.E.2d 97, 129 (1998) (quoting *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 death sentence to be disproportionate. First, the jury found defendant guilty of first-degree murder under theories of both premeditation and deliberation and felony murder. We have 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). Second, evidence tended to show that the victim was brutally stabbed in his own home. This Court has consistently emphasized that murder committed in the home particularly " 'shocks the conscience' "

because such murders involve the violation of " 'an especially private place, one [where] a person has a right to feel secure.' " *Adams*, 347 N.C. at 77, 490 S.E.2d at 236 (quoting *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)) (alteration in original). Further, the evidence tended to show that defendant repeatedly stabbed the victim while he was bound and helpless, and while he was still conscious. Moreover, in none of the cases in which the death penalty was found to be disproportionate was the (e)(3) aggravating circumstance found. *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.

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. Thus, based upon the characteristics of this defendant and the crime he committed, we are convinced the sentence of death was neither excessive nor disproportionate.

We therefore conclude that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and that the judgment of death recommended by the jury and entered by the trial court must be left undisturbed.

NO ERROR.

STATION ASSOCIATES, INC.; LLOYD L. ALLEN, SR.; SUSAN BARNETTE BURNS; JERRY JAMES BARNETTE; MARK TY BARNETTE; KEVIN CLAY BARNETTE; JANET EVERITT BOYETTE; CORDELIA B. DAVIS; MARGARET GENDREUX CROW; MYRTLE ESTELL GENDREUX WATSON; DOROTHY EVERITT BOND; AND HARRY CLARK COOPER v. DARE COUNTY

No. 337PA98

(Filed 7 May 1999)

Deeds— statement of purpose—no language of reversion or termination—fee simple absolute

An 1897 deed conveying land to the United States for a life-saving station conveyed a fee simple absolute rather than a fee simple determinable where the deed contained no express and unambiguous language of reversion or termination upon condition broken and does not indicate that the interest of the United States in the property would automatically expire or revert to the grantor upon the discontinued use of the property as a life-saving station. Language in the granting clause giving the United States the right to "use and occupy" the property for the stated purposes and the word "term" in the warranty clause did not constitute a clear expression that the property should revert to the grantor or that the estate would automatically terminate upon the happening of a certain event.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 56, 501 S.E.2d 705 (1998), reversing orders entered by Ragan, J., on 23 September 1996, 6 January 1997, and 29 January 1997 in Superior Court, Dare County, and remanding for further proceedings. On 3 December 1998, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 9 March 1999.

Moore & Van Allen, PLLC, by David E. Fox and Jeffrey M. Young; and Young Moore & Henderson, P.A., by John N. Fountain and Dawn M. Dillon, for plaintiff-appellants and -appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Mark A. Davis, for defendant-appellant and -appellee.

PARKER, Justice.

This title dispute to approximately ten acres of land at the northern tip of Hatteras Island, Dare County, originates in an 1897 deed. In

that year Jessie B. Etheridge conveyed the land in issue (hereinafter "the property") to the United States in the following deed:

> Treasury Department
> Life-Saving Service—Form No. 12.
>
> Whereas, The SECRETARY OF THE TREASURY has been authorized by law to establish the LIFE-SAVING STATION herein described;
>
> And whereas, Congress, by Act of March 3, 1875, provided as follows, viz.: "And the Secretary of the Treasury is hereby authorized, whenever he shall deem it advisable, to acquire, by donation or purchase, [o]n behalf of the United States, the right to use and occupy sites for life-saving or life-boat stations, houses of refuge, and sites for pier-head Beacons, the establishment of which has been, or shall hereafter be, authorized by Congress;"
>
> And whereas, the said Secretary of the Treasury deems it advisable to acquire, on behalf of the United States, the right to use and occupy the hereinafter-described lot of land as a site for a Life-Saving Station, as indicated by his signature hereto:
>
> Now, this Indenture between Jessie B. Etheridge, party of the first part, and the United States, represented by the Secretary of the Treasury, party of the second part, WITNESSETH that the said party of the first part, in consideration of the sum of two hundred dollars by these presents grant[s], demise[s], release[s], and convey[s] unto the said United States all that certain lot of land situate in Nags Head township, County of Dare and State of North Carolina, and thus described and bounded: Beginning at a cedar post bearing from the South West corner of the Oregon Life Saving Station South 40° West and distant 28.24 chains from said post South 68° West 10 chains to post, thence South 22° E. 10 chains to post, thence North 68° E. 10 chains to post, thence North 22° W. 10 chains to first Station containing 10 acres, be the contents what they may, with full right of egress and ingress thereto in any direction over other lands of the grantor by those in the employ of the United States, on foot or with vehicles of any kind, with boats or any articles used for the purpose of carrying out the intentions of Congress in providing for the establishment of Life-Saving Stations, and the right to pass over any lands of the grantor in any manner in the prosecution of said purpose;

and also the right to erect such structures upon the said land as the United States may see fit, and to remove any and all such structures and appliances at any time; the said premises to be used and occupied for the purposes named in said Act of March 3, 1875:

To have and to hold the said lot of land and privileges unto the United States from this date.

And the said party of the first part for himself, executors, and administrators do[es] covenant with the United States to warrant and defend the peaceable possession of the above-described premises to the United States, for the purposes above named for the term of this covenant, against the lawful claims of all persons claiming by, through, or under Jessie B. Etheridge.

And it is further stipulated, that the United States shall be allowed to remove all buildings and appurtenances from the said land whenever it shall think proper, and shall have the right of using other lands of the grantor for passage over the same in effecting such removal.

In witness whereof, the parties hereto have set their hands and seals this 8th day of March, A.D. eighteen hundred and ninety-seven.

Signed, sealed, and delivered in presence of—

s/ J.B. Etheridge

s/ L.J. Gage
Secretary of the Treasury

The United States took possession and duly established a life-saving station on the property operated by the Life-Saving Service, a part of the United States Treasury Department. The United States Coast Guard was thereafter created; and sometime prior to 1915 the Coast Guard took over operation of the station, which was then named the Oregon Inlet Coast Guard Station. In December of 1989, the U.S. Coast Guard abandoned the station. On 17 July 1992 the United States quitclaimed its interest in the property to Dare County.

Plaintiffs, who are the heirs of the original grantor, Jessie B. Etheridge, along with a corporation that purchased from the heirs an ownership interest in the land, claimed title to the property and instituted this action against Dare County.

The trial court granted judgment on the pleadings to defendant Dare County, concluding as a matter of law that Dare County had title to the property in fee simple absolute. The Court of Appeals reversed and remanded holding that the United States was granted only a fee simple determinable by the 1897 deed and that a genuine issue of fact existed as to whether a condemnation proceeding by the United States in 1959 extinguished plaintiffs reversionary interest. 130 N.C. App. 56, 501 S.E.2d 705 (1998). We now reverse the Court of Appeals and reinstate the judgment of the trial court.

Before this Court defendant argues that the 1897 deed conveyed to the United States a fee simple absolute, but even if the estate conveyed was a fee simple determinable with a possibility of reverter, in 1959 when the United States created the Cape Hatteras National Seashore Recreation Area by condemning properties along the outer banks, plaintiffs' possibility of reverter in the property was extinguished by the condemnation. We do not need to address the second part of defendant's argument as we conclude that the 1897 deed conveyed to the United States not a fee simple determinable, but a fee simple absolute.

An estate in fee simple determinable is created by a limitation in a fee simple conveyance which provides that the estate shall automatically expire upon the occurrence of a certain subsequent event. *Elmore v. Austin*, 232 N.C. 13, 20-21, 59 S.E.2d 205, 211 (1950). "The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested." *Washington City Bd. of Educ. v. Edgerton*, 244 N.C. 576, 578, 94 S.E.2d 661, 664 (1956); *see also First Presbyterian Church of Raleigh v. Sinclair Refining Co.*, 200 N.C. 469, 473, 157 S.E. 438, 440 (1931). "Ordinarily a clause in a deed will not be construed as a condition subsequent, unless it contains language sufficient to qualify the estate conveyed and provides that in case of a breach the estate will be defeated, and this must appear in appropriate language sufficiently clear to indicate that this was the intent of the parties." *Ange v. Ange*, 235 N.C. 506, 508, 235 N.C. 755, 71 S.E.2d 19, 20 (1952); *see also First Presbyterian*, 200 N.C. at 473, 157 S.E. at 440; *Braddy v. Elliott*, 146 N.C. 578, 580-81, 60 S.E. 507, 508 (1908).

This Court has declined to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken. *Washington City*, 244 N.C. at 577, 578, 94 S.E.2d at 662, 663 (habendum clause con-

tained expression of intended purpose—"for school purposes"; held fee simple because no power of termination or right of reentry was expressed); *Ange*, 235 N.C. at 508, 71 S.E.2d at 20 (habendum clause contained the language "for church purposes only"; nevertheless held to be an indefeasible fee since there was "no language which provides for a reversion of the property to the grantors or any other person in case it ceases to be used as church property"); *Shaw Univ. v. Durham Life Ins. Co.*, 230 N.C. 526, 529-30, 53 S.E.2d 656, 658 (1949) (property and the proceeds therefrom were to be "perpetually devoted to educational purposes"; held fee simple absolute since there was "nothing in the . . . deed to indicate the grantor intended to convey a conditional estate," and there was "no clause of re-entry, no limitation over or other provision which was to become effective upon condition broken"); *Lassiter v. Jones*, 215 N.C. 298, 300-01, 1 S.E.2d 845, 846 (1939) (deed conveyed property "for the exclusive use of the Polenta Male and Female Academy; it shall be used exclusively for school purposes"; held to have conveyed a fee simple "for the reason that nowhere in the deed is there a reverter or reentry clause"); *First Presbyterian*, 200 N.C. at 470-71, 473, 157 S.E. at 438-39, 440 (habendum clause indicated that the property was to be used for church purposes only; held to be an indefeasible fee simple, notwithstanding the language in the habendum clause, since there was "no language showing an intent that the property shall revert to the grantor . . . or that the grantor . . . shall have the right to reenter."); *Hall v. Quinn*, 190 N.C. 326, 328-29, 130 S.E. 18, 19-20 (1925) (granting clause and habendum clause both indicated that the property was "to be used for the purposes of education" only; held to be an estate in fee simple because there was "no clause of re-entry; no forfeiture of the estate upon condition broken"); *Braddy*, 146 N.C. at 580-81, 60 S.E. at 508 (recitals that the grantor was to improve the property did not create an estate upon condition since there was an absence of an express reservation in the deed of a right of reentry).

We have stated repeatedly that a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry is insufficient to create an estate on condition and that, in such a case, an unqualified fee will pass. *Washington City*, 244 N.C. at 578, 94 S.E.2d at 664; *Ange*, 235 N.C. at 508, 71 S.E.2d at 20; *Shaw Univ.*, 230 N.C. at 530, 53 S.E.2d at 658; *Lassiter*, 215 N.C. at 302, 1 S.E.2d at 847.

However, in those cases in which the deed contained express and unambiguous language of reversion or termination we have con-

strued a deed to convey a determinable fee or fee on condition subsequent. *Mattox v. State*, 280 N.C. 471, 472, 186 S.E.2d 378, 380 (1972) (habendum clause contained condition that if the grantee failed to continuously and perpetually use the property as a Highway Patrol Radio Station and Patrol Headquarters, the land "shall revert to, and title shall vest in the Grantor"); *City of Charlotte v. Charlotte Park & Rec. Comm'n*, 278 N.C. 26, 28, 178 S.E.2d 601, 603 (1971) (habendum clause contained language that "upon condition that whenever the said property shall cease to be used as a park . . . , then the same shall revert to the party of the first part"); *Lackey v. Hamlet City Bd. of Educ.*, 258 N.C. 460, 461, 128 S.E.2d 806, 807 (1963) (deed contained paragraph providing, "It is also made a part of this deed that in the event of the school's disabandonment (failure) . . . this lot of land shall revert to the original owners"); *Charlotte Park & Rec. Comm'n v. Barringer*, 242 N.C. 311, 313, 88 S.E.2d 114, 117 (1955) (deed indicated that in the event the lands were not used solely for parks and playgrounds, the "said lands shall revert in fee simple to the undersigned donors"), *cert. denied*, 350 U.S. 983, 100 L. Ed. 851 (1956); *Pugh v. Allen*, 179 N.C. 307, 308, 102 S.E. 394, 394 (1920) (deed contained provision that "in case the said James H. Pugh should die without an heir the following gift shall revert to the sole use and benefit of my son"); *Smith v. Parks*, 176 N.C. 406, 407, 97 S.E. 209, 209 (1918) (deed indicated that "should [grantor] die without leaving such heir or heirs, then the same is to revert back to her nearest kin"); *Methodist Protestant Church of Henderson v. Young*, 130 N.C. 8, 8-9, 40 S.E. 691, 691 (1902) (deed expressed that if the church shall "discontinue the occupancy of said lot in manner as aforesaid, then this deed shall be null and void and the said lot or parcel of ground shall revert to [the grantor]").

Applying this law to the deed in the present case, we note that the 1897 document is completely devoid of any language of reversion or termination. Nowhere does the deed indicate that the United States' interest in the property would automatically expire or revert to the grantor upon the discontinued use of the property as a life-saving station. Plaintiffs contend, however, that the deed contains certain phrases expressive of the parties' intent that the estate was to be of limited duration: first, that the granting clause gives the United States the right only to "use and occupy" the property for the stated purposes; and second, that the word "term" within the warranty clause, in which the grantor warrants peaceable possession of the property "for the purposes above named for the term of this covenant," is sufficient to indicate that the parties intended that the United States'

occupancy of the property would be for a limited duration. We disagree with plaintiffs' arguments. The use of the words "use and occupy" and "term" in this deed is not the equivalent of a clear expression that the property shall revert to the grantor or that the estate will automatically terminate upon the happening of a certain event.

Plaintiffs also state that for over one hundred years, the proper construction of deeds has focused on the intent of the parties and that a narrow focus on "technical" or "magic" words is inappropriate. They argue that the language of purpose contained within the deed, coupled with the language permitting the United States to "erect such structures on the said land as the United States may see fit, and to remove any and all such structures at any time," is inconsistent with the grant of a fee simple absolute. Such language of purpose and license, the argument runs, would be surplusage if a fee simple absolute were intended; thus, it follows that the deed conveys only a determinable fee since, "[if] possible, effect must be given to every part of a deed" and "no clause, if reasonable intendment can be found, shall be construed as meaningless." *Mattox*, 280 N.C. at 476, 186 S.E.2d at 382. In making this argument, plaintiffs rely on the reasoning employed by the District Court for the Eastern District of North Carolina in *Etheridge v. United States*, 218 F. Supp. 809 (E.D.N.C. 1963). In *Etheridge*, the court attempted to apply North Carolina law in construing a deed nearly identical to the deed in this case; using a methodology of focusing on the parties' intent and giving effect to all parts of the deed, the court held that the deed conveyed a fee simple determinable. *Id.* at 811-13. This Court is not bound by decisions of a United States District Court interpreting or applying North Carolina law.

While discerning the intent of the parties is the ultimate goal in construing a deed, *Mattox*, 280 N.C. at 476, 186 S.E.2d at 382; *Carney v. Edwards*, 256 N.C. 20, 24, 122 S.E.2d 786, 788 (1961), we disagree with plaintiffs' characterization of the test, requiring express and unambiguous language of reversion or termination, as a test that relies on "rigid technicality" and ignores the intent of the parties. Under our case law the use of some express language of reversion or termination is the usual manner in which parties intending to create a fee simple determinable manifest that intent. The language of termination necessary to create a fee simple determinable need not conform to any "set formula." *Lackey*, 258 N.C. at 464, 128 S.E.2d at 809. Rather, "any words expressive of the grantor's intent that the estate

shall terminate on the occurrence of the event" or that "on the cessation of [a specified] use, the estate shall end," will be sufficient to create a fee simple determinable. *Barringer*, 242 N.C. at 317, 88 S.E.2d at 120. In this case, however, no such language or expression can be found from which the Court can conclude, without speculation and conjecture, that "it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." N.C.G.S. § 39-1 (1984).

Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Dare County, for reinstatement of the judgment of the Superior Court.

REVERSED.

GRACE E. KELLY, ADMINISTRATRIX OF THE ESTATE OF CLINTON L. KELLY v. WEYERHAEUSER COMPANY

No. 2A99

(Filed 7 May 1999)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 556, 514 S.E.2d 318 (1998), affirming summary judgment for defendant entered 8 July 1997 by Allen (J.B., Jr.), J., in Superior Court, Lee County. Heard in the Supreme Court 12 April 1999.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, P.A., by Jonathan Silverman, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Dayle A. Flammia and Thomas M. Clare for defendant-appellee.

PER CURIAM.

AFFIRMED.

PATSY PAYNE DAETWYLER v. DAVID ALAN DAETWYLER

No. 372A98

(Filed 7 May 1999)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 246, 502 S.E.2d 662 (1998), affirming in part, reversing in part, and remanding an order entered by Reingold, J., on 24 February 1997 in District Court, Forsyth County. Heard in the Supreme Court 13 April 1999.

David B. Hough for plaintiff-appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

PER CURIAM.

AFFIRMED.

JUDY BEAVER, SPOUSE OF KYLE R. BEAVER, DECEASED v. CITY OF SALISBURY, SELF-INSURED

No. 394PA98

(Filed 7 May 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 417, 502 S.E.2d 885 (1998), reversing an opinion and award of the Industrial Commission entered 27 May 1997. Heard in the Supreme Court 11 February 1999.

Doran and Shelby, P.A., by David A. Shelby and Michael Doran, for plaintiff-appellant.

Underwood Kinsey Warren & Tucker, P.A., by C. Ralph Kinsey, Jr., and Richard L. Farley, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ROY O. RODWELL AND COWEE CORPORATION v. PAUL C. CHAMBLEE

No. 559A98

(Filed 7 May 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 473, 509 S.E.2d 785 (1998), reversing entry of summary judgment against plaintiff Roy O. Rodwell signed 19 March 1997 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 12 April 1999.

Michael W. Strickland & Associates, P.A., by Michael W. Strickland, for plaintiff-appellee Rodwell.

Bode, Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr., and Anthony D. Taibi, for defendant-appellant.

PER CURIAM.

Chief Justice Mitchell and Justices Parker, Martin, and Wainwright voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by Timmons-Goodson, J. Justices Frye, Lake, and Orr voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Greene, J. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Wake County, for reinstatement of its judgment in favor of defendant.

REVERSED.

STATE OF NORTH CAROLINA v. CHRISTINA MARTINEZ TIRALONGO

No. 575A97

(Filed 7 May 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 127 N.C. App. 757, 493 S.E.2d 498 (1997), finding no prejudicial error in defendant's trial but ordering a new sentencing hearing on the judgment entered 30 October 1996 by Wainwright, J., in Superior Court, Onslow County. Defendant also appeals pursuant to N.C.G.S. § 7A-30(1) based on a substantial constitutional question. Heard in the Supreme Court 12 April 1999.

Michael F. Easley, Attorney General, by Lars F. Nance, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt and Anne M. Gomez, Assistant Appellate Defenders, for defendant-appellant.

PER CURIAM

The decision of the Court of Appeals is affirmed. The State's motion to dismiss the appeal pursuant to N.C.G.S. § 7A-30(1) based on a substantial constitutional question is allowed.

AFFIRMED; APPEAL DISMISSED IN PART.

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

C.C.& J. ENTER., INC. v. CITY OF ASHEVILLE

No. 184PA99

Case below: 132 N.C.App. 550

Motion by intervenor for temporary stay allowed 20 April 1999 pending determination of intervenor's petition for discretionary review.

DELTA ENV. CONSULTANTS OF N.C. v.
WYSONG & MILES CO.

No. 108P99

Case below: 132 N.C.App. 160

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed 6 May 1999.

FAULKENBURY v. TEACHERS' AND STATE EMPLOYEES' RET. SYS.

No. 100P99

Case below: 132 N.C.App. 137

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

GENERAL ACCIDENT INS. CO. v. MSL ENTER., INC.

No. 112P99

Case below: 132 N.C.App. 234

Petition by third party plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

HENDRICKS v. HILL REALTY GRP., INC.

No. 49P99

Case below: 131 N.C.App. 859

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999. Conditional petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 dismissed 6 May 1999.

IN RE JENNINGS

No. 107P99

Case below: 132 N.C.App. 235

Notice of appeal by respondent pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 6 May 1999. Petition by respondent (Candace Jennings) for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999. Conditional petition filed by petitioner and attorney advocate for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

IN RE MUTZ

No. 79P99

Case below: 132 N.C.App. 235

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

PARAMORE v. LILLEY

No. 125P99

Case below: 132 N.C.App. 397

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 May 1999.

POE v. ATLAS-SOUNDELIER/AMERICAN TRADING & PROD. CORP.

No. 167P99

Case below: 132 N.C.App. 472

Motion by defendant (Snyder) to dismiss petition for discretionary review denied 14 April 1999.

ROBINSON v. POWELL

No. 549P98

Case below: 125 N.C.App. 743

Petition by defendant for discretionary review pursuant G.S. 7A-31denied 6 May 1999. Justice Martin recused.

SHARPE v. WORLAND

No. 55PA99

Case below: 132 N.C.App. 223

Petition by defendants (Worland and Greensboro Anesthesia) for writ of supersedeas allowed 6 May 1999. Petition by defendants (Worland and Greensboro Anesthesia) for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1999. Petition by defendant (Wesley Long) for writ of supersedeas allowed 6 May 1999. Petition by defendant (Wesley Long) for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1999.

STATE v. ALLEN

No. 163P99

Case below: 132 N.C.App. 584

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 May 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

STATE v. BOWEN

No. 393P98

Case below: 130 N.C.App. 485

Petition by defendant to rehear petitions pursuant to Rule 31 dismissed 6 April 1999. Motion by defendant (Bowen) for an order of judgment by the North Carolina Supreme Court dismissed 6 May 1999. Motion by defendant (Bowen) to restrain State from denying equal protection dismissed 6 April 1999.

STATE v. CARTER

No. 319A93-2

Case below: Rockingham County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Rockingham County denied 6 May 1999.

STATE v. CHANCE

No. 98P99

Case below: 132 N.C.App. 134

Motion by Attorney General to dismiss petition for discretionary review and petition for writ of certiorari dismissed 6 May 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 May 1999. Justice Martin recused.

STATE v. CINTRON

No. 190A99

Case below: 132 N.C.App. 605

Petition by Attorney General for writ of supersedeas allowed 22 April 1999. Motion by Attorney General for temporary stay allowed 22 April 1999.

STATE v. CONNERS

No. 32A99

Case below: 131 N.C.App. 879

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 May 1999.

STATE v. CORBETT

No. 16A99

Case below: 131 N.C.App. 879

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

STATE v. FOSTER

No. 198P99

Case below: 132 N.C.App. 823

Motion by defendant (Foster) for temporary stay denied 28 April 1999.

STATE v. GOLDSTON

No. 1A96-2

Case below: Durham County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Durham County denied 6 May 1999.

STATE v. JACKSON

No. 136P99

Case below: 132 N.C.App. 398

Motion by Attorney General to dismiss appeal allowed 6 May 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

STATE v. OKWARA

No. 122P99

Case below: 132 N.C.App. 585

Motion by defendant for appropriate relief is treated as a petition for writ of certiorari and denied 26 April 1999. Petition by defendant for writ of supersedeas and motion for temporary stay denied 26 April 1999. Motion by defendant (Okwara) for temporary stay denied 26 April 1999.

STATE v. SANCHEZ

No. 97P99

Case below: 127 N.C.App. 558

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 May 1999.

STATE v. SAUNDERS

No. 130P99

Case below: 132 N.C.App. 399

Motion by Attorney General to dismiss appeal allowed 6 May 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

STATE v. SIMMONS

No. 13P99

Case below: 131 N.C.App. 703

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 May 1999.

STATE v. SUMMERS

No. 195P99

Case below: 132 N.C.App. 636

Motion by Attorney General for temporary stay denied 6 May 1999.

STATE v. SYRIANI

No. 300A91-2

Case below: Mecklenburg County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Mecklenburg County denied 6 May 1999.

STATE v. WOODS

No. 9P99

Case below: 131 N.C.App. 557

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999. Justice Martin recused.

STATE ex rel. EASLEY v. N.G. PURVIS FARMS

No. 194P99

Case below: 132 N.C.App. 825

Motion by Attorney General for temporary stay allowed 26 April 1999 pending determination of petition for discretionary review.

VANCE v. VANCE

No. 505P98

Case below: 131 N.C.App. 335

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

WHEELER v. QUEEN

No. 88P99

Case below: 132 N.C.App. 91

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

WHITLEY v. KENNERLY

No. 106P99

Case below: 132 N.C.App. 390

Petition by defendants (Lewis and Kennerly) for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

WILLIAMS v. AIKENS

No. 142P99

Case below: 132 N.C.App. 400

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 6 May 1999.

PETITIONS TO REHEAR

CARRIKER v. CARRIKER

No. 312PA98

Case below: 350 N.C. 71

Petition by defendant to rehear pursuant to Rule 31 denied 6 May 1999.

HAYES v. TOWN OF FAIRMONT

No. 338PA98

Case below: 350 N.C. 81

Petition by defendant to rehear pursuant to Rule 31 denied 12 April 1999.

PROGRESSIVE AMERICAN INSURANCE COMPANY, A CORPORATION v. FRANCISCO VASQUEZ, JAVIER LUNA, TYVOLIA FAISON, ADMINISTRATOR OF THE ESTATE OF DARYELL GLEN CARLISLE, VIRGINIA LASSITER, ADMINISTRATOR OF THE ESTATE OF AMOS H. BRYANT, NORMAN JOHNSON, JR., WILLIAM T. PARKER, T.A. LOVING, INC., A CORPORATION, AND AETNA CASUALTY & SURETY COMPANY, A CORPORATION

No. 286PA98

(Filed 9 June 1999)

1. **Insurance— excess liability policy—UIM coverage not required**

The Financial Responsibility Act does not require a commercial excess liability policy to offer separate uninsured and underinsured motorist coverage pursuant to N.C.G.S. § 20-279.21(b)(3) and (b)(4) in addition to what is offered in the underlying business automobile policy. Where there are separate and distinct excess liability and underlying policies, UIM coverage is not written into the excess liability policy by operation of law and only exists if it is provided by the contractual terms of the excess policy.

2. **Insurance— business automobile policy—UIM coverage per accident—reduction for workers' compensation and tortfeasor's liability payment**

A business automobile policy's UIM coverage limit of $1,000,000 applied per accident rather than per claimant. Further, the insurer's maximum UIM liability under the policy was properly reduced by the aggregate of workers' compensation benefits paid or payable to all claimants for the accident and by the amount paid to claimants by the tortfeasor's liability carrier. N.C.G.S. § 20-279.21(b)(3), (b)(4), and (e).

Justice FRYE dissenting.

Justice MARTIN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 742, 502 S.E.2d 10 (1998), affirming in part and reversing in part an order entered by Stephens (Donald W.), J., on 3 April 1997 in Superior Court, Wake County. On 5 November 1998, the Supreme Court allowed conditional petitions for discretionary review as to additional issues. Heard in the Supreme Court 8 March 1999.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant and -appellee Johnson; Mast, Schulz, Mast, Mills & Stem, P.A., by David F. Mills, for defendant-appellant and -appellee Faison; Law Offices of Jonathan S. Williams, by Jonathan S. Williams, for defendant-appellant and -appellee Parker; Whitley, Jenkins & Riddle, by Eugene G. Jenkins, for defendant-appellant and -appellee Lassiter.

Womble Carlyle Sandridge & Rice, PLLC, by Richard T. Rice and Garth A. Gersten, for defendant-appellant and -appellee Aetna Casualty and Surety Company.

Yates, McLamb & Weyher, L.L.P., by Andrew A. Vanore, III, for defendant-appellant and -appellee Aetna Casualty and Surety Company.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

ORR, Justice.

In this case, we are asked to decide, *inter alia*, the threshold issue of whether N.C.G.S. § 20-279.21 of the Financial Responsibility Act requires a commercial excess liability policy to offer separate uninsured and underinsured motorist ("UM" and "UIM," respectively) coverage in addition to what is offered by the underlying policy.

On 1 April 1994, defendant Aetna Casualty & Surety Company (now known as Travelers Casualty and Surety Company) issued a "Business Auto Coverage Policy" ("BAP") and a separate "Commercial Excess Liability Insurance Policy" to "T.A. Loving Company." The BAP provided UIM coverage limits and bodily injury liability limits of $1,000,000 per accident. The excess liability policy provided a $20,000,000 limit of liability for bodily injury for any one occurrence arising out of third-party liability claims made against Loving in excess of the underlying limits. The excess liability policy referenced the BAP as the underlying insurance.

On 8 July 1994, Amos H. Bryant and Daryell Carlisle were killed and Norman Johnson, Jr., and William T. Parker were injured when a flatbed truck, owned by Francisco Vasquez and driven by Javier Luna, collided with a pickup truck owned by T.A. Loving, Inc., and driven by Carlisle, a Loving employee. Bryant, Johnson, and Parker were also Loving employees. Tyvolia Faison, administratrix of Carlisle's

estate; Virginia Lassiter, administratrix of Bryant's estate; Johnson; and Parker ("claimants") received $250,000 of primary liability coverage from plaintiff Progressive American Insurance Company ("Progressive American"), the liability insurer for Vasquez.

On 1 June 1995, Progressive American filed this action seeking a declaratory judgment that it had no obligation to defendants, under a policy issued to Vasquez by Progressive American which purported to cover the flatbed truck, with respect to any injuries or damages sustained in the accident. Defendant Aetna Casualty & Surety Company ("Aetna") filed an answer and cross-claim for declaratory judgment requesting, in part, a declaration that the excess liability policy issued by Aetna did not provide UM or UIM coverage above or in addition to that provided by the underlying auto policy.

Aetna subsequently filed a motion for summary judgment, which was heard at the 21 February 1997 session of Superior Court, Wake County. Although the trial court, in its "Memorandum Decision" of 4 March 1997 and its subsequent order of 3 April 1997, granted Aetna's motion for summary judgment, Aetna disagreed with that portion of the trial court's order regarding UIM coverage under the excess liability policy as set forth in the following conclusions of law:

> 2. The Aetna Business Auto Coverage Policy, number 25 FJ 1078005 CCA, provides One Million Dollars ($1,000,000.00) in underinsured motorist coverage for the aggregate of all claims and all claimants seeking recovery for wrongful death or personal injury arising out of a single incident. Under this policy, the maximum obligation of Aetna is a total of One Million Dollars ($1,000,000.00), reduced by the amount of primary carrier liability coverage paid by Progressive American Insurance Company, which amount is Two Hundred Fifty Thousand Dollars ($250,000.00). The net amount of Seven Hundred Fifty Thousand Dollars ($750,000.00) is further reduced by the aggregate amounts paid or payable under any workers' compensation policy to all claimants.
>
> 3. The Commercial Excess Liability Policy, Number 025 XS 23999348 CCA (the umbrella policy), provides additional underinsured motorist coverage, in addition to that provided in the auto coverage policy; however, the Court rules that such additional coverage is limited to One Million Dollars ($1,000,000.00) of excess coverage for underinsured motorist liability incurred, above the initial One Million Dollars ($1,000,000.00) coverage in

> the auto policy. This One Million Dollars ($1,000,000.00) limit is in the aggregate for all claims and all claimants; however, it is not reduced by any workers' compensation payments made to claimants.

Aetna and the claimant-defendants appealed the trial court's decision to the Court of Appeals.

The Court of Appeals, in a unanimous decision, reversed that part of the trial court's order limiting the level of UIM coverage under the excess liability policy to $1,000,000. Instead, the Court of Appeals held "that the umbrella policy [excess liability policy] provides UIM coverage in the amount of $20,000,000.00 per accident." *Progressive Am. Ins. Co. v. Vasquez*, 129 N.C. App. 742, 748, 502 S.E.2d 10, 15 (1998). We allowed Aetna's petition for discretionary review as to this issue.

[1] Claimants present two arguments as to why the Court of Appeals was correct in holding that the excess liability policy was required to offer UM/UIM coverage. First, they contend that the excess liability policy meets the statutory requirements of N.C.G.S. § 20-279.21. In essence, their argument is that N.C.G.S. 20-279.21(b)(3) refers to a "policy of bodily injury liability insurance," which constitutes a broader category of coverage than a motor vehicle liability policy. Thus, they argue, the excess liability policy was a "policy of bodily injury liability insurance," and therefore, UM and UIM coverage was required to be offered. Secondly, they contend that this Court's decision in *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317 (1995), mandates such a conclusion. For the reasons that follow, we disagree with claimants' position and, accordingly, reverse the Court of Appeals as to this issue.

We begin our discussion with a brief review of the history of the statute in question. The main statutory provisions controlling UM and UIM insurance in North Carolina are codified as subdivisions (b)(3) and (b)(4), respectively, of N.C.G.S. § 20-279.21. The UM provision, (b)(3), was first adopted by the General Assembly in 1961, and the UIM provision, (b)(4), was adopted in 1979. Both subdivisions have been amended several times over the years.

The purposes behind the original enactments are clear. "Our uninsured motorist statute was enacted by the General Assembly as a result of public concern over the increasingly important problem arising from property damage, personal injury, and death inflicted by

motorists who are uninsured and financially irresponsible." *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 535, 155 S.E.2d 128, 130 (1967). Likewise, the UIM addition to the statute was passed to address circumstances where " 'the tortfeasor has insurance, but his [or her] coverage is in an amount insufficient to compensate the injured party for his full damages.' " *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 189, 420 S.E. 2d 124, 127 (1992) (quoting James E. Snyder, Jr., *North Carolina Automobile Insurance Law* § 30-1 (1988)). "Under North Carolina law, an insured may purchase UM coverage alone or UM and UIM coverage in combination, but he [or she] may not purchase UIM coverage by itself." George L. Simpson III, *North Carolina Uninsured and Underinsured Motorist Insurance* xvii (1998) [hereinafter *N.C. UM and UIM Insurance*].

N.C.G.S. § 20-279.21, which encompasses the UM and UIM provisions, is titled " 'Motor vehicle liability policy' defined" and begins with subsection (a), which provides that in North Carolina, insurers may issue two kinds of motor vehicle liability policies: an "owner's policy" or an "operator's policy." The requirements of these two types of policies are substantially different.

While not defined in the statute, an "owner's policy" is a motor vehicle liability policy that insures "the holder against legal liability for injuries to others arising out of the ownership, use or operation of a motor vehicle owned by him [or her]." *Howell v. Travelers Indem. Co.*, 237 N.C. 227, 229, 74 S.E.2d 610, 612 (1953). The requirements for an owner's policy are set forth in subsection (b). "[Subsection] (b) requires that an owner's policy designate the particular vehicles it insures and that it provide bodily injury and property damage liability coverage to the named insured and certain other persons while using [the] vehicles." *N.C. UM and UIM Insurance* at 103.

In 1961, the General Assembly enacted chapter 640 of the Session Laws, titled: "An Act to Amend G.S. § 20-279.21 Defining Motor Vehicle Liability Insurance Policy for Financial Responsibility Purposes so as to Include Protection Against Uninsured Motorists." The Act provided in part:

> (2) Striking out the period at the end of subdivision 2 [of N.C.G.S. § 20-279.21(b)] and inserting in lieu thereof the word and punctuation "; and"; and
>
> (3) Adding thereto a new subdivision to be designated as subdivision 3 . . . .

Ch. 640, sec. 1(2), (3), 1961 N.C. Sess. Laws 831, 832. Semicolons are typically used to connect clauses that are closely related in thought. Here, the addition of the semicolon and of the word "and" between subdivision (2) and the new subdivision (3), as well as the title of the Act itself, unambiguously indicates that subdivision (3) is a part of the law that explains the definition of "motor vehicle liability insurance policy" and is *not* an unrelated subdivision that presents "bodily injury liability policy" as a separate and distinct category.

The intent of the drafters of the 1961 amendment to N.C.G.S. § 20-279.21(b) appears to us to be unmistakable. Because subdivision (2) addresses both "bodily injury to or death" *and* "injury to or destruction of property," it follows that those two separate concerns are addressed in the new subdivision. Thus, subdivision (3) begins at the conclusion of subdivision (2) as follows:

> (2) . . . ; and
>
> (3) No policy of *bodily injury liability insurance* . . . shall be delivered or issued . . . unless coverage is provided therein . . . in limits for *bodily injury* or death set forth in Subsection (c) of paragraph 20-279.5 . . . for the protection of persons . . . entitled to recover damages . . . because of bodily injury, sickness or disease, including death . . . . Such provisions shall include coverage for . . . persons . . . entitled to recover damages . . . because of injury to or destruction of the property of the insured, with a limit . . . of five thousand dollars . . . .

(Emphasis added.) This language sets apart "bodily liability insurance" in order to mandate a different level of coverage than that set forth in the provisions that apply to property damage. Subdivision (3) is a continuation of the law applying to motor vehicle liability policies. There is no public policy rationale for the General Assembly to have created a new category of insurance policy for uninsured motorist coverage in (b)(3), and there is no indication that it meant to do so or that it did so.

In 1979, the General Assembly enacted chapter 675, titled, "An Act to Authorize the Issuance of Underinsured Motorist Coverage by Insurers at the Written Request of Insureds." A new subdivision (4) was added to N.C.G.S. § 20-279.21(b), which provided in part:

> (4) In addition to the coverages set forth in subdivisions (1) through (3) of this subsection, at the written request of the insured, shall provide for underinsured motorist insurance coverage to be used with policies affording uninsured motorist at limits in excess of the limits prescribed by the applicable financial responsibility law pursuant to this section . . . .

Ch. 675, sec. 1, 1979 N.C. Sess. Laws 720, 720-21.

A 1992 amendment to (b)(4) provided that

> [i]f the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the higher limit of bodily injury liability coverage for any one vehicle in the policy.

Act of July 2, 1992, ch. 835, sec. 9, 1991 N.C. Sess. Laws 322, 331, 332 (clarifying the uninsured and underinsured motorists law). As we stated in *Isenhour v. Universal Underwriters Ins. Co.*,

> [w]hen a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails. . . . Under N.C.G.S. § 20-279.21(b)(4), the UIM coverage is the same as the policy limits for automobile liability unless the insured has rejected such insurance or selected a different limit, and this rejection or selection must be in writing.

341 N.C. at 605, 461 S.E.2d at 322. Since the excess liability policy is silent as to UIM coverage, claimants contend that the Financial Responsibility Act incorporates the requirement into the excess policy by operation of law.

In summary as to this argument, we conclude that subdivision (3) requires UM coverage in a motor vehicle liability policy under certain circumstances and sets specific limits on the amounts of coverage in the two component parts of the motor vehicle liability policy: one for bodily injury and one for property damage. Thus, we find no basis for claimants' argument that the phrase "policy of bodily injury liability insurance" in subdivision (3) denotes a liability policy, more expansive than a "motor vehicle liability policy," into which the requirements of the Financial Responsibility Act as set forth in N.C.G.S. § 20-279.21(b) are incorporated by operation of law.

Under N.C.G.S. § 20-279.21(g),

> [a]ny policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess for additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

N.C.G.S. § 20-279.21(g) (Supp. 1998). While N.C.G.S. § 20-279.21(g) refers to a single policy as opposed to separate and distinct policies, it is indicative of legislative intent to exempt excess coverage from the requirements of the Financial Responsibility Act. Furthermore, N.C.G.S. § 58-3-152, effective 14 August 1997, specifically allows insurers to exclude UIM coverage from umbrella and excess liability policies, which suggests that the legislature did not intend to mandate UIM coverage in separate umbrella or excess liability policies.

Thus, claimants' argument that the separate excess liability policy need not be a motor vehicle liability policy as defined and delineated by N.C.G.S. § 20-279.21 must fail. Under N.C.G.S. § 20-279.21(a), a "motor vehicle policy" of liability insurance must be "certified as provided in G.S. 20-279.19 or 20-279.20 as proof of financial responsibility." Here, the excess liability policy in question does not meet that requirement and, therefore, is not required to offer the insured UM and UIM coverage pursuant to N.C.G.S. § 20-279.21(b)(3) and (b)(4).

We note that claimants contend that we should not consider the argument that the excess liability policy does not meet the requirements of a motor vehicle liability policy because Aetna failed to raise this issue below. We disagree in that Aetna's first assignment of error from the trial court's order is that the trial court erred in determining that the excess liability policy provided UIM coverage as a matter of law. The only statutory grounds for requiring UM/UIM coverage is N.C.G.S. § 20-279.21 dealing with motor vehicle liability policies. We conclude that this issue is properly before us.

The claimants also rely, as did the Court of Appeals, on our decision in *Isenhour v. Universal Underwriters Ins. Co.* to support their contention that the Financial Responsibility Act requires UIM cover-

age in excess liability policies. The specific issue we addressed in *Isenhour* was "[w]hether a multiple-coverage fleet insurance policy which includes umbrella coverage must offer UIM coverage equal to the liability limits under its umbrella coverage section." 341 N.C. at 603, 461 S.E.2d at 320. In *Isenhour*, the vehicle plaintiff was driving when the accident occurred was covered by a multiple-coverage fleet insurance policy that included umbrella coverage. It was purchased by his employer and issued by defendant Universal Underwriters Insurance Company. Defendant argued that the underlying policy and the umbrella policy were separate and distinct policies and that the umbrella component of the policy did not apply to plaintiffs' claim. We concluded that because the umbrella section of the policy provided liability coverage in the amount of $2,000,000, the UIM coverage offered had to be equal to the total amount of liability coverage offered as was then required under N.C.G.S. § 20-279.21. *Id.* at 606, 461 S.E.2d at 322.

Thus, the issue addressed in *Isenhour* was *how much* UIM insurance was available under the 1992 version of N.C.G.S. § 20-279.21, not whether a separate and distinct policy of excess liability must also offer UM/UIM coverage. Where there are separate and distinct underlying and excess liability policies, the legislature's policy of providing some compensation to innocent victims who have been injured by financially irresponsible motorists is satisfied by requiring the underlying, primary policy to provide UIM coverage "equal to the highest limit of bodily injury . . . liability coverage for any one vehicle in the policy," where the insured has neither rejected UIM coverage nor selected a different coverage limit in the motor vehicle liability policy. While we are aware that, in deciding *Isenhour*, this Court's decision was "aided" by *Krstich v. United Servs. Auto. Ass'n*, 776 F. Supp. 1225 (N.D. Ohio 1991), in which there were also separate underlying and excess liability policies, *Krstich* is a decision rendered by a federal court and is not dispositive here. We also note that *Krstich* was decided under Ohio law and that state's applicable statute. The court in *Krstich* in dicta did, however, continue by analyzing North Carolina law. Needless to say, we disagree with that court's ultimate analysis.

We do not find that N.C.G.S. § 20-279.21, *Isenhour*, or public policy requires that an excess liability policy offer separate UM/UIM coverage in addition to what is provided by the underlying policy where there are two separate policies: an underlying, primary policy required by law under the Financial Responsibility Act and an excess

liability policy voluntarily purchased by the insured to provide further protection from liability for the insured.

Where there are separate and distinct excess liability and underlying policies, UIM coverage is not written into the excess liability policy by operation of law and exists only if it is provided by the contractual terms of the excess policy. Here, the excess liability policy makes no reference to providing UIM coverage. As the terms of the excess liability policy itself do not provide UIM benefits, and the Financial Responsibility Act is not applicable to the excess liability policy, claimants cannot prevail on this issue.

We now turn our attention to issues raised in claimants' conditional petitions for discretionary review. In addition to the $250,000 of primary liability coverage claimants received from plaintiff Progressive American Insurance Company, claimants all received workers' compensation benefits under a workers' compensation policy issued by Aetna to T.A. Loving, Inc.

In granting Aetna's motion for summary judgment, the trial court concluded that Aetna's maximum UIM liability under the BAP is $1,000,000 reduced by the amount of primary carrier liability coverage paid by plaintiff and the aggregate amounts paid or payable to all claimants under any workers' compensation policy. The Court of Appeals affirmed the trial court's holding that the BAP provides $1,000,000 per accident reduced by the $250,000 paid by Progressive American and the trial court's stacking of the claimants' individual workers' compensation benefits in calculating the reduction to the amount payable under the BAP.

[2] In their appeal, claimants argue that the BAP should be construed to provide a UIM coverage limit of $1,000,000 per claimant, as opposed to per accident, and that workers' compensation offsets should be deducted from each individual claim, not stacked against the total UIM coverage provided by the BAP.

N.C.G.S. § 20-279.21(e) provides that a motor vehicle policy "need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any worker's compensation law." The terms of the BAP contain the following limit of liability provision:

D. LIMIT OF INSURANCE

. . . .

2. Any amount payable under this coverage shall be reduced by:

   a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits.

As we noted in *Manning v. Fletcher*, 324 N.C. 513, 517, 379 S.E.2d 854, 856 (1989), "[t]wo public policies are inherent in N.C.G.S. § 20-279.21(e). First, the section relieves the employer of the burden of paying double premiums, and second, the section denies the windfall of a double recovery to the employee."

Claimants argue that the language of N.C.G.S. § 20-279.21(b)(4) mandates that the BAP's UIM coverage limit of $1,000,000 be provided per claimant, as opposed to per accident. To bolster their contention that the language of the statute mandates that UIM be provided per claimant, claimants cite the following portion of N.C.G.S. § 20-279.21(b)(4):

> Underinsured motorists coverage is deemed to apply to the first dollar of an underinsured motorists coverage claim beyond amounts paid to the claimant under the exhausted liability policy.
>
> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

N.C.G.S. § 20-279.21(b)(4), paras. 1, 2 (Supp. 1998). The language of (b)(3) sets a $1,000,000 cap for "the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom." We do not read (b)(3) or (b)(4) as requiring UIM coverage to be provided per claimant.

As Aetna notes, in *Aills v. Nationwide Mut. Ins. Co.*, 88 N.C. App. 595, 363 S.E.2d 880 (1988), the Court of Appeals upheld a similar limiting provision. The court stated, "[w]e construe the policy's 'each accident' provision to mean that $100,000 is the outer aggregate limit of defendant's exposure per accident (should there be multiple claims)." *Id.* at 597-98, 363 S.E.2d at 882. Here, as the Court of Appeals stated, "[t]he BAP explicitly, by its terms, provides that

its coverage applies on a per accident basis." *Progressive Am. Ins. Co.*, 129 N.C. App. at 749, 502 S.E.2d at 14. Neither N.C.G.S. § 20-279.21(b)(3) nor (b)(4) precludes application of UIM coverage on a per-accident basis.

We hold that the Court of Appeals did not err in concluding that the BAP's $1,000,000 UIM coverage limit applies per accident, as opposed to per claimant. We also hold that the Court of Appeals did not err in concluding that "[t]he policy is clear and unambiguous that any amount payable under the BAP is reduced by *all* worker's compensation benefits paid or payable for the accident and by the amount paid by the tortfeasor's liability carrier." *Id.* at 750, 502 S.E.2d at 15 (emphasis added).

In conclusion, for the reasons stated herein, we affirm the Court of Appeals with respect to its findings that the UIM coverage provided by the BAP applies per accident and is reduced by the aggregate of workers' compensation benefits paid or payable to all claimants for the accident and the $250,000 paid to claimants by Progressive American. However, because we conclude that the Financial Responsibility Act is not applicable to the excess liability policy, and the language of the excess liability policy does not by its terms provide UIM coverage, we reverse the Court of Appeals' holding that the excess liability policy provides UIM coverage and remand to that court for further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Justice FRYE dissenting.

In this case, the majority concludes that because the commercial excess liability policy in question is not a "motor vehicle liability policy" as defined by N.C.G.S. § 20-279.21(a), it is not required to offer the insured uninsured motorist (UM) and underinsured motorist (UIM) coverage pursuant to N.C.G.S. § 20-279.21(b)(3) and (b)(4). I respectfully dissent from the majority's decision on this issue.

Once again this Court is called upon to interpret a complex and difficult statute, N.C.G.S. § 20-279.21 (Supp. 1998). We must decide whether, in this case, the statute requires the insurer to provide UIM coverage under subdivision (b)(4) of the statute. However, in order to do so, we must first determine whether the policy at issue was

required to provide UM coverage, because N.C.G.S. § 20-279.21(b)(4) requires that policies insuring automobile liability that are written at limits exceeding the minimum statutory liability limits and that afford UM coverage must provide UIM coverage unless rejected by a named insured. *See Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989).

Effective 14 August 1997, the General Assembly amended chapter 58 of the North Carolina General Statutes to permit insurers to limit or exclude UM and UIM coverage with respect to insurance policies providing excess liability coverage. *See* N.C.G.S. § 58-3-152 (Supp. 1998). Thus, the issue presented by this case is whether a commercial excess liability policy, which covers bodily injury arising out of the ownership, maintenance, or use of a motor vehicle, issued prior to the effective date of N.C.G.S. § 58-3-152, provides UIM coverage despite the policy's silence as to such coverage. While the majority has set forth one reasonable interpretation of N.C.G.S. § 20-279.21, it is not writing on a clean slate. This Court has already spoken to the interpretation of N.C.G.S. § 20-279.21(b)(3) and (b)(4) on a closely related, if not identical, issue. I would hold that our interpretation of N.C.G.S. § 20-279.21(b)(4) articulated in *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317 (1995), controls this question and that the commercial excess liability policy at issue in this case does provide UIM coverage.

In *Isenhour v. Universal Underwriters Ins. Co.*, we addressed the question whether a multiple-coverage fleet insurance policy that included umbrella coverage was required to offer UIM coverage equal to the liability limits under its umbrella coverage section. *Id.* In a unanimous decision, we held that, under the version of N.C.G.S. § 20-279.21(b) applicable at that time, the insurer was required to offer the insured UIM coverage in an amount equal to the automobile bodily injury coverage provided in the umbrella coverage section of the policy. *Id.* at 605, 461 S.E.2d at 322.

In reaching that conclusion in *Isenhour*, we examined the conditions under which a policyholder is entitled to UIM coverage. We first noted the analysis of the decision of *Krstich v. United Servs. Auto. Ass'n*, 776 F. Supp. 1225 (N.D. Ohio 1991), which determined that " 'a "policy of bodily injury liability insurance" which covers "liability arising out of the ownership, maintenance, or use" of a motor vehicle' " must provide UM coverage. *Isenhour*, 341 N.C. at 604, 461 S.E.2d at 321 (quoting *Krstich*, 776 F. Supp. at 1234 (applying North

Carolina law)). Pursuant to N.C.G.S. § 20-279.21(b)(4), such a policy must provide UIM coverage if the policyholder has elected liability coverage above the statutory minimums. *See id.*; *see also Sutton*, 325 N.C. at 263, 382 S.E.2d at 762. In addition, the policyholder must not have executed a rejection of UIM coverage. *Isenhour*, 341 N.C. at 605, 461 S.E.2d at 322; *see also* N.C.G.S. § 20-279.21(b)(4). Because the statutory prerequisites were met, we held that the defendant-insurer in *Isenhour* was required to have offered the insured UIM coverage under the umbrella coverage section of the fleet policy in an amount equal to the limit of automobile bodily injury liability coverage provided by the insured's umbrella coverage.

The rationale of *Isenhour* is that subdivision (b)(3) requires an excess liability policy to provide UM coverage and that, when read together, subdivisions (b)(3) and (b)(4) mandate UIM coverage. While the umbrella coverage at issue in *Isenhour* was part of a multi-coverage policy, we adopted the rationale of *Krstich*, a case which very clearly involved separate underlying and excess insurance policies, as a basis for our decision. As noted by the majority, *Krstich* is a federal case decided under Ohio law and thus not binding on this Court; however, the *Krstich* court said that the result would be the same under both the Ohio statute and the North Carolina statute. This Court did not reject that assertion in *Isenhour* and thus approved an interpretation of N.C.G.S. § 20-279.21(b)(3) and (b)(4) that would require policies of bodily injury liability insurance which cover liability arising out of the ownership, maintenance, or use of a motor vehicle to provide UM coverage and UIM coverage if the other statutory prerequisites are met. Our analysis in *Isenhour* was not dependent upon the policy satisfying the definition of "motor vehicle liability policy" contained in N.C.G.S. § 20-279.21(a).

In *Isenhour,* this Court gave an interpretation to N.C.G.S. § 20-279.21(b)(3) and (b)(4) that, if followed in this case, would require an excess liability policy to provide UIM coverage. The General Assembly has not rejected the interpretation given to N.C.G.S. § 20-279.21(b)(3) and (b)(4) in the *Isenhour* decision. Instead, the General Assembly amended chapter 58 of the North Carolina General Statutes, effective 14 August 1997, so as to permit insurers "to limit or exclude UM and UIM coverage with respect to insurance policies providing excess liability coverage." N.C.G.S. § 58-3-152. However, the enactment of N.C.G.S. § 58-3-152 did not affect the interpretation of N.C.G.S. § 20-279.21(b)(3) and (b)(4) adopted in *Isenhour.*

Finally, and perhaps most important, the interpretation of N.C.G.S. § 20-279.21(b)(4) given in *Isenhour* fulfills the "avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, [which] is to compensate the innocent victims of financially irresponsible motorists." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. The majority's construction ignores our long-standing tenet that, as a remedial statute, the provisions of N.C.G.S. § 20-279.21(b)(4) should be "liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Id.*

The umbrella policy issued by Aetna in this case provides bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of a motor vehicle. Therefore, pursuant to N.C.G.S. § 20-279.21(b)(3) as interpreted by *Isenhour*, the excess liability policy would be required to provide UM coverage, and under the precedent of *Isenhour*, I would hold that the policy must also provide UIM coverage pursuant to N.C.G.S. § 20-279.21(b)(4).

Justice MARTIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. HARVEY LEE GREEN, JR.

No. 385A84-5

(Filed 9 June 1999)

1. Discovery— capital cases—post-conviction motion for appropriate relief—retroactivity of discovery statute

The discovery provisions of N.C.G.S. § 15A-1415(f) apply retroactively to post-conviction motions for appropriate relief in capital cases, but only when such motions were filed before the effective date of that statute, 21 June 1996, and had been allowed or were still pending on that date. In this context, the term "pending" means that on 21 June 1996 a motion for appropriate relief had been filed but had not been denied by the trial court, or the motion for appropriate relief had been denied by the trial court but the defendant had filed a petition for writ of certiorari which had been allowed by, or was still before, the N.C. Supreme Court.

2. Discovery— capital case—discovery of State's file—effective date of statute—prior denial of motion for appropriate relief

Defendant was not entitled to discovery of the State's complete files pursuant to N.C.G.S. § 15A-1415(f) where, at the time subsection (f) became effective on 21 June 1996, defendant had no motion for appropriate relief pending as the trial court had previously entered a final order denying his motion for appropriate relief, no petition for writ of certiorari to review that order had been allowed by the N.C. Supreme Court, and no petition for writ of certiorari was before the Court. Defendant's mere act of filing a motion with the trial court to reconsider its prior order denying his motion for appropriate relief did not make such order any less final or convert defendant's denied motion for appropriate relief into a pending motion so as to entitle him to discovery under N.C.G.S. § 15A-1415(f).

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order signed 31 August 1998 by Duke, J., in Superior Court, Pitt County, denying defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 8 February 1999.

Michael F. Easley, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State.

Center for Death Penalty Litigation, by Gretchen M. Engel, Staff Attorney; and Henderson Hill for defendant-appellant.

MITCHELL, Chief Justice.

The issue before this Court is whether N.C.G.S. § 15A-1415(f), which governs post-conviction discovery in capital cases, applies to this defendant who was convicted of a capital offense, sentenced to death, and had his post-conviction motion for appropriate relief denied prior to 21 June 1996, the effective date of the statute. For the reasons that follow, we conclude that N.C.G.S. § 15A-1415(f) does not apply retroactively to such situations. Therefore, we affirm the order of the trial court denying defendant's motion for discovery pursuant to that statute.

Fifteen years ago, on 19 June 1984, defendant Harvey Lee Green, Jr., pled guilty to two counts of first-degree murder and two counts of common law robbery in connection with the 1983 beating deaths of Sheila Bland and Michael Edmondson. Following a capital sentencing

proceeding, the jury recommended a sentence of death for each first-degree murder conviction. The trial court entered judgment accordingly, and defendant appealed to this Court as a matter of right.

Prior to our review of the merits of that appeal, we remanded the case to the Superior Court, Pitt County, upon motion of the State, for a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), to determine whether there had been racial discrimination in the selection of defendant's jury. *State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989). After the hearing, the trial court made findings of fact and concluded that there had been no racial discrimination in the jury selection. The case was then certified back to this Court. Because the trial court had not allowed defendant to present any evidence at the hearing, we remanded the case for another hearing pursuant to *Batson*. After that hearing, the trial court made detailed findings of fact and again found no *Batson* error. The case was again returned to this Court.

The State then filed a motion in which it conceded prejudicial error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), and moved that defendant receive a new capital sentencing proceeding. Thus, we vacated defendant's sentences and remanded the case to the Superior Court, Pitt County, for that purpose. *State v. Green*, 329 N.C. 686, 406 S.E.2d 852 (1991). Following defendant's second capital sentencing proceeding, a jury again recommended a sentence of death for each murder conviction, and the trial court sentenced defendant accordingly. Upon review, we found no error. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

More than a year later, in December 1995, defendant filed a motion for appropriate relief in Superior Court, Pitt County. In his motion for appropriate relief, defendant requested discovery pursuant to then-existing law. After discovery had been completed, the trial court denied defendant's motion for appropriate relief on 1 May 1996. On 7 June 1996, defendant filed a motion to recuse and a motion to reconsider with the trial court. The record before us does not indicate that the trial court ever ruled on these motions, so we must assume that it did not.

On 21 June 1996, the General Assembly ratified "An Act to Expedite the Postconviction Process in North Carolina." Ch. 719, 1995 N.C. Sess. Laws 389. The Act included the addition of a new subsection of N.C.G.S. § 15A-1415 that concerns discovery in con-

nection with post-conviction motions for appropriate relief in capital cases and provides:

> (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 defendant'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.

N.C.G.S. § 15A-1415(f) (1997). Thereafter, defendant twice requested discovery of the State's complete files pursuant to N.C.G.S. § 15A-1415(f). Because defendant's motion for appropriate relief had already been denied, the prosecutor denied the requests. Defendant then filed a petition for writ of certiorari with this Court on 12 July 1996 seeking to review the trial court's 1 May 1996 denial of his motion for appropriate relief. However, defendant filed his petition for writ of certiorari after the time granted him by this Court had expired and after we had denied his motion for an extension of time to file the petition. We granted the State's motion to dismiss defendant's petition for that reason.

Defendant subsequently filed a petition in United States District Court for a writ of habeas corpus, together with a motion for leave to conduct discovery of the State's files. The district court denied defendant's habeas corpus petition and concluded that his motion for discovery was moot. *Green v. French*, 978 F. Supp. 242 (E.D.N.C. 1997). Defendant appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the district court's rulings and denied defendant's motion for rehearing. *Green v. French*, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 698 (1999).

On 3 April 1998, this Court filed its decision in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), in which we applied N.C.G.S. § 15A-1415(f). In *Bates*, we concluded that the plain language of the discovery provision of the statute requires the prosecution in capital cases to disclose the complete files of all law enforcement and prosecutorial agencies involved in an investigation and prosecution of the capital defendant.

On 15 July 1998, defendant filed the motion for discovery *sub judice* in Superior Court, Pitt County, pursuant to N.C.G.S. § 15A-1415(f). On 31 August 1998, the trial court entered an order making findings of fact and concluding *inter alia* that: (1) defendant's post-conviction review was complete and that he had no motion for appropriate relief pending in state court; (2) neither N.C.G.S. § 15A-1415(f) nor *Bates* had been in effect when defendant's motion for appropriate relief was denied on 1 May 1996; (3) defendant had received all of the discovery to which he was legally entitled at the time his motion for appropriate relief had been denied; and (4) retroactive application of N.C.G.S. § 15A-1415(f) to defendant's previously denied motion for appropriate relief would disrupt the orderly administration of justice. Therefore, the trial court denied defendant's motion for discovery. Defendant petitioned this Court for a writ of certiorari to review the trial court's order denying his discovery motion. We allowed defendant's petition in order to consider the retroactivity question. We also allowed defendant's motion to supplement his certiorari petition.

On appeal, defendant contends that in its order of 31 August 1998, the trial court erred by denying him the expanded discovery rights provided by N.C.G.S. § 15A-1415(f) with regard to his motion for appropriate relief which had been previously denied by the trial court on 1 May 1996. The requirements of N.C.G.S. § 15A-1415(f) clearly apply to motions for appropriate relief filed on or after 21 June 1996. The issue presented here is whether the discovery provisions of new subsection (f) apply retroactively and, if so, whether they apply to this defendant's motion for appropriate relief which was denied by the trial court on 1 May 1996, prior to the effective date of the new subsection.

At the outset we note that this Court has adopted several standards relating to whether statutes which create new rules of North Carolina criminal procedure should be construed to apply retrospectively. It is a well-established rule of construction in North Carolina that a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation. *In re will of Mitchell*, 285 N.C. 77, 203 S.E.2d 48 (1974). This Court has stated that "[e]very reasonable doubt is resolved against a retroactive operation of a statute." *Hicks v. Kearney*, 189 N.C. 316, 319, 127 S.E. 205, 207 (1925). However, another rule of statutory construction is that statutes relating to

modes of procedure are generally held to operate retroactively, where the statute or amendment does not contain language clearly evincing a contrary legislative intent. *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970). Applying the foregoing principles, we conclude that the legislature intended that N.C.G.S. § 15A-1415(f) apply retrospectively. However, our determination that new subsection (f) of the statute applies retrospectively does not, in and of itself, resolve the question of whether the discovery allowed by that subsection is available to defendant in the case which is before us.

Here, defendant contends that retrospective application of new subsection (f) entitles him to the full discovery provided by that section in connection with his motion for appropriate relief which was denied by the trial court on 1 May 1996. In this context, however, we conclude that defendant is not entitled to application of the new subsection to his post-conviction motion for appropriate relief which had been denied prior to the adoption of the subsection. Even if the concept of retroactivity is given its very broadest possible meaning, a defendant is not entitled to have new subsection (f) applied to a motion for appropriate relief which was no longer pending on 21 June 1996, the effective date of the subsection, because it had been denied by final judgment entered before that date. *See generally Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334 (1989); *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649 (1987); *State v. Zuniga*, 336 N.C. 508, 444 S.E.2d 443 (1994); *State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (1994); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. Rivens*, 299 N.C. 385, 261 S.E.2d 867 (1980); *Morrison v. McDonald*, 113 N.C. 327, 18 S.E. 704 (1893). In this case, the trial court's order denying defendant's post-conviction motion for appropriate relief had become "final" before N.C.G.S. § 15A-1415 was amended to include new subsection (f), if the term "final" is given any reasonable possible meaning. Defendant filed the motion for appropriate relief at issue here on 18 December 1995. After defendant had obtained discovery pursuant to then-existing law, the trial court entered its order of 1 May 1996 denying the motion for appropriate relief. New subsection (f) of N.C.G.S. § 15A-1415 relating to a defendant's right to discovery in connection with motions for appropriate relief did not become effective until 21 June 1996, almost two months after the trial court denied defendant's motion for appropriate relief. Only much later, on 12 July 1996, did defendant file an *untimely* petition for writ of certiorari with this Court, which this Court dismissed for that reason.

[1],[2] For purposes of applying the discovery provisions of new subsection (f), we conclude that those provisions apply retroactively to post-conviction motions for appropriate relief in capital cases, but only when such motions were filed before 21 June 1996 and had been allowed or were still pending on that date. In this context, the term "pending" means that on 21 June 1996 a motion for appropriate relief had been filed but had not been denied by the trial court, or the motion for appropriate relief had been denied by the trial court but the defendant had filed a petition for writ of certiorari which had been allowed by, or was still before, this Court. Defendant has failed to meet this test. At the time new subsection (f) became effective on 21 June 1996, defendant had no motion for appropriate relief pending as the trial court had previously entered a final order denying his motion for appropriate relief, no petition for writ of certiorari to review that order had been allowed by this Court, and no petition for writ of certiorari was before this Court. Therefore, defendant is not entitled to the post-conviction discovery allowed in capital cases by new subsection (f), with regard to his motion for appropriate relief which was denied on 1 May 1996.

Further, we are convinced that our decision in *Bates* is irrelevant to the question of the retroactivity of the discovery requirements of new subsection (f). In *Bates*, we announced no new rule of criminal procedure. Instead, as our unanimous decision in *Bates* demonstrates, the new procedural rule embodied in subsection (f) was clear beyond all peradventure from the moment new subsection (f) became effective on 21 June 1996. *See generally Bates*, 348 N.C. 29, 497 S.E.2d 276.

Nonetheless, defendant contends that the intent of the legislature to ensure thorough and complete post-conviction review in capital cases requires disclosure of all of the State's investigative and prosecutorial files to all capital defendants in all post-conviction situations whatsoever. We do not agree.

The "Act to Expedite the Postconviction Process in North Carolina" apparently was enacted in 1996 in response to legislative concerns that the post-conviction process in capital cases appeared endless. *Id.* Moreover, legislative and judicial action in the federal arena seems to have provided much of the impetus behind the General Assembly's decision to revise the post-conviction process in this state. *See Felker v. Turpin*, 518 U.S. 651, 135 L. Ed. 2d 827 (1996) (interpreting and applying the federal Antiterrorism and Effective

Death Penalty Act of 1996). Defendant is correct that the legislature apparently intended for the amendment to " 'expedite the post-conviction process in capital cases while ensuring thorough and complete review.' " *State v. Atkins*, 349 N.C. 62, 109, 505 S.E.2d 97, 126 (1998) (quoting *Bates*, 348 N.C. at 37, 497 S.E.2d at 280-81). However, retroactive application of the discovery provision of subsection (f) to defendant here would not achieve the General Assembly's intent; instead, it would defeat that intent. A construction of the statute such as that proposed by defendant "which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975); *see also Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979) (policy objectives of a statute may be considered in ascertaining legislative intent). Here, we conclude that the legislature's objective in adopting the statute may reasonably be served without doing violence to the legislative language.

Applying the discovery provision of subsection (f) in the manner defendant proposes would mean that every death row inmate, without regard to his or her post-conviction status, would be entitled to begin discovery anew, thereby prolonging the capital post-conviction review process and staving off execution indefinitely. Those capital defendants who have already completed direct and collateral review could begin the process of capital case post-conviction review all over again by the simple expedient of filing discovery motions. Such a result would have a devastating effect on the orderly administration of our criminal justice system. After reviewing the language of N.C.G.S. § 15A-1415(f) in conjunction with the title of the Act, we are convinced that the General Assembly did not intend for the discovery procedures of N.C.G.S. § 15A-1415(f) to apply to motions for appropriate relief which were denied prior to 21 June 1996 and as to which no petition for writ of certiorari had been allowed by or was pending before this Court on that date.

In *Bates*, this Court recognized that the discovery provision of N.C.G.S. § 15A-1415(f) fit into a much larger statutory scheme designed to provide full post-conviction disclosure to counsel for capital defendants so that "they may raise all potential claims in a single motion for appropriate relief." *Bates*, 348 N.C. at 37, 497 S.E.2d at 281. Defendant's proposed application of N.C.G.S. § 15A-1415(f) would undermine that broad statutory framework for post-conviction review in capital cases.

In the instant case, defendant's motion for appropriate relief was denied by the trial court on 1 May 1996. This was a final judgment. Any appellate review of that judgment was subject to this Court's discretionary grant of certiorari. N.C.G.S. § 15A-1422(c)(3) (1997). When N.C.G.S. § 15A-1415(f) became effective on 21 June 1996, no petition for writ of certiorari seeking review of the 1 May 1996 order had been allowed by or was pending before this Court. On 21 June 1996, defendant's case was beyond the jurisdiction of the trial court and not pending before any other court of this state. N.C.G.S. § 15A-1418 (1997).

Further, the fact that defendant filed a motion to reconsider and a motion to recuse with the trial court on 7 June 1996, more than a month after it had denied his motion for appropriate relief, is not controlling. We need not consider here whether the trial court's denial of defendant's motion for appropriate relief would have been "final" for retroactivity purposes had defendant's motion for reconsideration been allowed by the trial court. We conclude here only that the mere act of a defendant in filing a motion with the trial court to reconsider its prior order denying a motion for appropriate relief does not make such order any less final or convert the defendant's denied motion for appropriate relief into a pending motion. To hold otherwise would encourage defendants in situations such as the one before us to play fast and loose with the courts; they could simply wait until some unforeseeable future time when execution was imminent, then breathe new life into a motion for appropriate relief which had been denied prior to the effective date of N.C.G.S. § 15A-1415(f) by filing a motion asking the trial court to reconsider a long-standing order denying the motion for appropriate relief. Again, this would entirely frustrate the intent of the legislature when it enacted the "Act to Expedite the Postconviction Process in North Carolina."

Since he entered his guilty pleas fifteen years ago, this capital defendant has received the benefit of every new rule of law to arise as his convictions and sentences have been reviewed time and again in both the state and federal courts. Defendant's two *Batson* hearings and second capital sentencing proceeding because of *McKoy* error represent only a minute part of the state and federal court review he has received. Defendant has also received full, fair, and thoughtful review of his conviction and capital sentences in this Court and full habeas review in federal court on several occasions. Not every new rule of criminal procedure should be made applicable in every case. At some point, every judgment in a capital

case must become final and the review process must cease. As stated by Justice O'Connor:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. . . . "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include assignment of final competence to determine legality." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-51 (1962) (emphasis omitted).

Teague, 489 U.S. at 309, 103 L. Ed. 2d at 355. Indeed, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 691, 28 L. Ed. 2d 404, 419 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). We completely agree with these observations and conclude that they are equally applicable in this case involving a new statutory rule relating solely to procedures applied during post-conviction review. Accordingly, for the reasons previously stated, the order of the Superior Court, Pitt County, denying defendant's motion for discovery pursuant to N.C.G.S. § 15A-1415(f) is affirmed.

AFFIRMED.

CALVIN THOMAS NELSON v. CALVIN EUGENE NELSON

No. 67A99

(Filed 9 June 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 132 N.C. App. 235, 517 S.E.2d 687 (1999), affirming an order entered 5 December 1997, *nunc pro tunc* 3 December 1997, by Carter (Clarence W., Jr.), J., in Superior Court, Stokes County. Heard in the Supreme Court 11 May 1999.

Stover & Bennett, by Michael R. Bennett, for plaintiff-appellant.

Jeffrey S. Lisson for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. JOHNNY STREET PARKER

No. 152A97

(Filed 25 June 1999)

1. **Indigent Defendants— capital case—statutory right to two attorneys—jury deferments and excuses—absence of lead attorney**

Defendant's statutory right to representation by two attorneys in a capital trial was not violated when the trial court proceeded with limited jury orientation, jury excuses, and jury deferments without the presence of his lead counsel, who was ill, where the court proceeded with the consent of defendant and his second court-appointed attorney, and a third attorney who had been assisting defendant's two court-appointed attorneys in jury selection was present and still assisting. N.C.G.S. § 7A-450(b1).

2. **Crimes, Other— malicious castration—dead victim—continuous transaction with murder—sufficiency of evidence**

There was sufficient evidence to support submission of a charge of malicious castration to the jury, even though the medical examiner testified that the victim was dead at the time of the castration, where the evidence was sufficient to show that the crime of malicious castration was committed in conjunction with the victim's murder as part of a continuous chain of events forming one single transaction.

3. **Burglary— indictment—intended felony**

An indictment for first-degree burglary was not required to specify the felony which defendant intended to commit at the time of the breaking or entering.

4. **Burglary— first-degree burglary—constructive breaking—intent to commit felonious assault—sufficiency of evidence**

The evidence was sufficient to support submission of a charge of first-degree burglary to the jury where the trial court instructed the jury that the felonious intent alleged was "felonious assault with a deadly weapon inflicting serious injury," and the jury could draw inferences from the evidence that the victim

could testify about defendant's involvement in a burglary and murder in a downstairs apartment, that the victim was forced through violence and the threat of violence back into his upstairs apartment before being killed by defendant, and that defendant intended at the time he entered the victim's apartment to commit a felonious assault on the victim.

5. Criminal Law— mistrial—selection of jury foreperson—presence of alternate jurors

The trial court did not err by denying defendant's motion for a mistrial because the jury first selected a foreperson before the alternate jurors were excluded from the jury room where no deliberations or any conversation regarding the facts of the case occurred while the alternate jurors were present. N.C.G.S. § 15A-1215(a).

6. Burglary— felony murder—underlying felony—felonious intent—assault as felony—instructions not plain error

The trial court did not commit plain error in a prosecution for felony murder in its instructions on the felonious intent element of the underlying felony of burglary, although there may have been some initial confusion in the trial court's instructions, where the court ultimately set forth the required elements that the jury needed to find to properly determine whether the assault defendant intended to commit at the time he broke and entered the victim's apartment was in fact a felony.

7. Robbery— instructions—taking by violence or putting in fear—supporting evidence

In a felony murder prosecution based upon the underlying felony of armed robbery, the trial court's instruction that taking of property in an armed robbery could be accomplished "by violence or by putting [the victim] in fear" did not erroneously allow the jury to convict defendant upon a theory not supported by the evidence where the evidence showed not only that the taking of property was accomplished by violence but also that the victim was awake with his eyes open when a gun was pointed at his face and fired below his right eye, thus permitting the jury to find that defendant threatened the use of the gun when he pointed it at the victim's face and that the victim was in some fear as he realized the gun was aimed at his face.

8. Criminal Law— prosecutor's closing argument—not shifting of burden of proof

The prosecutor's argument to the jury in a prosecution for two first-degree murders, "Get him to show you the evidence says those weren't his fingerprints. And, that he wasn't at 203 Northeast Street in the early morning hours of the 2nd of October, 1994," and "Get them to show the evidence that he didn't have anything [sic] with the murders" did not shift the burden of proof to defendant; rather, when considered in the overall context in which the remarks were made and the overall factual circumstances to which they referred, they constituted comments on the strength of the State's evidence and the absence of any contradictory evidence.

9. Evidence— identification of defendant—brief opportunity for observation

The trial court properly permitted identification of defendant by a witness who observed defendant during the day from a short distance for a period of a few seconds to a minute and was able to remark about defendant's unseasonable clothing. The witness's limited opportunity for observation goes to the weight rather than the admissibility of the identification.

10. Confessions and Incriminating Statements— statements not made under influence of drugs—statements not result of interrogation

Incriminating statements made by defendant to law officers after his arrest at a detox center were not made while defendant was under the influence of drugs and were properly admitted into evidence at defendant's murder trial where the evidence supported findings by the trial court that defendant was not handcuffed, spoke clearly and coherently, understood questions, made appropriate responses, and that the incriminating statements were not made in response to interrogation by the officers but were entirely voluntary. These findings support the trial court's conclusion that defendant's statements were made freely, voluntarily, and understandingly.

11. Sentencing— capital sentencing—aggravating circumstance—pecuniary gain—sufficient evidence

The trial court properly submitted the pecuniary gain aggravating circumstance to the jury in this capital sentencing proceeding, although there was evidence that defendant told his

cousin that he broke into the victim's apartment to steal a gun for his own protection, where there was substantial evidence to support an inference by the jury that defendant's motive in stealing the gun was to exchange it or sell it for drugs. Moreover, the fact that defendant may have intended to steal the gun for his personal use does not change the fact that the killing was committed for the purpose of getting something of value, which is sufficient to support the pecuniary gain aggravating circumstance. N.C.G.S. § 15A-2000(e)(6).

12. Sentencing— capital sentencing—mitigating circumstance—no significant history of criminal activity—supporting evidence

The trial court did not err by submitting over defendant's objection the mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence tended to show that defendant began drinking alcohol as a child and started using marijuana and cocaine when he was thirteen years old; a couple of years later, defendant was committing break-ins to support his drug habit and was hospitalized for treatment of substance abuse; a forensic psychiatrist testified that defendant was frequently violent; and at age eighteen, defendant was sent to juvenile detention. The trial court could properly determine that a reasonable juror could find that defendant had no significant history of prior criminal activity within the meaning of N.C.G.S. § 15A-2000(f)(1).

13. Sentencing— capital sentencing—mitigating circumstance—no significant history of criminal activity—submission over objection—prosecutor's argument—instruction by court

In a capital sentencing proceeding in which the trial court submitted the (f)(1) no significant history of prior criminal activity mitigating circumstance to the jury over defendant's objection, the prosecutor's arguments were not misleading as to whether defendant requested submission of the (f)(1) mitigating circumstance; furthermore, the trial court properly instructed the jury that defendant did not request submission of the (f)(1) mitigating circumstance, and the trial court's failure to inform the jury that submission of this mitigating circumstance was required as a matter of law was harmless when the instructions are viewed in their totality.

14. Criminal Law— prosecutor's closing argument—capital sentencing—rights given defendant—not due process violation

Assuming arguendo that it was improper for the prosecutor to argue to the jury in a capital sentencing proceeding that defendant "has been given food to eat and a warm place to stay. Health care, lawyers, social workers, psychiatrist," that the victims did not have a five-week trial or two lawyers to plead their cases, and that the victims had a jury of one to decide their fate and didn't get a hearing, these statements did not deny defendant due process since the prosecutor did not directly attack defendant's exercise of his constitutional rights, substantial evidence supported the aggravating circumstances submitted to the jury, the jury was instructed to base its decision on the evidence alone and not on the arguments of counsel, and it is unlikely that the jury's recommendations were influenced by these portions of the prosecutor's closing argument.

15. Sentencing— capital sentencing—life sentences—consecutive or concurrent—refusal to answer jury's question

In a capital sentencing proceeding for two first-degree murders, the trial court did not err by instructing the jury, in response to the jury's inquiry as to whether two life sentences would be served consecutively or concurrently, that it was the court's job to make that determination and that the court was "not allowed to tell you what I'm going to do because that should not influence your—verdict."

16. Sentencing— capital sentencing—aggravating circumstances—murder while engaged in second murder—course of conduct—separate evidence—instructions

In this capital sentencing proceeding for two first-degree murders, there was substantial separate evidence to support the (e)(5) aggravating circumstance that the first victim's murder was committed while defendant was engaged in the commission of the second victim's murder and the (e)(11) aggravating circumstance that the first victim's murder was committed while defendant was engaged in a course of conduct which included the commission of the crime of malicious castration of the second victim where the evidence showed that defendant committed a series of crimes as part of a continuous transaction. Furthermore, there was no reasonable likelihood that the trial

court's instructions would have caused jurors to consider the murder of the second victim to support both aggravating circumstances where the trial court's instructions correctly informed the jury that the only violent crime which could be considered to support the (e)(11) aggravating circumstance was the second victim's castration, and the wording of the circumstance on the "Issues and Recommendation as to Punishment" form further clarified the instruction.

17. Sentencing— capital sentencing—aggravating circumstance—course of conduct—castration of second victim—single transaction

The trial court did not err in submitting the (e)(11) aggravating circumstance that the murder of Buchanan was part of a course of conduct which included the commission by defendant of another crime of violence (castration of Dowdy) where there was sufficient evidence that the crime of malicious castration was committed in conjunction with Dowdy's murder as part of a continuous chain of events which included Buchanan's murder and was thus a violent felony committed against Dowdy as part of a course of conduct including the murder of Buchanan.

18. Appeal and Error— preservation of issues—submission of aggravating circumstance—failure to object or contend plain error

Defendant waived appellate review of the issue as to whether the trial court erred by submitting to the jury the aggravating circumstance that the murder of one victim was committed while defendant was engaged in flight after committing another homicide, N.C.G.S. § 15A-2000(e)(5), where defendant failed to object to the trial court's instructions at the time they were given or before the jury retired to deliberate, and defendant failed to specifically and distinctly contend that the trial court's submission of the (e)(5) aggravating circumstance was plain error.

19. Sentencing— capital sentencing—aggravating circumstance—murder while engaged in arson—continuous transaction

The trial court did not err by submitting to the jury as an aggravating circumstance that the murder of Dowdy was committed by defendant while defendant was engaged in the commission of arson, N.C.G.S. § 15A-2000(e)(5), although there was

no evidence that there was any burning of Dowdy's upstairs apartment, where defendant killed both Buchanan in his downstairs apartment and Dowdy and set fire to the downstairs apartment, and the murder of Dowdy and the arson occurred under a short span of time and were parts of a continuous transaction.

20. Criminal Law— prosecutor's closing argument—aggravating circumstances—existence found by verdicts—no gross impropriety

The prosecutor's closing argument in a capital sentencing proceeding that, with regard to many of the aggravating circumstances, the jurors had already found them to exist by their verdicts did not encourage the jurors to engage in impermissible double counting and was not so grossly improper as to require the trial court to intervene ex mero motu where none of defendant's convictions from the guilt phase that were used to support either of defendant's convictions of first-degree murder were used as aggravating circumstances for the same murder in the sentencing phase.

21. Sentencing— capital sentencing—death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where (1) defendant was convicted of first-degree murder of one victim (Dowdy) under the theory of premeditation and deliberation; (2) defendant shot the second victim (Buchanan) in the face at close range; (3) defendant showed no remorse for the brutal murder and castration of Dowdy; and (4) defendant murdered both victims in their homes.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Lanier (Russell J., Jr.), J., on 13 March 1997 in Superior Court, Sampson 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 21 January 1998. Heard in the Supreme Court 12 January 1999.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

James R. Parish for defendant-appellant.

FRYE, Justice.

In a capital trial, defendant was convicted by a jury of first-degree murder of James William Buchanan under the theory of felony murder. The same jury convicted defendant of first-degree murder of Jerry Lee Dowdy under the theories of felony murder and premeditation and deliberation. The jury also found defendant guilty of malicious castration, first-degree burglary of a home and larceny of a firearm therefrom, first-degree arson, breaking or entering a motor vehicle, first-degree burglary of an apartment, felonious breaking or entering of a house, breaking or entering of a storage building, felonious breaking or entering of a storage building and felonious larceny therefrom, and breaking or entering of a motor vehicle and misdemeanor larceny therefrom.

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. The trial court arrested judgment on the larceny of a firearm conviction and continued prayer for judgment on two counts of breaking or entering and one count of misdemeanor larceny. Consecutive terms of imprisonment were imposed for the remaining convictions.

Defendant makes twenty-nine 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: On the morning of 2 October 1994, John Williams noticed smoke coming from a house located at 201 Northeast Street in the town of Roseboro. He drove to the police department to report the smoke. Billy Herring, the chief of the Roseboro Fire Department, received the fire call around 7:25 a.m. and went to the house at 201 Northeast Street. James William Buchanan, also known as "Alabama," lived in the downstairs portion of the house, and Jerry Lee Dowdy lived in an upstairs apartment. Herring pushed the downstairs door open. A fireman, Keith Sessoms, observed testicles lying in the doorway to the downstairs area.

Officers found the lifeless body of James Buchanan, a fifty-two-year-old businessman and Roseboro town commissioner, on his bed

in the bedroom of the downstairs apartment. He had been shot in the face and burned. The cloth covering on the bed had been burned, with only the springs remaining. In the bedroom, dresser drawers were open with everything pulled out of them; on the floor, there was a broken television, clothes, a pink Bic-style cigarette lighter, a burned lighter-fluid can, and a nine-millimeter shell casing. There was heavy fire damage in the bedroom, on and around the bed.

Officers found the lifeless body of Jerry Dowdy, a fifty-year-old groundskeeper at the Hardee's Restaurant in Roseboro, lying face-down in a large puddle of blood in the kitchen of his upstairs apartment. Spatters of blood were apparent on the kitchen table, the lower portion of the stove and the sink cabinets, the walls, the floor, the side of the refrigerator, and extending into the hallway. Dowdy was naked from the waist down, with underwear around his legs. His testicles had been removed, and there were multiple chopping wounds to his head and hands. Officers found an empty wallet under his left elbow, blood and hair on an ax propped against a cabinet under the sink, and a bloody knife on the kitchen floor.

Betty Edwards lived nearby at 208 Railroad Street in Roseboro. On 2 October 1994, she noticed that several items, including a battery charger, an electric heater, a gas edger, a toolbox, and a black case with tools in it, had been removed from her storage building. Ms. Edwards' son's 1991 Nissan Stanza had also been entered, and papers had been scattered around in the car.

James Jackson lived at 203 Northeast Street in Roseboro, next door to Buchanan's home. He testified that, on 2 October 1994, when he arrived home, there was security tape around his residence. The phone lines had been cut, a storm window under the garage had been removed, and the padlock had been pried from the door of a storage building. Nothing had been taken from the residence.

Between 10:00 p.m. on Saturday, 1 October 1994 and 4:00 a.m. on Sunday, 2 October 1994, several people saw defendant in Roseboro. Defendant was wearing a multiple-color, splashed shirt under a dark-green, long-sleeve pullover shirt with black stripes and no collar, and a pair of gray stone-washed jeans with a tear in the right knee and a splash of orange paint on one leg. By 9:00 a.m. on Sunday, 2 October 1994, defendant had on a pair of gray dress pants, instead of the gray stone-washed jeans, and a pair of black and white Asics tennis shoes.

A tennis-shoe impression in blood on a newspaper found in the hallway of Dowdy's upstairs apartment was an exact match in design and size to an impression from the Asics tennis shoe defendant was wearing when he arrived at his cousin's house at 9:00 a.m. on 2 October 1994. When seized on 6 October 1994, it was determined that the tennis shoes had human blood on them.

Defendant's cousin, Mitchell Parker, testified as follows: On the night of 2 October 1994, defendant told Mitchell that he knew there was a gun at Buchanan's house and that he had gone there to steal it. Defendant said that as he was stealing the gun, Buchanan woke up and grabbed him from behind. He said he shot Buchanan in the head to get him off of him. Then Dowdy woke up and came downstairs, and a fight ensued. Defendant said that he "busted" Dowdy's head. Defendant said that he decided to burn the house and that he changed clothes, cut some phone lines at a nearby house, and took a lawnmower. Defendant also told Mitchell that, earlier that day, he smoked some marijuana, drank some beer, and injected cocaine several times.

At 5:00 a.m. on the morning of 3 October 1994, defendant's family tried to have him committed to the mental health department because they thought he was hallucinating from drugs. Later that day, defendant was committed and sent to Onslow Detox Center. By that time, defendant was calm and cooperative, oriented to the surroundings, and understood what was said and what was occurring.

Defendant stayed at the detox center for two days. On Wednesday, 5 October 1994, defendant was arrested at the detox center for the murders of Buchanan and Dowdy. At the police station, defendant told the officers that he had gone to a house near Buchanan's on 2 October 1994 and had stolen a lawnmower and a battery charger from the shed. He had also stolen a cellular phone from Buchanan's car. He denied going into Buchanan's house. Then the officers told defendant that his cousin had told them that defendant had admitted killing Buchanan, and defendant put his head down, cried, and asked for a lawyer. Following his request, the interrogation ended. Defendant was handcuffed and taken to the police car. Once outside, defendant asked one of the officers how serious everything was, to which the officer replied, "It's real bad." Defendant replied, "I didn't mean to kill Alabama [Buchanan]." Defendant then began crying.

Defendant did not testify during the trial. He did call several witnesses.

I. PRETRIAL

[1] In his first argument, defendant contends that the trial court erred by proceeding with the orientation of new jurors along with requests for deferments and excuses in the absence of defendant's lead counsel, who was ill. Defendant contends that the trial court violated his rights as an indigent defendant, under N.C.G.S. § 7A-450, to have two attorneys representing him. We disagree.

John Parker (no relation to defendant) was appointed as counsel to represent defendant, and Isaac Cortes, Jr., was appointed as co-counsel. Lead counsel, Parker, became ill and was absent during several court proceedings. During Parker's absence, the trial court proceeded with administrative matters. A third attorney, who had been present and participating with defendant's court-appointed attorneys throughout jury selection, was present during these proceedings.

Every criminal defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). An indigent defendant is entitled to two attorneys in a capital case. N.C.G.S. § 7A-450(b1) (1995). Failure to appoint additional counsel in a capital case in a timely manner is a violation of the statute, which is prejudicial error *per se*. *State v. Hucks*, 323 N.C. 574, 581, 374 S.E.2d 240, 245 (1988). In the instant case, defendant has not claimed that additional counsel was not appointed in a timely manner. Instead, defendant claims that the actions of the trial court in proceeding with limited jury orientation, jury excuses, and jury deferments without the presence of his lead counsel violated his right to the appointment and presence of two counsel. However, the statute does not require that both appointed attorneys be involved in every aspect of a defendant's case.

In *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996), this Court concluded that the trial court did not violate the defendant's statutory right to two counsel by not allowing both attorneys to object during *voir dire*. This Court held that since the trial court "did not deny defendant the assistance of a second attorney or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys

meaningless," there was no violation of the statute. *Id.* at 493, 461 S.E.2d at 675.

In the instant case, the trial judge asked defendant's other counsel and defendant if they had a problem proceeding with orientation of the jurors and hearing requests for deferments and excuses; defendant's counsel did not object to such proceedings. The dialogue proceeded as follows:

> THE COURT: It has been brought to the Court's attention by telephone that the lead counsel for the defendant Mr. John Parker is ill and that he is unable to proceed today and probably not tomorrow. However, we do have a new panel of juror[s] coming in tomorrow that it would facilitate matters if we could do the orientation and hear the requests for deferments and excuses in Mr. Parker's absence. What I'd like to inquire about of Mr. Cortes, and Fusco and Parker, your client, if you have any problem with doing that?
>
> MR. CORTES: No, sir. That seems to me to be some what more of an administrative than actual jury selection and therefore more in the hands of the Court and we do not oppose or object to that proceeding.
>
> THE COURT: All right. Well, we will begin tomorrow morning doing that and that alone at 9:00. That's what [sic] the folks have been told to come.

The actions of the trial court in this case did not violate defendant's rights under the statute. Defendant had two court-appointed attorneys as required under N.C.G.S. § 7A-450(b1). The trial court was confronted with the illness of defendant's lead counsel and the fact that jurors had been summoned to court. In continuing the proceedings with the consent of defendant and with defendant and one of his court-appointed attorneys present, the trial court did not violate the right of defendant to have two attorneys appointed in his capital case. *See State v. Thomas*, 350 N.C. 315, 337, — S.E.2d —, — (1999). This is especially true where, as here, a third attorney, who had been assisting defendant's two court-appointed attorneys in jury selection, was present and still assisting. The trial court "did not deny defendant the assistance of a second attorney or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys meaningless." *Frye*, 341 N.C. at 493, 461 S.E.2d at 675.

The State contends, and we agree, that defendant's statutory right to representation by two attorneys was not violated by the actions of

the trial court in the instant case. Accordingly, we reject defendant's first argument.

II. GUILT PHASE

[2] In his second argument, defendant contends that the trial court erred in failing to dismiss the charge of malicious castration of Jerry Lee Dowdy at the close of all the evidence because there was insufficient evidence to support submission of this charge. The evidence showed that Sessoms, one of the firemen at the scene of the crime, saw testicles in the downstairs doorway. Dowdy was found dead upstairs in his apartment. According to the medical examiner, Dowdy's testicles had been cut off after death. Defendant does not contend that he did not commit the acts necessary to constitute malicious castration. Instead, he contends that, since Dowdy was dead at the time of the castration and the gravamen of the offense appears to prohibit these acts being done to a living person, the evidence was insufficient to support submission of this charge.

The State, on the other hand, contends that if a series of assaultive crimes against a person who has been murdered occurred in a continuous transaction, the exact time of the assaultive felony in relation to the death of the victim is irrelevant. *See State v. Wilkinson*, 344 N.C. 198, 214-17, 474 S.E.2d 375, 385 (1996). We agree with the State.

In *Wilkinson*, this Court concluded that there was sufficient evidence that the two sex offenses to which the defendant pled guilty were committed as part of a continuous chain of events with the murder forming one continuous transaction. *Id.* The Court in *Wilkinson* relied on *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991), in which we stated:

> "Because the sexual act was committed during a continuous transaction that began when the victim was alive, we conclude the evidence was sufficient to support defendant's conviction for first-degree sexual offense. This Court, on numerous occasions, has held that to support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction."

Wilkinson, 344 N.C. at 215-16, 474 S.E.2d at 384 (quoting *Thomas*, 329 N.C. at 434-35, 407 S.E.2d at 149); *see also State v. Davis*, 325 N.C.

607, 631, 386 S.E.2d 418, 431 (1989) (stating that a homicide victim is still a "person" if the death and the taking form a continuous chain of events within the meaning of common-law robbery), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990); *State v. Fields*, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985) (holding that when the theft and the use or threat of force are connected so as to form a single transaction, the intent to steal could be formulated before or after the use of force); *State v. Williams*, 308 N.C. 47, 67, 301 S.E.2d 335, 348 (stating that whether the felony occurred prior to or immediately after the killing is immaterial so long as it is a part of a series of incidents which form one continuous transaction), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983).

In the instant case, defendant's cousin testified that defendant told him that Dowdy came downstairs after defendant shot Buchanan in the head. Dowdy and defendant started to fight, and defendant "busted" Dowdy's head with a claw hammer. Dowdy was found lying facedown, naked from the waist down, testicles removed, with his underwear cut and pulled down his legs, in a large puddle of blood in the kitchen of his upstairs apartment. Blood spatters were found throughout the kitchen. The fact that defendant's testicles were removed postmortem is insufficient to remove it from our continuous transaction line of cases. Accordingly, we hold that the evidence is sufficient to show that the crime of malicious castration was committed in conjunction with Dowdy's murder as part of a continuous chain of events, forming one single transaction. Contrary to defendant's arguments, the trial court did not err in failing to dismiss the charge of malicious castration at the close of all the evidence.

[3] As defendant's third argument, he contends that the trial court erred in failing to dismiss, at the close of all the evidence, the charge of first-degree burglary of the apartment of Dowdy, as the indictment was insufficient to allege burglary, and the evidence was insufficient to support submission of this charge to the jury. While the indictment alleged that defendant broke and entered the apartment "with the intent to commit a felony therein," it did not specify a particular felony.

This Court determined in *State v. Worsley*, 336 N.C. 268, 280-81, 443 S.E.2d 68, 74 (1994), that an indictment for the charge of burglary need not specify the felony the defendant intended to commit at the time of the breaking or entering if " '[t]he indictment charges the offense . . . in a plain, intelligible, and explicit manner and contains

sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense,' " and it " 'informs the defendant of the charge against him with sufficient certainty to enable him to prepare his defense.' " *Id.* at 281, 443 S.E.2d at 74 (quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985)); *see also* N.C.G.S. § 15A-924(a)(5) (1997). Similarly, in the present case, the indictment for first-degree burglary need not specify the felony which defendant intended to commit.

[4] During the instructions to the jury on the burglary count, the court informed the jury that the felonious intent alleged was "felonious assault with a deadly weapon inflicting serious injury." Accordingly, the State had the burden of proving by substantial evidence that, at the time of the breaking or entering, defendant had that specific felonious intent.

First-degree burglary is the breaking or entering of an occupied dwelling at night with intent to commit a felony therein. N.C.G.S. § 14-51 (1993); *State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995). A breaking may be actual or constructive. *State v. Wilson*, 289 N.C. 531, 539, 223 S.E.2d 311, 316 (1976). A constructive breaking occurs when entrance is obtained as the result of violence commenced or threatened by a defendant. *Williams*, 308 N.C. at 362, 302 S.E.2d at 441. At the time of entrance, the intent to commit the felony must be present, and "this can but need not be inferred from the defendant's subsequent actions." *Montgomery*, 341 N.C. at 566, 461 S.E.2d at 739; *see also State v. Peacock*, 313 N.C. 554, 559, 330 S.E.2d 190, 193 (1985).

Here, defendant told his cousin that he went to Buchanan's house to steal a gun. Defendant did not tell his cousin where he was when he first hit Dowdy or how Dowdy got back upstairs. In Dowdy's upstairs apartment, there was blood spatter in the kitchen, a bloody tennis shoe print on a newspaper in the hallway, bloodstains in the bathroom, and bloodstains on the floor of the living room and in the hallway leading into the bedroom where closet doors were open and drawers were pulled out. There was no trail of bloodstains or blood spatter on the stairs and none downstairs. The jury could draw the clear inference that Dowdy was forced through violence and the threat of violence back into his upstairs apartment before being killed by defendant. The jury could further infer that defendant intended at the time he entered Dowdy's apartment to commit a felonious assault on Dowdy, who could testify about defendant's involve-

ment in the burglary and murder in the downstairs apartment. Accordingly, we hold that the trial court did not err in submitting the charge of first-degree burglary to the jury.

[5] In his fourth argument, defendant contends that the trial court committed reversible error in denying defendant's motion for mistrial based upon the allegation that the twelve jurors and the alternate jurors deliberated in the jury room and selected a foreperson prior to the alternates being excluded from the jury room. Defendant contends that his rights were violated under the North Carolina Constitution, Article I, Section 24, and N.C.G.S. § 15A-1215(a). This assignment of error has no merit.

It is well settled in North Carolina that the presence of an alternate in the jury room *during deliberations* violates N.C.G.S. § 15A-1215(a) and constitutes reversible error *per se*. *See* N.C.G.S. § 15A-1215(a) (1997); *State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975). On the other hand, "where the alternate's presence in the jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function," the alternate's presence will not void the trial. *Bindyke*, 288 N.C. at 628, 220 S.E.2d at 533-34.

Here, the trial court gave the jury its instructions near the end of a day's session and told the jurors that the first thing that they would do the next day would be to choose a foreperson. The next day, when the trial court instructed them to select a foreperson, the jurors informed the court that they had already selected one. After the trial court sent the twelve into the jury room to begin deliberations and excused the alternates, defendant moved for a mistrial. The trial court denied defendant's motion and then brought the jury back into the courtroom to inquire whether the jury began its deliberation in the alternate jurors' presence. In response to the court's question, the jurors told the court that no deliberations or any other conversation transpired regarding facts of this case. Subsequently, the trial court instructed them to select a foreperson again and to begin deliberations thereafter. The jurors are presumed to have followed the trial court's instructions. *See State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 641 (1999). Since the alternate jurors were not present during deliberations, there is no prejudicial error.

[6] In his fifth argument, defendant contends that the trial court committed reversible error by giving the jury misleading and inaccurate

instructions on the felonious intent element of burglary during its instructions on the underlying felonies for felony murder. Defendant contends that by misinstructing the jury as to felonious assault with a deadly weapon inflicting serious injury, the trial court omitted one of the necessary elements of the offense of burglary, thereby relieving the State of its burden of proof in violation of defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

Here, the court instructed the jury that under first-degree felony murder, the State had to prove that the killing of a human being was done in the perpetration of, or attempt to perpetrate, a felony. During the instruction on the underlying felony of burglary, confusion arose as to which felony defendant was alleged to have intended to commit when he broke and entered Dowdy's apartment. The District Attorney called the error to the court's attention and a bench conference was held to clear up the confusion. The trial court then instructed the jury on the elements of felonious assault with a deadly weapon inflicting serious injury, the felony which defendant was alleged to have intended to commit when he broke and entered Dowdy's apartment.

Because defendant's counsel did not object to this instruction at the time it was given or before the jury retired to deliberate, this issue is not properly preserved for appellate review. *See* N.C. R. App. P. 10(b)(2); *State v. Allen*, 339 N.C. 545, 554-56, 453 S.E.2d 150, 154-55 (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). Therefore, defendant is entitled to relief only if the instructions amounted to plain error, which is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988), *quoted in State v. Davis*, 349 N.C. 1, 34, 506 S.E.2d 455, 473 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 1999 WL 148333 (June 7, 1999). However, we conclude that while there may have been some initial confusion in the trial court's instruction, the court ultimately set forth the required elements that the jury needed to find to properly determine whether the assault defendant intended to commit at the time he broke and entered Dowdy's apartment was in fact a felony. Defendant has not shown that the jury was misled by the instructions or that the trial

court committed error so fundamental as to result in a miscarriage of justice. Thus, defendant has not shown plain error.

[7] In his sixth argument, defendant contends that the trial court improperly instructed the jury on the charge of felony murder as it relates to the underlying offense of robbery with a dangerous weapon. In its instruction to the jury, the trial court defined robbery as the "taking and carrying away of personal property of another from [his] person or in [his] presence without his consent by violence or by putting him in fear and with the intent to deprive him of its use permanently, the taker knowing he was not entitled to take it." Defendant challenges that portion of the instruction which tells the jury that the taking of the property could be accomplished "by violence or by putting him in fear." Defendant argues that since all of the State's evidence shows that the taking of the property was accomplished by violence rather than by putting the victim in fear, only one of the two theories is supported by evidence. Thus, defendant argues, the jury instruction erroneously allowed the jury to convict defendant upon a theory not supported by the evidence.

Here, the State's evidence showed that Buchanan awoke and grabbed defendant and that Buchanan was awake with his eyes open when the gun was pointed at his face and fired below his right eye. We agree with the State that the jury was entitled to find that defendant threatened the use of the gun when he pointed it at Buchanan's face and that Buchanan was in some fear as he realized the gun was aimed at his face. Accordingly, the evidence was sufficient to permit the jury to convict defendant in accord with the jury instructions.

Defendant's seventh argument is based upon three assignments of error. Defendant contends that the indictments charging defendant with two counts of first-degree burglary and one count of second-degree burglary were insufficient because they failed to specify the felony defendant intended to commit when he allegedly broke and entered the premises. Defendant recognizes that this Court, in *Worsley*, 336 N.C. at 280, 443 S.E.2d at 74, concluded that an indictment for first-degree burglary that satisfies the requirements of N.C.G.S. § 15A-924(a)(5) is sufficient even though it does not specify the felony that the defendant intended to commit when entering the dwelling house. Nevertheless, defendant asks this Court to review our *Worsley* opinion in light of "the difficulties that opinion has created."

Earlier in this opinion, we determined that the indictment here meets the requirements of N.C.G.S. § 15A-924(a)(5) as articulated in *Worsley*. Moreover, a defendant may move for a bill of particulars pursuant to N.C.G.S. § 15A-925 by requesting items of factual information pertaining to a charge but not recited in the pleading and by alleging that such information is necessary to adequate preparation or the conduct of the defense. *See Worsley*, 336 N.C. at 281, 443 S.E.2d at 74; *see also* N.C.G.S. § 15A-925 (1997). Here, defendant failed to file a motion for a bill of particulars pursuant to N.C.G.S. § 15A-925, nor did defendant file a motion to dismiss or otherwise object to the indictments before the trial court. Accordingly, we decline to reconsider our decision in *Worsley*.

Defendant further contends that there was insufficient evidence to submit the burglary charges to the jury. While including these contentions in his argument headings in his brief, defendant fails to present any argument or cases in support of these assignments of error. Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure provides that assignments of error in support of which no reason or argument is stated or authority cited are deemed abandoned. *See* N.C. R. App. P. 28(b)(5); *see also State v. Call*, 349 N.C. 382, 416, 508 S.E.2d 496, 519 (1998). Therefore, defendant has abandoned the issue of whether there was insufficient evidence to submit the burglary charges to the jury. With regard to issues in the portion of the three assignments of error properly before the Court, we hold that the trial court did not err. Thus, we reject defendant's argument.

In his eighth argument, based upon two assignments of error, defendant contends that the trial court committed reversible error in the burglary cases by instructing the jury as to the specific felonies the State contended defendant intended to commit at the time he broke and entered the two apartments. Defendant contends that it was error to give the instructions as to the specific felonies because the indictments failed to allege the specific felonies.

In support of this argument, defendant cites several earlier cases, but acknowledges that the law may have changed with this Court's interpretation in *Worsley*. We agree. Accordingly, we reject defendant's eighth argument.

[8] In defendant's ninth argument, he contends that the trial court erred in allowing the prosecutor to argue, over objection, that the burden of proof was on defendant and in not correcting this mistake

despite defendant's objection. Defendant contends that during closing arguments for the guilt phase, the prosecutor's argument placed the burden upon defendant to prove his innocence.

The challenged portion of the guilt-phase closing arguments is as follows:

> [PROSECUTOR]: And the absence of prints is not evidence of his innocence. All that means is that they didn't get any prints of value. It would be great if they could have gotten more prints from that house. . . . That's not evidence that he is innocent. That just means that they didn't find any prints. *Get him to show you the evidence says those weren't his fingerprints. And, that he wasn't at 203 Northeast Street in the early morning hours of the 2nd of October, 1994.* Just happen to be breaking into the house here next to where two people were killed that Saturday night. *It just happened by chance to be doing that. I guess that's what they will . . . argue. Get them to show the evidence that he didn't have anything [sic] with the murders of Buchanan and Dowdy.*
>
> [DEFENSE COUNSEL]: Your Honor, may I object and approach the bench?
>
> THE COURT: Yes.
>
> (Bench conference)
>
> [DEFENSE COUNSEL]: He is telling the jury to make us show them the evidence. We have no burden of proof in this. He is putting the burden of proof [sic] and I assume that we do not have.
>
> [PROSECUTOR]: That's not—
>
> [DEFENSE COUNSEL]: I object to that argument.
>
> [PROSECUTOR]: I am arguing that if we prove both cases—
>
> THE COURT: I think that is legitimate. I think the case law holds that he can make such statements. But you have your objections noted.

(Emphasis added.)

"Admittedly, it is well-settled law that the burden of proof remains with the State regardless of whether a defendant presents any evidence, and it is well-settled law that a defendant need not tes-

tify, a fact which may not be commented on by the prosecutor." *State v. Howard*, 320 N.C. 718, 729, 360 S.E.2d 790, 796 (1987). However, in its closing argument, the State may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State. *State v. Mason*, 317 N.C. 283, 287, 345 S.E.2d 195, 197 (1986). Further, "[a] prosecutor's challenged remarks must be reviewed in the overall context in which they were made and in view of the overall factual circumstances to which they referred." *State v. 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).

Applying these principles to the instant case, we conclude that the prosecutor's remarks did not shift the burden of proof in the trial. After carefully reviewing the challenged argument in the overall context in which it was made and in view of the overall factual circumstances to which it referred, we conclude that the prosecutor's argument was a comment on the strength of the State's evidence and the absence of any contradictory evidence. The prosecutor then speculated with the jury as to how the defense would explain away the evidence or would try to convince the jury that the absence of certain evidence would mean defendant was not guilty. While the prosecutor's argument came close to the line, we are satisfied that a reasonable jury would have understood the argument here in the context in which it was given, and not as shifting the burden of proof from the State to defendant. Accordingly, we find no prejudicial error.

In his tenth argument, defendant contends that the trial court committed reversible error in instructing the jury as to the murder of Buchanan that it could consider whether the murder was committed during the perpetration of a burglary since there was insufficient evidence to support the crime charged and since the indictment was fatally defective. Defendant, in his eleventh argument, makes similar contentions as to the murder of Dowdy. In argument twelve, based on two assignments of error, defendant contends that the trial court should have arrested judgment on the charges of first-degree murder as to both Dowdy and Buchanan for similar reasons. We reject defendant's tenth, eleventh, and twelfth arguments for the reasons discussed under defendant's argument seven.

[9] Defendant contends in his thirteenth argument that the trial court committed reversible error in denying his motion to suppress the identification of him by a witness whose opportunity to observe was so brief as to make the identification inherently incredible and thus

violative of his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

In support of his argument, defendant relies upon *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), in which this Court decided that testimony identifying the defendant as the man seen running along the side of a building at night at a distance of 286 feet should not be submitted to a jury. In *Miller*, the Court noted that without the witness' testimony, the State's evidence would not have connected the defendant to the offense for which he was charged. *Id.* at 732, 154 S.E.2d at 905. However, where there is a " 'reasonable possibility of observation sufficient to permit subsequent identification,' " it is for the jury to decide the credibility of and the weight to be given the witness' testimony. *State v. Turner*, 305 N.C. 356, 363, 289 S.E.2d 368, 372 (1982) (quoting *Miller*, 270 N.C. at 732, 154 S.E.2d at 905).

In the instant case, the undisputed evidence supports an entirely different result. Bill Sessoms arrived at work in Roseboro around 7:00 am on Sunday, 2 October 1994. He was driving his vehicle and stopped at an intersection waiting to make a left turn. While he was waiting, he saw a young man walk across the street in front of his van and turn into the alley behind his shop. Sessoms drove into the alley and parked in front of his back door. Sessoms testified that the young man, who was directly in front of his van, was very heavily dressed for the weather that day. The man had on an old khaki-colored rain cap and a heavy coat that reached below his knees. He had the collar on the coat pulled up and the brim of his hat pulled down.

As Sessoms pulled up in his vehicle, the young man's collar fell down; the man pulled his collar back up and kept walking down the alley. Sessoms testified that he got out of the van and went inside the shop. He then came back out to see where the man had gone; the man had walked all the way to the end of the alley and then turned left towards the post office. Sessoms' observation occurred during the day, from about ten feet away, and lasted for a few seconds to a minute. Fifteen to twenty minutes later, the fire alarm went off, and one of the men working on the rescue squad told Sessoms that there was a fire at Buchanan's house. Sessoms saw a picture in the paper on Wednesday of that week and recognized the person in the picture as the man he had seen in the alley. Sessoms never viewed a photographic lineup or any other photos. The next time he saw defendant in person was in court. Here, the testifying witness not only observed

defendant during the day, from a short distance, but was also able to remark about defendant's unseasonable clothing.

The State argues under *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990), that the trial court did not err by allowing the identification into evidence for the jury's consideration. We agree. In this case, the identification testimony was admissible on grounds that there was "a reasonable possibility of observation sufficient to permit subsequent identification." *Miller*, 270 N.C. at 732, 154 S.E.2d at 906, *quoted in Sneed*, 327 N.C. at 273, 393 S.E.2d at 534; *see also State v. Coffey*, 326 N.C. 268, 283, 389 S.E.2d 48, 57 (1990) (concluding that identification not "incredible" where witnesses viewed defendant for varying lengths of time during the day at a reasonably close range). While Sessoms observed defendant for only a few to sixty seconds, this "limited opportunity for observation goes to the weight the jury might place upon [his] identification rather than its admissibility." *State v. Ricks*, 308 N.C. 522, 528, 302 S.E.2d 770, 773 (1983). Based on the foregoing, we reject defendant's thirteenth argument.

[10] Defendant, in his fourteenth argument, contends that the trial court committed reversible error in denying his motion to suppress any statements he gave to law enforcement officers, as the statements were not a product of his knowing, voluntary, and intelligent waiver of any of his rights and were thus in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

Around 8:00 a.m. on 5 October 1994, Special Agent Tilley of the State Bureau of Investigation and Captain Landis Lee of the Sampson County Sheriff's Department went to the detox center in Jacksonville and arrested defendant for the murders of Buchanan and Dowdy. When they arrived, defendant was asleep. They awakened him and told him about the warrants. Defendant got dressed and went with the officers to the SBI district office in Jacksonville. Defendant contends that any statement he made to the two officers should be suppressed because he was under the influence of drugs at the time they were given.

To determine whether an in-custody inculpatory statement is admissible, we must look to the totality of the circumstances. *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986). Inculpatory statements made to law enforcement officers while a defendant is in custody are admissible as evidence of guilt whenever the totality of

the circumstances shows that the defendant knowingly, voluntarily, and intelligently waived his constitutional rights. *See State v. Johnson*, 322 N.C. 288, 292, 367 S.E.2d 660, 662 (1988). Findings of fact by the trial court are binding on the appellate courts if there is competent evidence to support those findings, even if there was evidence presented in the trial court which would have supported a different conclusion. *State v. Pittman*, 332 N.C. 244, 259, 420 S.E.2d 437, 446 (1992); *Johnson*, 322 N.C. at 293, 367 S.E.2d at 663.

The evidence regarding defendant's motion to suppress was essentially uncontradicted. Defendant was not handcuffed; he spoke clearly and coherently, understood questions, and made appropriate responses. Defendant's interrogation ended promptly when he asked for a lawyer. The trial judge found that defendant's incriminating statements were not made in response to interrogation by the officers, but were entirely voluntary. After reviewing the totality of the circumstances, we conclude that there is substantial evidence to support the trial court's findings of fact, and the findings support the trial court's conclusion that defendant's statements were made freely, voluntarily, and "understandingly." Accordingly, we reject defendant's fourteenth argument.

III. CAPITAL SENTENCING PHASE

[11] In his fifteenth argument, defendant contends that the trial court committed reversible error by instructing the jury that one of the aggravating circumstances to be considered in the homicide of Buchanan was that the capital felony was committed for pecuniary gain pursuant to N.C.G.S. § 15A-2000(e)(6). Defendant contends that there was no evidence to support submission of this aggravating circumstance, and thus defendant's rights to due process and a fair trial as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution were violated.

Defendant contends that the evidence showed that the motivating factor for his breaking into Buchanan's apartment was to steal a gun for his own personal protection. Therefore, defendant argues, there was insufficient evidence to support a motive of pecuniary gain and the trial court erred in submitting this aggravating circumstance to the jury. We disagree. Although there was evidence that defendant told his cousin his intent in stealing the gun was to have it for protection, there was substantial evidence that defendant broke into buildings and automobiles that night to steal money or property that

could later be converted into drugs. Dowdy's empty wallet was discovered underneath his body, the house in which Dowdy and Buchanan lived had been ransacked, a phone was stolen from Buchanan's car, and items were removed from a storage building near the house. At the sentencing hearing, defendant himself presented evidence that he had a history of committing break-ins to support his drug habit. From this evidence the jury could infer that defendant's motive in stealing the gun was to exchange it or sell it for drugs.

Further, "[t]he gravamen of the pecuniary gain aggravating circumstance is that 'the killing was for the purpose of getting money or something of value.' " *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210 (quoting *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). The fact that defendant may have intended to steal the gun for his personal use does not change the fact that the killing was committed for the purpose of getting something of value. *See State v. Chandler*, 342 N.C. 742, 755, 467 S.E.2d 636, 644, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996). Therefore, the trial court did not err in submitting the (e)(6) aggravating circumstance. Accordingly, we reject defendant's fifteenth argument.

[12] In his sixteenth argument, defendant contends that the trial court erred by submitting as a mitigating circumstance that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1) (Supp. 1998).

During the penalty-phase instructions conference, defense counsel indicated that they were not requesting the mitigating circumstance of no significant history of prior criminal activity. The following exchange occurred:

> THE COURT: All right, now we get to the first bone of contention. The significant history of prior criminal activity before the date of the murder.
>
> [DEFENSE COUNSEL]: Your Honor, we omitted that from our, from our statutory because there is no evidence of prior history. We don't want to simply put it on and let them, let them attack it, Your Honor. And, for that reason.
>
> THE COURT: Well, you know, there is evidence, you know, from your physicians and your, and you know, from, from those as to the fact that he had been in prison or juvenile detention for

eight months and he had committed breaking and enterings and that he had, you know, used illegal drugs. However, there is no evidence as to convictions, but the cases do not really say we've got to have convictions. It said history.

[PROSECUTOR]: It's simply history of criminal activity and Your Honor.

[DEFENSE COUNSEL]: As a statutory mitigator and we do not contend for it, Your Honor. We are the ones that are opposed to the mitigators.

THE COURT: Well, I realize that but there are a couple of cases that would indicate that it is error not to submit it even over the defendant's objection if there is, is evidence under which a juror could conclude that or I guess you'd say lack of evidence.

Defendant asserts that the submission of the (f)(1) mitigating circumstance, over objection, along with the trial court's instruction and prosecutor's arguments were a violation of defendant's due process rights and guarantees of a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

This Court has emphasized that the test governing the decision to submit the (f)(1) mitigator is " 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. White*, 343 N.C. 378, 394-95, 471 S.E.2d 593, 602-03 (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996); *see also State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996). "Significant" has been defined as meaning that the jury's sentencing recommendation is likely to be influenced by the defendant's prior criminal activity. *Williams*, 350 N.C. at 11, 510 S.E.2d at 633; *see also State v. Williams*, 343 N.C. 345, 371, 471 S.E.2d 379, 393 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997). If a rational jury could so conclude, the trial court has no discretion; the trial court must submit the statutory mitigating circumstance to the jury without regard to the State's or the defendant's wishes. *White*, 343 N.C. at 394-95, 471 S.E.2d at 603.

In the instant case, the evidence tended to show that defendant began drinking alcohol as a child and started using marijuana and cocaine when he was thirteen years old. A couple of years later,

defendant was committing break-ins to support his drug habit and was hospitalized for treatment of substance abuse. A forensic psychiatrist testified that defendant was frequently violent and gave examples of him striking a horse and fighting and biting the owner. At eighteen, defendant was sent to juvenile detention. Here, the trial court determined that a reasonable juror could find that defendant had "no significant history of prior criminal activity" within the meaning of the statute. Thus, the trial court properly submitted the (f)(1) statutory mitigating circumstance for the jury's consideration.

[13] During closing arguments, the prosecutor began to argue that the jury should not find the (f)(1) mitigating circumstance. After defendant's objection was made and sustained, the trial court instructed the jury that the (f)(1) mitigator was not requested by defendant; however, since there was some evidence from which a juror might find the circumstance, the court decided to submit it to the jury.

We have cautioned prosecutors and trial courts that when a defendant objects to the submission of a mitigating circumstance, prosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance. *Walker*, 343 N.C. at 223, 469 S.E.2d at 923. Also, in *Walker*, the Court emphasized that

> the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

Id. at 223-24, 469 S.E.2d at 923. In the instant case, the trial court instructed the jury that defendant did not request submission of the (f)(1) mitigating circumstance. While the trial court did not inform the jury that submission of the mitigating circumstance is required as a matter of law, we conclude that the omission was harmless when the instructions are viewed in their totality. Moreover, we conclude that the prosecutor's arguments were not misleading as to whether defendant requested submission of the (f)(1) mitigating circumstance. Accordingly, this assignment of error is rejected.

[14] In his seventeenth argument, defendant contends that the trial court committed reversible error in allowing the prosecutor to argue in his closing sentencing-phase argument, over defendant's objection, that the trial procedures guaranteeing defendant a fair trial were undeserved. Defendant contends that the prosecutor's argument attempted to create resentment in the jurors regarding the trial process and thereby denied defendant his rights to a fair trial as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution. Defendant contends that the prosecutor's closing argument denigrated the procedural safeguards provided to defendant under the law.

In the instant case, defendant complains of the following prosecutorial argument:

> [PROSECUTOR]: He [defendant] is the master of his own faith. Let's not get all mixed up here. This will be the last time that I will talk to you about this. You have got to decide justice. He has put himself in this position. What has happened [since] he committed those murders on October 2nd, 1994? He has been given every right in the book. *He has been given food to eat and a warm place to stay. Healthcare, lawyers, social workers, psychiatrist.* He gets to visit with his family. He gets everything somebody alive would have. What about Alabama or Jerry Dowdy? They have not been here for the last two and a half years. And they are not going to be here for the next and the next after that. *They are not entitled to a presumption of innocence. They didn't get that. They didn't have a two part five week long trial. They didn't get a lawyer to plead their cases with Johnny Street Parker that night. Much less two lawyers.*
>
> [DEFENSE COUNSEL]: Your Honor, I will object to that. The defendant is entitled to the defense as a matter of law. And now it has become affected [sic] aggravated factors even—for the defendant[]—
>
> THE COURT: Okay. I am going to overrule it right now, Mr. Parker.
>
> [PROSECUTOR]: *They didn't have anybody to stand up and object for them. They didn't have an opportunity to sit here and participate in these proceed[ings]. They didn't have a Judge to*

see that [their] trial was fair. They didn't have a jury of twelve to decide their fate. They had a jury of one. They didn't get a hearing.

(Emphasis added.)

In *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992), we said that trial counsel are granted wide latitude over the scope of jury argument and that "control of closing arguments is in the discretion of the trial court." Counsel are allowed to argue the facts which have been presented, along with reasonable inferences drawn from those facts. *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). In order for defendant to receive a new sentencing proceeding, the prosecutorial comment must have " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *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)).

We assume, *arguendo*, that the italicized portions of the prosecutor's argument were improper. Nevertheless, the prosecutor did not directly attack defendant's exercise of his constitutional rights. *See State v. Walls*, 342 N.C. 1, 64, 463 S.E.2d 738, 772 (1995) (concluding that the prosecutor did not attack the defendant's exercise of constitutional rights by suggesting to the jury that the victims had "no lawyer, no jury, no bailiff, no judge and no legal rights"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Substantial evidence supported the aggravating circumstances submitted to the jury, and the jury was instructed that it should base its decision on the evidence alone and not on the arguments of counsel. For these reasons, it is unlikely that the jury's sentencing recommendations were influenced by these portions of the prosecutor's closing argument. Therefore, we conclude that the prosecutor's argument did not deny defendant due process.

[15] In his eighteenth argument, defendant contends that the trial court committed reversible error and violated his constitutional rights in failing to properly answer the jury's questions during deliberation as to whether two life sentences would be served consecutively or concurrently. The jury retired to begin deliberations in the sentencing phase and submitted a written request to define life imprisonment without parole, whether "life" meant twenty years or death by natural causes, whether there was a possibility of "time off

for good behavior," and whether the terms would be served consecutively or concurrently if the jury returned life imprisonment for both cases.

This Court has consistently held that parole eligibility evidence is irrelevant in a capital sentencing proceeding as it reveals nothing regarding defendant's character or record or about any circumstances of the offense. *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995); *see also State v. Alston*, 341 N.C. 198, 219, 461 S.E.2d 687, 697 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). In *Simmons v. South Carolina*, 512 U.S. 154, 162-71, 129 L. Ed. 2d 133, 141-47 (1994), the United States Supreme Court determined that when the State argues "future dangerousness" in a capital sentencing proceeding and state law prohibits defendant's release on parole, due process requires the court to inform the jury that the life sentence faced by the defendant would be life imprisonment without parole. So where the State does not argue future dangerousness, as in the instant case, there is no due process requirement that the jury be informed that defendant would be parole ineligible under a life sentence.

However, N.C.G.S. § 15A-2002 provides:

> If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison, without parole.
>
> The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole.

N.C.G.S. § 15A-2002 (Supp. 1998).

Here, under *Simmons*, there was no due process requirement that the jury be informed that defendant would be parole ineligible under a life sentence. Nevertheless, pursuant to N.C.G.S. § 15A-2002, the trial court brought the jury back into the courtroom and instructed that "life" means life imprisonment "without parole." The trial court continued by instructing the jury that life imprisonment means "until death."

In addition, defendant contends that the trial judge erred by failing to tell the jurors what he would do if they returned two life sentences. With regard to this contention, we hold that the trial court properly instructed the jurors by stating the following: "It is not a proper matter for your consideration in this phase of the trial. That is my job to make that determination. And, I'm not allowed to tell you what I'm going to do because that should not influence your—verdict." The trial court has discretion to determine whether to impose concurrent or consecutive sentences. N.C.G.S. § 15A-1354(a) (1997). The trial court is not required to make its decision and inform the jury thereof before the jury deliberates. Hence, the trial court did not err, and we reject defendant's argument.

[16] In his nineteenth argument, based upon two assignments of error, defendant contends that the trial court committed reversible error in submitting to the jury both the (e)(5) aggravating circumstance that the murder of Buchanan was committed while defendant was engaged in the commission of another homicide and the (e)(11) aggravating circumstance that the murder of Buchanan was committed while defendant was engaged in a course of conduct which included the commission by defendant of another crime of violence (castration) against another person (Dowdy). Defendant contends that the (e)(11) aggravating circumstance subsumed the language in the (e)(5) aggravating circumstance. In addition, under this argument, defendant contends that the trial court committed reversible error in instructing the jury that it could consider the aggravating circumstance that the murder of Buchanan was committed while defendant was engaged in the commission of another homicide.

Defendant contends that the trial court's oral instruction failed to limit the class of violent crimes to castration because the instruction was hindered by the written "Issues and Recommendation as to Punishment" form subsequently given to the jury. Defendant asserts that by the written submission in the "Issues and Recommendation as to Punishment" form, the instructions made the act of castration one of many acts, or an example, of violence against other people rather than limiting the aggravating circumstance solely to castration. Defendant argues that, as a result, the trial court's oral instruction to the jury and the written words on the "Issues and Recommendation as to Punishment" form would allow a reasonable jury to utilize identical evidence to find both aggravating circumstances (e)(5) and (e)(11). We disagree.

In *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), we stated that

> submission of more than one aggravating circumstance supported by the same evidence "amount[s] to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979). However, where there is separate substantial evidence to support each aggravating circumstance, it is not improper for each aggravating circumstance to be submitted even though the evidence supporting each may overlap. *State v. Jennings*, 333 N.C. 579, 627-28, 430 S.E.2d 188, 213-14, *cert. denied*, [510] U.S. [1028], 126 L. Ed. 2d 602 (1993).

Further, this Court has specifically upheld the submission of both the (e)(5) and (e)(11) aggravating circumstances in the same case. *See Wilkinson*, 344 N.C. at 228, 474 S.E.2d at 391.

In the instant case, there was substantial separate evidence to support the (e)(5) aggravating circumstance that Buchanan's murder was committed while defendant was engaged in the commission of Dowdy's murder and the (e)(11) aggravating circumstance that Buchanan's murder was committed while defendant was engaged in a course of conduct which included commission of the crime of malicious castration. The evidence shows that, on 2 October 1994, defendant committed a series of crimes as a part of a continuous transaction of criminal activity.

With regard to defendant's contention that the trial court erred in its oral instructions to the jury, we note that defendant failed to object to that portion of the instruction which he contends improperly led the jury to consider the Dowdy homicide in support of two aggravating circumstances in the Buchanan homicide. Since defendant argues plain error on review, he must show that the error was so fundamental that another result would probably have been obtained absent the error. *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). In the instant case, defendant cannot meet this standard.

A jury charge must be construed contextually and will be upheld when the charge is correct as a whole. *State v. Stephens*, 347 N.C. 352, 359, 493 S.E.2d 435, 439 (1997), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 66 (1998). The challenged portion of the oral instruction

closely followed the pertinent pattern jury instructions. *See* N.C.G.S. § 15A-2000; N.C.P.I.—Crim. 150.10 (1997). The instruction correctly informed the jury that the only violent crime which could be considered to support the (e)(11) aggravating circumstance was Dowdy's castration. The wording of the circumstance on the "Issues and Recommendation as to Punishment" form further clarified the instruction. There is no reasonable likelihood that the trial court's instructions would have caused the jurors to consider the murder of Dowdy to support both aggravating circumstances. Defendant's argument based upon these two assignments of error is rejected.

In his twentieth argument, defendant contends that the trial court committed reversible error in submitting to the jury the (e)(5) aggravating circumstance that the murder of Buchanan was committed while defendant was engaged in the commission of arson because there was insufficient evidence to support the submission of that aggravating circumstance. The State argues that there was substantial evidence presented to show that Buchanan's residence was an occupied dwelling at the time it was burned by defendant, as the interval between the mortal blow and the arson was short, and the murder and arson constituted parts of a continuous transaction. We agree. *See State v. Jaynes*, 342 N.C. 249, 273-74, 464 S.E.2d 448, 464 (1995) (concluding that the interval of three and one-half hours between murder and arson was short enough to be one continuous transaction), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

[17] In his twenty-first argument, defendant contends that the trial court committed reversible error in submitting the (e)(11) aggravating circumstance that the murder of Buchanan was part of a course of conduct in which defendant engaged, including the commission of another crime of violence against another person (castration of Dowdy). As in a previous argument, defendant contends that there is insufficient evidence to prove that the crime of castration occurred. Defendant assumes that the castration conviction will be reversed for insufficiency of the evidence. Thus, defendant concludes that the death sentence must be vacated because there is a reasonable possibility that the consideration by the jury of the castration charge might have contributed to the recommendation of the death penalty. *See State v. Robbins*, 319 N.C. 465, 516-17, 356 S.E.2d 279, 309-10, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Defendant's contention has no merit.

As discussed earlier in defendant's second argument, there was sufficient evidence that the crime of malicious castration was com-

mitted in conjunction with Dowdy's murder as part of a continuous chain of events forming one single transaction. Since the malicious castration was a part of a continuous, single transaction, the malicious castration was a violent felony committed against Dowdy and was a part of a course of conduct including the murder of Buchanan. Thus, the trial court properly submitted the (e)(11) aggravating circumstance.

[18] In his twenty-second argument, defendant contends that the trial court committed reversible error in submitting as an aggravating circumstance that the murder of Dowdy was committed while defendant was engaged in flight after committing another homicide, *see* N.C.G.S. § 15A-2000(e)(5), as there was no evidence to support submission of this aggravating circumstance. Defendant contends that since the State failed to present competent evidence that the killing of Dowdy was committed during flight, there was no direct evidence of the order in which the two men were murdered.

The State correctly contends that defendant has waived his right to assign error to the trial judge's instructions by failing to object to the language of the instructions at the time they were given or before the jury retired to deliberate. *See* N.C. R. App. P. 10(b)(2); *Allen*, 339 N.C. at 554-55, 453 S.E.2d at 155. Since this issue was not properly preserved for appeal, this Court may review it only for plain error. *Allen*, 339 N.C. at 555, 453 S.E.2d at 155. The plain error rule requires defendant to show that the error was so fundamental that another result would probably have been obtained absent the error. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. The State further contends that defendant waived plain error review by failing to allege in his assignment of error that the trial court committed plain error. *See* N.C. R. App. P. 10(c)(4); *see also State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995); *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994). We agree. In the instant case, defendant failed to specifically and distinctly contend that the trial court's submission of the (e)(5) aggravating circumstance was plain error. Thus, defendant has waived his right to appellate review of this issue.

[19] In his twenty-third argument, defendant contends that the trial court committed reversible error in submitting to the jury as an aggravating circumstance that the murder of Dowdy was committed by defendant while defendant was engaged in the commission of arson, *see* N.C.G.S. § 15A-2000(e)(5), as there was insufficient evidence to submit that aggravating circumstance to the jury. Defendant

contends that there was no evidence that there was any burning in connection with Dowdy's apartment. The State contends, and we agree, that such evidence is not required where the burning of the downstairs apartment and the murder of Dowdy were parts of a continuous transaction.

If the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction, then a dwelling is "occupied" for purposes of the arson statute. *See* N.C.G.S. § 14-58 (1995); *see also Jaynes*, 342 N.C. at 274, 464 S.E.2d at 464. In *Jaynes*, this Court held that the interval of three and one-half hours between the victim's death and the setting of the fire did not prevent a finding "based on all the surrounding circumstances that the interval was 'short' enough for the arson and the murder to be parts of one continuous transaction." *Jaynes*, 342 N.C. at 275, 464 S.E.2d at 464. Construing the evidence in the light most favorable to the State in the instant case, defendant carried out the murder of Dowdy and the arson as parts of a continuous transaction. The record shows that the deaths of Dowdy and Buchanan occurred somewhere around 3:30 a.m. or 4:00 a.m., and possibly as late as 7:00 a.m., on Sunday, 2 October 1994. The fire was set using lamp oil or lighter fluid and burned for some twenty minutes to one hour. The fire department received the fire call at approximately 7:25 a.m. Hence, under *Jaynes*, the murder of Dowdy and the arson occurred under a short span of time and as parts of a continuous transaction. The trial court properly submitted the aggravating circumstance that the murder of Dowdy was committed while defendant was engaged in the commission of arson.

[20] In his twenty-fourth argument, defendant contends that the trial court committed reversible error in allowing the prosecutor to argue in his sentencing-phase closing argument that with regard to many of the aggravating circumstances, the jurors had already found them to exist by their verdicts. Defendant did not object to this argument. Where a defendant fails to object to the prosecutor's argument at trial, "the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979), *quoted in State v. Hoffman*, 349 N.C. 167, 185, 505 S.E.2d 80, 91 (1998), *cert. denied*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 3613 (1999).

In the instant case, none of defendant's convictions from the guilt phase that were used to support either of his convictions of first-degree murder were used as aggravating circumstances for the same murder in the sentencing phase. In his argument, the prosecutor was merely urging the jurors to understand how their earlier verdicts compared to the aggravating circumstances and to urge them to so find in their sentencing determination. This argument did not encourage the jury to engage in impermissible double-counting. Clearly the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. Therefore, we reject defendant's twenty-fourth argument.

IV. PRESERVATION ISSUES

Defendant's twenty-fifth through twenty-ninth arguments are essentially preservation issues. Defendant acknowledges that we have decided these issues contrary to his position, but asks us to reconsider those decisions. We reject each of these arguments on the authority of the cases cited:

The trial court's instruction on Issue Three of the "Issues and Recommendation as to Punishment" form, directing the jury to continue to Issue Four if the mitigating circumstances were of equal value and failed to outweigh aggravating circumstances, violated defendant's constitutional rights. *State v. Keel*, 337 N.C. 469, 493, 447 S.E.2d 748, 761 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995).

The trial court's instruction that permitted jurors to reject submitted mitigation on the basis that it had no mitigating value violated defendant's constitutional rights. *Walton v. Arizona* 497 U.S. 639, 111 L. Ed. 2d 2511 (1990); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597.

The trial court's use of the term "may" in sentencing Issues Three and Four violated defendant's constitutional rights. *State v. McNeill*, 349 N.C. 634, 653, 509 S.E.2d 415, 426 (1998); *State v. Geddie*, 345 N.C. 73, 104, 478 S.E.2d 146, 162 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 43 (1997).

The trial court's submission of the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel violated defendant's rights to due process and to be free from cruel and unusual punishment, on the grounds that the language is unconstitutionally vague. *State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

The trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's constitutional rights by using the inherently ambiguous and vague terms "satisfaction" and "satisfy" to define the burden of proof. *Payne*, 337 N.C. at 531-33, 448 S.E.2d at 108-09; *State v. Franks*, 300 N.C. 1, 17, 265 S.E.2d 177, 186 (1980).

Having carefully considered defendant's arguments on these issues, we find no compelling reason to depart from our prior holdings. Accordingly, we reject these arguments.

V. PROPORTIONALITY

Defendant did not make an argument related to proportionality. Nevertheless, this Court is required by statute to review the record in all capital cases to determine (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentences of death were based; (2) whether the death sentences were entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the Buchanan murder, the following aggravating circumstances were submitted to and found by the jury: (1) that the murder was committed by defendant while he was engaged in the commission of first-degree arson, N.C.G.S. § 15A-2000(e)(5); (2) that the murder was committed by defendant while he was engaged in the commission of another homicide, N.C.G.S. § 15A-2000(e)(5); (3) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (4) 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). In the Dowdy murder, the aggravating circumstances submitted to and found by the jury were: (1) that the murder was committed by defendant while he was engaged in the commission of first-degree arson, N.C.G.S. § 15A-2000(e)(5); (2) that the murder was committed by defendant while he was engaged in flight after the commission of another homicide, N.C.G.S. § 15A-2000(e)(5); and (3) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the 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 now turn to our final statutory duty of proportionality review.

[21] 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. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. 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. The instant case is distinguishable in the following ways: (1) defendant was convicted of first-degree murder of Dowdy under the theory of premeditation and deliberation; (2) defendant shot Buchanan directly in the face at close range; (3) defendant showed no remorse for the brutal murder and castration of Dowdy; and (4) defendant murdered both victims in their homes.

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.* This Court has never found the death penalty to be disproportionate where the defendant was convicted of killing more than one victim. *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. Harden*, 344 N.C. 542, 566, 476 S.E.2d 658, 671 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997). In this case, both victims were murdered in the sanctity of their own homes. Such a murder " '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.' " *Frye*, 341 N.C. at 512, 461 S.E.2d at 686 (alteration in original) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)).

After 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.

A. RON VIRMANI, M.D. v. PRESBYTERIAN HEALTH SERVICES CORP.; IN RE KNIGHT PUBLISHING COMPANY D/B/A THE CHARLOTTE OBSERVER AND JOHN HECHINGER

No. 62PA97-2

(Filed 25 June 1999)

1. Parties— motion to intervene—no required findings and conclusions

The trial court did not err by denying The Charlotte Observer's motion to intervene in an action in which plaintiff challenged the revocation of his medical privileges at defendant-hospital and which involved sealed records and a closed courtroom due to use of peer review records. Contrary to the holding of the Court of Appeals, there is no authority which indicates that a trial court must record specific factual findings and conclusions of law prior to denying a motion to intervene.

2. Parties— intervention as of right—sealed records and closed courtroom—newspaper—no direct interest in action

The Charlotte Observer was not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A-1, Rule 24 in an action in which plaintiff challenged the revocation of his medical privileges at defendant-hospital and which involved sealed records and a closed courtroom due to use of medical peer review records. The Observer has no direct interest in plaintiff's action and its indirect interest may be adequately asserted in a timely manner by other means.

3. Parties— permissive intervention—sealed records and closed courtroom—newspaper—indirect or contingent interest

The trial court did not abuse its discretion by denying The Charlotte Observer permissive intervention under N.C.G.S. § 1A-1, Rule 24 in an action in which plaintiff challenged the revocation of his medical privileges at defendant-hospital and which involved sealed records and a closed courtroom due to use of peer review records. The Observer's interest is only indirect or contingent and there was every reason to believe that permitting the Observer to intervene would unduly delay the adjudication of the rights of the original parties. Moreover, the Observer had alternative means of obtaining a full and timely review of the issue it sought to raise.

4. Public Records— court records—inherent power to ensure fairness and impartiality—retained by courts

Notwithstanding the broad scope of the public records statute and the specific grant of authority in N.C.G.S. § 7A-109(a), North Carolina trial courts always retain the necessary inherent power granted by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order to ensure that each side has a fair and impartial trial. Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government and the General Assembly has no power to diminish it in any manner.

5. Public Records— medical peer review documents—court proceedings—excluded from Act

The plain language of N.C.G.S. § 131E-95 excludes information and records pertaining to medical review committee proceedings from the public records law and there is nothing in the plain language of the statute to support the contention that it applies only to third party malpractice plaintiffs. Furthermore, the argument that any document or record which a judge considers in determining litigants' rights is part of the public records of the courts was rejected because there must be a way for a court to review documents alleged to be inadmissible without making them public records.

6. Public Records— medical peer review documents—attached to complaint—public domain

The trial court erred by sealing medical peer review documents which were attached to a complaint arising from the revocation of hospital medical privileges. While the documents might otherwise have been protected by N.C.G.S. § 131E-95, once they were filed in the public records of the court by the plaintiff as part of his complaint they were thrust into the public domain de facto and became subject to the Public Records Act. However, it was improper for those documents to be attached to the complaint and they continue to be inadmissible as evidence or as a forecast of evidence.

7. Public Records— medical peer review documents—submitted directly to judge—properly sealed

The trial court did not err in an action arising from the revocation of medical privileges at a hospital by sealing medical peer review documents which were never filed with the clerk and which were submitted directly to the presiding judge in support of arguments on various pretrial motions. Defendant-hospital took painstaking steps to preserve any confidentiality afforded by law to the records and information submitted to the judge.

8. Public Records— federal common law—no greater than First Amendment access

Any possible federal common law right of public access to state court proceedings and records is no greater than the First Amendment right assumed to exist and discussed below.

9. Public Records— state common law—supplanted by Act

N.C.G.S. § 131E-95 supplants any North Carolina common law right of public access to information regarding medical review committee proceedings and related materials and The Charlotte Observer in this case has no right under the common law of North Carolina to the information.

10. Public Records— North Carolina Constitution—open courts—civil proceedings—qualified right of public access

The open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings. This qualified public right of access is subject to reasonable lim-

itations imposed in the interest of the fair administration of justice or for other compelling public purposes. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review.

11. Public Records— medical peer review records—sealed—open courts provision not violated

The trial courts did not violate the North Carolina constitutional open courts provision in an action arising from the revocation of hospital medical privileges by excluding the public from the court hearings and by sealing peer review records. The public's interest in access to these court proceedings, records, and documents is outweighed by the compelling public interest in protecting the confidentiality of medical records in order to foster effective exchange among medical peer review members, there was no reasonable alternative, and the judges provided a sufficient record for appellate review.

12. Public Records— medical peer review documents—sealed—no federal constitutional violation

The trial court did not violate any federal constitutional right to attend court proceedings and view records in an action arising from the revocation of hospital medical privileges by closing hearings and sealing materials and transcripts involving medical peer review records. Assuming that the United States Supreme Court would hold that the qualified First Amendment right to public access applies to civil cases, the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and there is no alternative which will adequately protect that interest.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, 127 N.C. App. 629, 493 S.E.2d 310 (1997), reversing and remanding orders entered in Superior Court, Mecklenburg County, by Gray, J., on 24 January 1996; by Downs, J., on 9 February 1996; by Johnson (Marcus L.), J., on 8 May 1996 and 10 May 1996; by Downs, J., on 15 May 1996; and by Downs, J., on 22 May 1996. Heard in the Supreme Court 29 September 1998.

Bush, Thurman & Wilson, P.A., by Tom Bush, for plaintiff-appellee.

Kilpatrick Stockton, L.L.P., by Noah H. Huffstetler, III, for defendant-appellant.

Waggoner, Hamrick, Hasty, Monteith & Kratt, P.L.L.C., by John H. Hasty and G. Bryan Adams, III, for intervenors-appellees Knight Publishing Co. and John Hechinger.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Julian D. Bobbitt, Jr., on behalf of North Carolina Hospital Association and the North Carolina Medical Society, amici curiae.

Everett, Gaskins, Hancock & Stevens, L.L.P., by Hugh Stevens and C. Amanda Martin, on behalf of North Carolina Press Association, Inc., and The News and Observer Publishing Co., Inc; and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, on behalf of North Carolina Association of Broadcasters, Inc., amici curiae.

MITCHELL, Chief Justice.

This appeal presents an issue of first impression for this Court. We are called upon to decide whether the public and the news media have a right of access to civil court proceedings and records pertaining to medical peer review evaluations and, if so, the extent of this right. Specifically, appellant presents questions for review regarding the Court of Appeals' decision reversing several orders entered in a civil lawsuit in Superior Court, Mecklenburg County, which orders closed courtroom proceedings and sealed various documents.

This suit was brought by Dr. Ron Virmani against Presbyterian Health Services Corporation (Presbyterian) following the suspension of Dr. Virmani's medical staff privileges at The Presbyterian Hospital and Presbyterian Hospital Matthews (jointly, the Hospital), hospitals owned and operated by Presbyterian in Mecklenburg County, North Carolina. For the reasons set forth below, we affirm in part and reverse in part the decision of the Court of Appeals.

The portions of the record open to the public and the facts set forth in the briefs submitted to this Court on which the parties and the putative intervenor agree, indicate that the following events took place in connection with the instant case. After concerns were raised

about Dr. Virmani's competence as a physician, Presbyterian conducted a medical peer review evaluation of all of his cases at the Hospital. The medical review committee, comprised of six of Dr. Virmani's colleagues on the medical staff, reviewed the charts of the patients Dr. Virmani had admitted to the Hospital and treated there. Based on the peer review committee's evaluation, Presbyterian concluded that Dr. Virmani's medical judgment posed a serious risk to the health and safety of its patients and, therefore, suspended Dr. Virmani's medical privileges at the Hospital.

After exhausting the administrative appeals available within the Hospital, Dr. Virmani filed this lawsuit against Presbyterian on 22 January 1996, challenging the revocation of his privileges. Dr. Virmani attached numerous documents as exhibits to his complaint. These included copies of: a memo from the chairman (Chairman) of the Hospital's Obstetrics/Gynecology (OB/GYN) Department requesting a peer review evaluation of Dr. Virmani; a memo from the Chairman summarizing a meeting in which he notified Dr. Virmani of the peer review; a letter from the Chairman and the chairman of the OB/GYN peer review committee to members of the department, informing them of the peer review process; the peer review committee's detailed report and its summary of findings regarding its evaluation of Dr. Virmani; and a letter from Presbyterian's president suspending Dr. Virmani from the active staff. Dr. Virmani included in his complaint a motion for a temporary restraining order and for a preliminary injunction ordering Presbyterian to comply with the procedures set forth in the Hospital's bylaws and to reinstate Dr. Virmani until it so complied.

On 23 January 1996, Judge Marvin K. Gray conducted a hearing on plaintiff's motion for a temporary restraining order. Presbyterian moved to close the hearing and to seal the exhibits which were attached to the complaint and which contained confidential medical peer review records and materials. On 23 January 1996, Judge Gray signed a temporary restraining order directing the Hospital to readmit Dr. Virmani to the medical staff pending a hearing on his motion for a preliminary injunction. The temporary restraining order also directed that

> based upon the provisions contained in North Carolina General Statute § 131E-95. Medical Review Committee, the hearing on plaintiff's application for a temporary restraining order shall be confidential; that the exhibits attached to plaintiff's complaint

> shall be sealed by the clerk of court until further order of this court; and that all other pleadings, affidavits and motions heretofore filed with the court, shall be maintained and available to the public absent a subsequent ruling or order by this court to the contrary.

The exhibits attached to the complaint were sealed and are included in the record on appeal in an envelope marked as "Exhibit 3."

On 7 February 1996, Presbyterian submitted directly to Judge James U. Downs a legal memorandum in opposition to Dr. Virmani's motion for preliminary injunction along with supporting affidavits from various hospital personnel, all of which included medical peer review information. In its cover letter, Presbyterian noted that it had not filed these documents with the court because they were protected under the peer review statute. Presbyterian further stated in the letter, "We are providing, but not filing these documents in order that the Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute." Thereafter, Judge Downs issued an order on 9 February 1996 sealing confidential peer review information and records in the "Court File." This order sealed Presbyterian's motion to seal confidential peer review records and materials, the affidavits of hospital personnel and exhibits attached thereto, exhibits to plaintiff's complaint, and the memorandum in opposition to Dr. Virmani's motion for preliminary injunction. In the order, Judge Downs found that: (1) Presbyterian had filed with him "sensitive and confidential information and Peer Review Committee records and materials," (2) "under N.C.G.S. § 131E-95 records and materials produced and considered by a Medical Review Committee shall be confidential and not considered public records," and (3) "Medical Review Committee records and materials could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record during the course of the pending litigation."

A hearing was later held on plaintiff Dr. Virmani's motion for a preliminary injunction. On 7 March 1996, Judge Downs entered an order denying injunctive relief and dissolving that part of the earlier temporary restraining order which had ordered Dr. Virmani reinstated.

On 3 April 1996, *The Charlotte Observer* published a story by reporter John Hechinger about Dr. Virmani, based on certain docu-

ments Mr. Hechinger had obtained from the court file. On 7 May 1996, Mr. Hechinger attended a calendared hearing in the Superior Court, Mecklenburg County, on Presbyterian's motion to dismiss and the parties' cross motions for summary judgment. Early in the hearing, Presbyterian's attorneys moved to close the courtroom pursuant to N.C.G.S. § 131E-95 because confidential medical peer review information would be discussed during the hearing. Judge Marcus L. Johnson ordered that the hearing be closed to the public and that confidential peer review records which Presbyterian anticipated presenting to the court be sealed. In making his oral order, Judge Johnson noted that it appeared that during a substantial part of the hearing the parties would be discussing and presenting materials pertaining to peer review information. Mr. Hechinger objected to the closing of the hearing and asked for a continuance to allow him to obtain counsel to argue against the closure. Judge Johnson noted Mr. Hechinger's objection and request for a continuance but proceeded to close the hearing and denied the continuance. Mr. Hechinger complied with the closure by leaving the courtroom.

The following morning, an attorney for Knight Publishing Company d/b/a *The Charlotte Observer* and Mr. Hechinger (jointly, the *Observer*) appeared before Judge Johnson and presented written motions to intervene and to open the proceedings to the public and the news media. Judge Johnson denied the motions without hearing arguments. On 10 May 1996, Judge Johnson entered a written order sealing confidential peer review information and records and closing courtroom proceedings involving the discussion and disclosure of peer review information during a hearing on the parties' summary judgment motions. In this order, Judge Johnson made findings of fact virtually identical to those set forth in Judge Downs' earlier closure order. The parties and the putative intervenor all agree that Judge Johnson's order referred to the *Observer*'s motions and that it effectively, although not expressly, denied them. The order provided that (1) the documents presented or used by the parties in support of their motions which contained confidential peer review information would be sealed by the clerk of court, and (2) the summary judgment motions hearings and courtroom proceedings involving the medical review committee records, materials and findings would be closed to the public and the media. Subsequent orders were entered sealing videotapes and transcripts of those portions of the previously closed court proceedings in which medical peer review matters were discussed, presented or argued.

The *Observer* filed a notice of appeal and a petition for writ of certiorari with the Court of Appeals. The Court of Appeals allowed the *Observer*'s writ of certiorari as to the orders that (1) sealed confidential information and medical review committee records and materials that were considered by the court and/or were in the court file, (2) closed the court proceedings dealing with confidential medical review committee records and materials, (3) sealed portions of transcripts and videotapes of the court proceedings, and (4) denied the *Observer*'s motions to intervene and to open court proceedings. In its decision issued 18 November 1997, the Court of Appeals reversed all of the Superior Court orders at issue and directed the court to unseal all of the documents and other materials that had been sealed pursuant to those orders. Presbyterian filed timely notice of appeal as of right with this Court pursuant to N.C.G.S. § 7A-30(1), on the theory that the Court of Appeals' decision involved real and substantial questions arising under Article I, Section 18 of the North Carolina Constitution. Presbyterian also petitioned this Court for discretionary review and for a writ of supersedeas of the judgment of the Court of Appeals, which petitions were allowed on 5 March 1998.

[1] We first address defendant-appellant Presbyterian's argument that the Court of Appeals erred in reversing the trial court's order denying the *Observer*'s motion to intervene. On 8 May 1996, the *Observer* moved to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure "for the limited purpose of objecting to the court's closure of these proceedings to the public and news media." In its motions to intervene and to open the proceedings, the *Observer* asserted that because it was in the business of gathering and reporting to the public newsworthy events in the Charlotte area, it had the

> constitutional right to petition the court not to close these proceedings and to question the closure of these proceedings because closure of the proceedings to the public would deny them the protections guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the North Carolina Constitution.

The *Observer* argued in its motions that under these circumstances, it was incumbent upon the trial court to conduct a "plenary hearing" and to make findings of fact and conclusions of law in accordance with guidelines provided by the United States Supreme Court.

In an oral order at the hearing on 8 May 1996, Judge Johnson denied the *Observer*'s motions, for "the same reasons as given by Judge Downs in the existing order in the file." On 10 May 1996, Judge Johnson entered a written order closing the hearings and directing the clerk of court to seal the medical review committee records and information that had been submitted to the court, including those which had been attached to the complaint. In this written order, Judge Johnson included several findings similar to those set forth in Judge Downs' prior order, including that: (1) the parties had filed with the judge "sensitive and confidential information and Medical Review Committee records, materials and findings" in support of their motions; (2) the parties would be discussing the contents of these peer review materials during the motion hearings and proceedings; (3) "under N.C.G.S. § 131E-95 records and materials produced by a Medical Review Committee and findings of a Medical Review Committee shall be confidential and not considered public records" and (4) the peer review materials "could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record or if open to the public or news media during the course of the pending litigation."

The Court of Appeals concluded that the trial court had erred in denying the *Observer*'s motion to intervene without holding a hearing and without making findings of fact and conclusions of law. Based on this reasoning, the Court of Appeals reversed the trial court's order denying the motion to intervene. We disagree with the Court of Appeals. We have found no authority in decisions by this Court or the United States Supreme Court, including the cases cited by the *Observer* and the Court of Appeals, which indicates that a trial court must record specific factual findings and conclusions of law prior to denying a motion to intervene.

[2] Intervention in North Carolina is governed by statute. Rule 24 of the North Carolina Rules of Civil Procedure determines when a third party may intervene as of right or permissively. N.C.G.S. § 1A-1, Rule 24 (1990). A third party may intervene as a matter of right under Rule 24(a):

> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is subject of the action and he is so situated that the disposition of the action may as a practical

> matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.G.S. § 1A-1, Rule 24(a). This Court has stated that where no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A-1, Rule 24(a)

> "must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment . . . . One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect*, inconsequential, *or* a *contingent* one cannot claim the right to defend."

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (quoting *Mullen v. Town of Louisburg*, 225 N.C. 53, 56, 33 S.E.2d 484, 486 (1945)) (emphasis added) (applying former N.C.G.S. § 1-73), *quoted in River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 128, 388 S.E.2d 538, 554 (1990) (applying Rule 24(a)(2)). The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties. *Alford v. Davis*, 131 N.C. App. 214, ——, 505 S.E.2d 917, 920 (1998); *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978).

In the present case, there is no claim that any statute other than N.C.G.S. § 1A-1, Rule 24(a), confers upon the *Observer* an unconditional right to intervene. Nor does the *Observer* have a direct interest in the outcome of Dr. Virmani's wrongful discharge action against Presbyterian. At most, the *Observer* has an "indirect" or "contingent" interest—an interest common to all persons—in seeing matters relating to all civil actions made public. The only parties with a direct interest in this civil action are plaintiff and defendant. Because we conclude that the *Observer* has no direct interest in Dr. Virmani's action against Presbyterian and that the *Observer*'s indirect interest may be adequately asserted in a timely manner by other means, we hold that the *Observer* was not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A-1, Rule 24(a).

[3] We further conclude that the trial court did not err in denying the *Observer* permissive intervention. Rule 24 "contains specific requirements which control and limit intervention." *State ex rel. Comm'r. of Ins. v. N.C. Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980). A private third party may be *permitted* to intervene under Rule 24(b), but only "(1) When a statute confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common." N.C.G.S. § 1A-1, Rule 24(b) (1990). Subject to these limitations, permissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion. *See Comm'r. of Ins.*, 300 N.C. at 468, 269 S.E.2d at 543; *see also Alford*, 131 N.C. App. at ——, 505 S.E.2d at 921; *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992). A trial court abuses its discretion under this statute "where its ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Alford*, 131 N.C. App. at ——, 505 S.E.2d at 921 (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998)). Our trial courts should bear in mind, however, that Rule 24(b)(2) expressly requires that in exercising discretion as to whether to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." N.C.G.S. § 1A-1, Rule 24(b).

In the instant case, the *Observer*'s interest is only indirect or contingent. Further, there was every reason for the trial court to believe that permitting the *Observer* to intervene would—as it has—unduly delay the adjudication of the rights of the original parties. Accordingly, we conclude that the trial court's order denying the *Observer*'s motion to intervene was not so arbitrary that it could not have been the result of a reasoned decision.

In its brief before this Court and the Court of Appeals, the *Observer* argued—and the Court of Appeals has agreed—that the trial court erred in "summarily" denying the *Observer*'s motions to intervene *and* its motion to open the proceedings and make certain records public. By posing the question presented in this manner, however, the *Observer* has mixed two different questions—(1) whether the *Observer* was entitled to intervene, and (2) whether the court proceedings and records must be made public. The United States Supreme Court has indicated that trial court proceedings in criminal

cases may not be summarily closed when the trial court is faced with a First Amendment claim to a right of access, "[a]bsent an overriding interest articulated in findings." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581, 65 L. Ed. 2d 973, 992 (1980) (plurality opinion); *see also El Vocero de Puerto Rico (Caribbean International News Corp.) v. Puerto Rico*, 508 U.S. 147, 124 L. Ed. 2d 60 (1993); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*). We address at other points in this opinion the issue of whether the trial court's findings were sufficient to support its closure of the proceedings and sealing of the documents in this case. That substantive issue is different, however, from the question of who should be allowed to appear and present the issue in a civil case and how it should be presented.

We do not believe that the decisions of the United States Supreme Court cited by the *Observer* required the trial court to record specific findings of fact and conclusions of law when denying the *Observer*'s *motion to intervene* in this civil case. This issue of whether a putative intervenor should be allowed to intervene is an issue separate and apart from the merits of the substantive issue the putative intervenor seeks to raise if it is allowed to intervene, and we do not find the cited cases to be controlling. The *Observer*'s argument would be more compelling if it could not raise the substantive issue of whether court proceedings and records must be made public by any reasonable manner other than intervention as a party. We note, however, that the trial court's denial of the *Observer*'s motion to intervene did not necessarily preclude the *Observer* from presenting full briefs and argument and obtaining a timely ruling on the questions of its right of access to the proceedings and documents in this case. Even if prevented from intervening directly as a party in this civil case, the *Observer* was free to attempt to raise such questions without intervening as a party by (1) extraordinary writ practice, (2) a declaratory judgment action, or (3) resort to established remedies in equity; in fact, these represent the legal methods by which questions of public access to courts and their records are most frequently and successfully raised. *See, e.g., El Vocero de Puerto Rico*, 508 U.S. 147, 124 L. Ed. 2d 60 (declaratory judgment action); *Press-Enterprise II*, 478 U.S. 1, 92 L. Ed. 2d 1 (mandamus proceeding); *Press-Enterprise I*, 464 U.S. 501, 78 L. Ed. 2d 629 (petition for writ of mandate); *Richmond Newspapers*, 448 U.S. 555, 65 L. Ed. 2d 973 (petitions for writ of man-

damus and prohibition). Therefore, the *Observer* had alternative means of obtaining a full and timely review of the issue it sought to raise without being allowed to intervene as a party and unduly delay the adjudication of the rights of the original parties.

For the foregoing reasons, we conclude that the trial court did not err in denying the *Observer*'s motion to intervene. Accordingly, we conclude that the Court of Appeals erred in reversing the order of the trial court denying intervention.

Having determined that the trial court did not err by denying the motion of the *Observer* to intervene in this case, it would be appropriate for us to simply reverse the decision of the Court of Appeals without reaching the other issues raised by the *Observer*. However, those issues were addressed and resolved in the decision of the Court of Appeals, are likely to be raised again in some manner with regard to the facts before us in this case, and those issues have been fully briefed and argued before the Court of Appeals and before this Court. Therefore, in the interest of judicial economy, we elect to exercise the rarely used general supervisory power granted *exclusively to this Court* by Article IV, Section 12(1) of the North Carolina Constitution in order to reach and resolve those issues. *See Lea Co. v. N.C. Bd. of Transp.*, 317 N.C. 254, 263, 345 S.E.2d 355, 360 (1986); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

Defendant Presbyterian contends that the Court of Appeals erred in reversing the orders of the trial court closing courtroom proceedings and sealing documents and other materials in this civil action. The *Observer* first responds that because it has an absolute right of access to the peer review documents and testimony regarding the peer review process under N.C.G.S. § 132-1 and N.C.G.S. § 7A-109, the result reached by the Court of Appeals was correct.

Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records. *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Absent "clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *Id.* at 486, 412 S.E.2d at 19. The term "public records," as used in N.C.G.S. § 132-1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings. N.C.G.S. § 132-1(a) (1995).

The public's right of access to court records is provided by N.C.G.S. § 7A-109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings. N.C.G.S. § 7A-109(a) (1995).

[4] Notwithstanding the broad scope of the public records statute and the specific grant of authority in N.C.G.S. § 7A-109(a), our trial courts always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order in ensure that each side has a fair and impartial trial. "The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice." *In re Will of Hester*, 320 N.C. 738, 741, 360 S.E.2d 801, 804 (1987). Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1; *see State v. Britt*, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974); *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940). This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.

[5] In this case, the trial court sealed medical peer review documents and closed the proceedings relating to them. N.C.G.S. § 131E-95 shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions. The plain language of this statute excludes information and records pertaining to medical review committee proceedings from the public records law. The statute provides in relevant part:

> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, " 'Public records' defined," and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee.

N.C.G.S. § 131E-95(b) (1997). The purpose of N.C.G.S. § 131E-95 is to promote candor and frank exchange in peer review proceedings. *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986). The statute attempts to accomplish this goal by preventing discovery or introduction into evidence of a medical review committee's proceedings and the records and materials produced or considered by the committee. *Id.* at 82, 347 S.E.2d at 829.

N.C.G.S. § 131E-95 " 'represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.' " *Cameron v. New Hanover Memorial Hosp., Inc.*, 58 N.C. App. 414, 436, 293 S.E. 2d 901, 914, *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982) (quoting *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320-21 (1974)), *quoted in Shelton*, 318 N.C. at 82, 347 S.E.2d at 829. The statute serves the compelling public purpose of promoting the public health by encouraging "candor and objectivity in the internal workings of medical review committees." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829; *see also Whisenhunt v. Zammit*, 86 N.C. App. 425, 428, 358 S.E.2d 114, 116 (1987); *Cameron*, 58 N.C. App. at 436, 293 S.E.2d at 914. In *Shelton*, this Court also stressed the broad scope of N.C.G.S. § 131E-95:

> Subsection (b) of § 95 protects documents and related information against discovery or introduction into evidence "in *any* civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee."

Shelton, 318 N.C. at 82, 347 S.E.2d at 829 (quoting N.C.G.S. § 131E-95(b)) (emphasis in original).

Nevertheless, the *Observer* argues that the peer review materials and information at issue are not covered by N.C.G.S. § 131E-95 because the statute applies only to third party malpractice plaintiffs. There is absolutely nothing in the plain language of N.C.G.S. § 131E-95 which supports the *Observer*'s contention. Further, this Court rejected a strikingly similar argument in *Shelton*. *Id.* at 81-83, 347 S.E.2d at 828-29. We reject this argument as feckless.

The *Observer* further argues that even if the peer review materials at issue in this case are protected by N.C.G.S. § 131E-95, they became public records once Presbyterian tendered them to the presiding judge for his consideration in support of Presbyterian's arguments. The *Observer* argues that any document or record which a

judge considers in determining litigants' rights is part of the public records of the courts, regardless of whether it was actually introduced as evidence or filed with the court. We can find no case in which either this Court or the United States Supreme Court has established such a rule. We note that the *Observer* relies on several cases decided by the United States Court of Appeals for the Fourth Circuit and by appellate courts of other jurisdictions. None of those cases are binding authority for this Court when addressing this question, which is solely a question of state law. *See State v. Jarrette*, 284 N.C. 625, 654-55, 202 S.E.2d 721, 740 (1974), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1206 (1976). We reject such reasoning because there simply must be a way for a court to review documents alleged to be inadmissible and not "public records" without making them public by placing them in court records which are open to the public or by otherwise causing them to be thrust into the public domain.

As noted above, North Carolina's public records act grants public access to documents it defines as "public records," absent a specific statutory exemption. N.C.G.S. § 132-1(b). A custodian of such "public records" has no discretion to prevent public inspection and copying of such records. N.C.G.S. § 132-6 (1995). This Court has previously held that even documents which are protected from public disclosure by a statutory exemption from the definition of "public records" contained in N.C.G.S. § 132-1(a) are open to the public if they are placed in the public records in a governmental agency's possession. *News & Observer Publ'g Co. v. Poole*, 330 N.C. at 473-74, 412 S.E.2d at 12-13. In *Poole*, *The News and Observer* sought disclosure of certain investigative records prepared by special agents of the State Bureau of Investigation (SBI). Those SBI agents were assisting a University of North Carolina commission in its investigation of alleged improprieties relating to North Carolina State University's men's basketball team, which allegations were later found to be without evidentiary basis. The SBI improperly delivered to the commission the records in question and a report summarizing its investigation. *The News and Observer* claimed a right to copies of the documents under N.C.G.S. § 132-6. The commission claimed that the documents were protected by an express statutory exemption from the public records act of records and evidence collected and compiled by the SBI. We held that once the SBI placed the investigative reports in the records of the commission, they became commission records which were subject to the public records statute and must be disclosed to the same extent as other commission materials. *Id.* We explained that:

> To extend the statutory exemption to SBI investigative reports which have been placed in the public domain is like unringing a bell—a practical impossibility. When such reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the extent that agency's records are protected.

Id. at 474, 412 S.E.2d at 12.

In the instant case, the records to which the *Observer* seeks access fall into one of two categories: (1) those originally filed with the clerk of court as part of the public records of the court, or (2) those tendered only to the presiding judge for consideration on the merits of the parties' various motions. We must resolve the issues concerning each of these categories separately.

[6] Plaintiff, Dr. Virmani, attached some of the records in question as exhibits to his complaint which was filed with the clerk. These documents were made public the moment that Dr. Virmani filed his complaint. While they might otherwise have been protected by N.C.G.S. § 131E-95, once they were filed in the public records of the court by the plaintiff as part of his complaint they were thrust into the public domain *de facto* and became subject to the public records act. *See id.* The public and the news media have the same right to inspect and obtain copies of those records as they do with any other open court records. N.C.G.S. § 132-1(b). Further, the United States Supreme Court has affirmed the right to publish accurately information contained in such court records which are open to the public. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328 (1975).

The Court of Appeals reversed all of the orders of the trial court in question on this appeal and remanded this case to the trial court, "with direction that the trial court unseal all documents previously sealed pursuant to the orders hereby reversed." *Virmani v. Presbyterian Health Servs. Corp.*, 127 N.C. App. 629, 648, 493 S.E.2d 310, 323 (1997). As we have concluded that the documents filed as exhibits attached to plaintiff's complaint entered the public domain and became "public records" once the complaint was filed with the clerk of court, we agree that members of the public, including the *Observer*, were entitled to inspect and obtain copies of *those documents attached to the complaint.* Accordingly, we affirm in part the holding of the Court of Appeals directing that the sealed documents in this case be unsealed, but we affirm that holding only to the extent that it required the unsealing of the envelope marked "Exhibit 3" in

the record on appeal, which contains the documents originally attached to plaintiff's complaint when it was filed with the clerk of court.

The exhibits originally attached to plaintiff's complaint included exhibits which were records and materials produced by the medical review committee and others which were materials considered by the committee. We note that because N.C.G.S. § 131E-95 expressly prohibits the introduction of such documents "into evidence in any civil action," it was improper for Dr. Virmani to attach them to his complaint as evidence or as a forecast of evidence. We emphasize that those documents continue to be inadmissible as evidence or as a forecast of evidence in this case, which is "a civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the [medical peer review] committee." N.C.G.S. § 131E-95. However, as discussed above, once the peer review records attached to the complaint were filed with the court, they entered the public domain and were available, *de facto* and *de jure*, to the public from that source.

[7] We next consider the documents defendant-appellant Presbyterian submitted directly to the presiding judge in support of its arguments on the various pretrial motions. Presbyterian never filed any peer review materials with the clerk of court. Instead, Presbyterian only tendered such documents directly to the trial judge. Throughout the motions proceedings, Presbyterian took painstaking steps to preserve any confidentiality afforded by law to the peer review records and information it submitted to the trial judge. At the outset of each motion hearing and before the parties made any substantive arguments based on the peer review information, Presbyterian asked the presiding judge to seal documents containing confidential medical peer review information and to close the courtroom proceedings relating to this confidential information. In a cover letter to Judge Downs accompanying Presbyterian's legal memorandum in opposition to plaintiff's motion for preliminary injunction, Presbyterian's counsel stated:

> We are providing, *but not filing*, these documents in order that the Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute. We will need to address issues relating to confidentiality and privilege of the peer review process *prior to the commencement of the hearing.*

(Emphasis added). Because N.C.G.S. § 131E-95 clearly prohibits the introduction of peer review materials into evidence, Presbyterian's technique was the proper practice for tendering purportedly confidential peer review materials protected by the statute to the court for its consideration.

Documents which Presbyterian submitted directly to the trial judge and which are included in the record on appeal as sealed exhibits include several affidavits of Presbyterian and Hospital personnel, a transcript of a hearing before a peer review committee, and a legal brief in support of Presbyterian's motion for summary judgment (hereinafter referred to collectively as "Confidential Materials"). On defendant's motions, the trial court sealed these Confidential Materials. After reviewing the Confidential Materials, we conclude that each of them is or includes records and materials either produced by the medical review committee or considered by the committee; therefore, they are excluded from the definition of "public records" contained in our public records act by N.C.G.S. § 131E-95. *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. The trial court properly applied N.C.G.S. § 131E-95 when it ordered that these documents be sealed, as they are not "public records" and are not subject to discovery or introduction into evidence. *Id.*; N.C.G.S. § 131E-95(b).

We further note, however, that N.C.G.S. § 131E-95(b) also provides that:

> information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

N.C.G.S. § 131E-95(b). We have previously stated:

> These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee

itself, even though that information might have been shared by the committee.

Shelton, 318 N.C. at 83, 347 S.E.2d at 829.

We recognize that our conclusion that these and similar purportedly confidential documents are shielded from public access by N.C.G.S. § 131E-95 deprives the opposing party of the opportunity to review them in order to formulate a substantive argument about whether they are indeed confidential. However, to hold otherwise would nullify the statute, as the efforts of the party asserting the confidentiality of the records would automatically convert them into public records. As a matter of practicality, there is no other way to handle records which are alleged to be confidential or privileged than that employed here by Presbyterian and the trial court.

Rule 5(e)(1) of the North Carolina Rules of Civil Procedure provides that the presiding judge may permit parties to file papers directly with him or her. N.C.G.S. § 1A-1, Rule 5(e)(1) (Supp. 1998). Under this rule, the party asserting confidentiality may submit the documents to the trial judge for the limited purpose of determining *in camera* whether they should be shielded from the public. In the present case, that was the thrust of Presbyterian's efforts and the trial court understood it to be such. The trial court's review of any such purportedly confidential materials will always be *in camera*, but its ruling will be subject to review by our appellate courts. Where the trial court decides, as here, that as a matter of law the documents are not public records and will not be made available to the public by the court, the documents should be sealed and included in the record, thereby providing a record for appellate review.

[8] The *Observer* also argues that in addition to any statutory right of access, the public has a qualified common law right to inspect and copy public records and documents, including judicial records and documents. The *Observer* does not state whether it relies on a state or federal common law right, or both. In support of this argument, the *Observer* simply relies on citations to both state authorities and *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570 (1978) (5-4 decision). This reliance is misplaced.

The Supreme Court of the United States is uniquely a creature of the United States Constitution and enjoys a breadth of powers and of public confidence unique in the world. It is not, however, a "common law" court in any strict sense of that phrase. In 1938, the

Supreme Court of the United States overruled *Swift v. Tyson*, 41 U.S. 1, 10 L. Ed. 865 (1842), and stated in very careful language that, "[t]here is no federal *general* common law ." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194 (1938) (emphasis added). All post-*Erie* federal common law is specialized to apply to one peculiarly federal concern or another. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 68 L. Ed. 2d 500, 509 (1981). Post-*Erie* federal common law has its ultimate justification in the Constitution. *Erie*, 304 U.S. at 79-80, 82 L. Ed. at 1195. Therefore, post-*Erie* federal common law rules, unlike those of the *Swift* era, are binding on the states through the supremacy clause. George J. Romanik, *Federal Common Law Alive and Well Fifty Years After Erie: Boyle v. United Technologies Corp. and the Government Contractor's Defense*, 22 Conn. L. Rev. 239, 249 (1989); *see also Local 174, Teamsters of America v. Lucas Flour Co.*, 369 U.S. 95, 102, 7 L. Ed. 2d 593, 598 (1962). Recently, the Supreme Court has emphasized that in the strictest sense, federal common law rules are not simply an interpretation of a federal statute or administrative rule, but the judicial creation of a special federal rule of decision. *Atherton v. FDIC*, 519 U.S. 213, 218, 136 L. Ed. 2d 656, 664 (1997). The Supreme Court has also noted that whether federal power should be exercised in a given area to displace state law is primarily a decision for Congress and not the Court. *Id.* Therefore, the Court will not fashion rules of federal common law unless there is a significant conflict between some federal policy or interest and the use of state law. *Id.* Since *Erie*, the Supreme Court has recognized that the instances in which federal common law can be applied are few and restricted. *Texas Industries*, 451 U.S. at 640-43, 68 L. Ed. 2d at 509-11.

Against this background, it is difficult to imagine how the Supreme Court could recognize a federal common law right of public access to *state courts* broader than the right of access already required by the First or Sixth Amendment, without engaging in the exercise of general supervisory powers over the state courts. The Supreme Court has always taken the position that it has supervisory power over cases tried in federal courts; but as to cases tried in state courts, it has said that its authority is limited to enforcing the commands of the United States Constitution. *E.g.*, *Mu'Min v. Virginia*, 500 U.S. 415, 422, 114 L. Ed. 2d 493, 503 (1991); *see also Victor v. Nebraska*, 511 U.S. 1, 17, 127 L. Ed. 2d 583, 597 (1994). Although the Supreme Court requires no guidance from this Court, we suggest the possibility that no federal common law right of access to *state courts* should be recognized if the right of access is already protected by the

First or Sixth Amendment; conversely, if the right of access is not guaranteed by the Constitution of the United States, the adoption of a federal common law rule requiring *state courts* to allow public access would amount to an exercise of supervisory power over the state courts in an area not of federal concern.

Further, the Supreme Court did not purport in *Nixon* to *apply* the common law of any state or federal common law. Instead, in an opinion for a very divided Court, Justice Powell sought, in a discussion which was *obiter dictum* in that case, to "distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common law right of access." *Nixon,* 435 U.S. at 598-99, 55 L. Ed. 2d at 580. Justice Powell eventually abandoned his effort to define a common law rule, saying, "we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here." *Id.* at 599, 55 L. Ed. 2d at 580. Justice Powell did not speculate as to whether any such rule was a state or federal rule but reviewed state cases almost exclusively.

The "tapes at issue" in *Nixon* were tape recordings made and held by the President of the United States. The right of the public to access those tapes presented a peculiarly federal question with regard to which Congress had enacted substantial legislation. The majority actually decided the case "by giving conclusive weight to the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695," which had not been relied upon by the parties or given consideration by the lower federal courts. *Id.* at 616, 55 L. Ed. 2d at 591 (Stevens, J., dissenting). We do not believe that *Nixon* is controlling authority for the proposition that federal or state common law provides the public a right of access to state courts or their records. In any event, we conclude that being constitutionally derived, any possible federal common law right of public access to state court proceedings and records is no greater than the First Amendment right we assume to exist and apply at a later point in this opinion. *See United States v. Kaczynski*, 154 F.3d 930 (9th Cir. 1998).

[9] We next decide whether the *Observer* has a right under the common law of North Carolina to inspect and copy public records and, if so, whether that right includes the records and documents at issue here. When adopted in 1778, before the existence of the United States of America, current N.C.G.S. § 4-1 reaffirmed principles relating to the common law which had first been statutorily recognized for the Colony of North Carolina in 1715. N.C.G.S. § 4-1 provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986). This statute appears to have survived without amendment for the 221 years from its enactment to this date. The 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 therefore; and is not abrogated, repealed, or obsolete." *Gwathmey v. State*, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995). The common law that remains in force by virtue of N.C.G.S. § 4-1 "may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment." *Id.*

Further, as the common law originally was, and largely continues to be, a body of law discovered and announced in court decisions, this Court, as the court of last resort in North Carolina, may modify the common law of North Carolina to ensure that it has not become obsolete or repugnant to the freedom and independence of this state and our form of government. *Forsyth Memorial Hosp., Inc. v. Chisholm*, 342 N.C. 616, 621, 467 S.E.2d 88, 91 (1996); *Hall v. Post*, 323 N.C. 259, 264, 372 S.E.2d 711, 714 (1988). Perhaps the best example of this Court exercising its rarely used power to modify the common law was set out by Chief Justice Clark:

> Upon this common law it was held in North Carolina, by *Pearson, C.J.*, in *S. v. Black*, 60 N.C., [262 (1864)], that it was the "husband's duty to make the wife behave herself" and to thrash her, if necessary to that end, and in *S. v. Rhodes*, 61 N.C., 453 (1868), this Court sustained the charge of the judge below that a man "had the right to whip his wife with a switch no larger than his thumb," and this was cited and approved in *S. v. [Mabrey]*, 64 N.C., [592 (1870)]. But in *S. v. Oliver*, 70 N.C. [60] (in 1874), this Court overruled the numerous decisions to that effect, *Settle, J.*, saying: "The courts have advanced from that barbarism." Thus passed away the vested right of the husband to thrash his wife

> "with a whip no larger than his thumb," without any statute to change the law.
>
> As late as 1886, in *S. v. Edens*, 95 N.C., 693, the Court again held upon the same "judge-made" law of former times, that a man could "wantonly and maliciously slander" the good name of his wife with impunity, or "assault and beat her" if he inflicted no permanent injury upon her; but a majority of this Court reversed that holding in 1908 without any statute, in *S. v. Fulton*, 149 N.C., 485, [63 S.E. 145,] since which time no man has had legal authority to slander or assault and beat his wife in North Carolina. And thus passed away another vested right, or rather another wrong.

Price v. Charlotte Elec. Ry. Co., 160 N.C. 450, 455-56, 76 S.E. 502, 504 (1912) (Clark, C.J., concurring in the result). Decisions of this Court not turning on the application of statutes or constitutional principles constitute common law. *Id.* at 455, 76 S.E. at 504; *see also* O.W. Holmes, Jr., THE COMMON LAW, 1, 35 (Boston, Little, Brown, and Co., 1881); 1 James Kent, COMMENTARIES ON AMERICAN LAW 470 (4th ed. 1840). Bearing in mind the foregoing principles of common law construction, we turn to the question at hand.

At least since 1887, this Court has recognized a common law right of the public to inspect public records. *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 280, 322 S.E.2d 133, 136 (1984). However, to the extent that our General Assembly has dictated by statute that certain documents will not be available to the public, this common law right has been superseded. We have long held that when the General Assembly, as the policy-making agency of our government, legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State. *Id.* at 281, 322 S.E.2d at 137; *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956). As noted above, the General Assembly has enacted a statute which expressly provides that the proceedings of a medical review committee and the records and materials produced and considered by such a committee "shall be confidential and not considered public records ." N.C.G.S. § 131E-95(b). Therefore, N.C.G.S. § 131E-95 supplants any North Carolina common law right of public access to information regarding medical review committee proceedings and related materials. The *Observer* has no right under the common law of North Carolina to the medical peer review information and materials or to the portions of any hearings in this case pertaining to such information and materials.

[10] We must next turn to the constitutional issues presented on appeal. Defendant Presbyterian contends that the Court of Appeals erred in holding that the orders of the trial court closing the hearings in this case and sealing the Confidential Materials violated the North Carolina Constitution. The *Observer* responds that the decision of the Court of Appeals was correct because Article I, Section 18 of the North Carolina Constitution requires that all court proceedings and all records pertaining to court proceedings be open to the public. This open courts provision states that:

> All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18. The Court of Appeals engaged in an extensive analysis of the history of similar provisions in the constitutions of several states in the "OPEN COURTS PROVISION" section of its opinion below. *Virmani*, 127 N.C. App. at 637-41, 493 S.E.2d at 315-18. Based on its analysis, the Court of Appeals concluded that the open courts provision of our state Constitution creates a presumption that civil court proceedings are to be open to the public and that "the occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare." *Id.* at 645, 493 S.E.2d at 320. The Court of Appeals held that

> the open courts provision of our state constitution provides the public, including [the *Observer*], a constitutional right of access to the civil court proceedings at issue here, including the videotapes, tapes, and transcripts of these proceedings, and to those portions of the court records sealed by the trial court in the orders on appeal.

Id. at 644, 493 S.E.2d at 320. We do not agree.

Our task here is to determine whether a public right of access to court proceedings and records is inherent in the open courts provision of Article I, § 18 of our state's Constitution. This Court is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). In *Jackson*, we discussed at length this Court's role as final interpreter of our Constitution:

> We have said that even where provisions of the state and federal Constitutions are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Strictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.
>
> States remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen rights where none exist under the federal Constitution. *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). In construing the North Carolina Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. [*State ex rel. Martin v.*] *Preston*, 325 N.C. [438,] 449-50, 385 S.E.2d [473,] 479 [1989].

Jackson, 348 N.C. at 648, 503 S.E.2d at 103-04.

This Court has previously stated that Article I, Section 18 provides the public access to our courts. *See State v. Burney*, 302 N.C. 529, 537-38, 276 S.E.2d 693, 698 (1981); *In re Nowell*, 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977); *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976); *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957). In *Raper*, we stated:

> [T]he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35 [now Section 18]. The public, and especially the parties are entitled to see and hear what goes on in the courts. That courts are open is one of the sources of their greatest strength.

Raper, 246 N.C. at 195, 97 S.E.2d at 784 (citations omitted). Our reference to the right of the public there was mere *obiter dictum* unnecessary to the decision of the case, however, as the issue presented in *Raper* was whether the trial court could accept evidence at a hearing from which a *party* to the case was excluded. This Court has never expressly held that Article I, Section 18 provides members of the general public a right to attend *civil* court proceedings or to inspect or copy the records of such proceedings.

We now hold that the open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a *qualified* constitutional right on the part of the public to attend civil court proceedings. However, given the facts presented here, this qualified right of public access did not preclude the trial court from giving effect to the protections of N.C.G.S. § 131E-95 by sealing the materials in question or closing the court proceedings concerning those materials.

The qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. *Cf. In re Belk*, 107 N.C. App. 448, 420 S.E.2d 682 (concluding that neither the United States Constitution nor the North Carolina Constitution creates a constitutional right of the public to attend civil commitment proceedings), *appeal dismissed and disc. rev. denied*, 333 N.C. 168, 424 S.E.2d 905 (1992); *State v. Lemons*, 348 N.C. 335, 349, 501 S.E.2d 309, 318 (1998) (rights in criminal cases); *Burney*, 302 N.C. at 538, 276 S.E.2d at 699 (same). Thus, although the public has a qualified right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. In performing this analysis, the trial court must consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review to deter-

mine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access.

[11] Turning to the facts of this case, we conclude that the trial court did not err by excluding the public from the court hearings and by sealing related peer review records which concerned confidential information pertaining to Presbyterian's medical peer review investigation of Dr. Virmani. The judges in the trial court properly sealed the Confidential Materials as well as the videotapes and transcripts of the closed hearings; in doing so, they also provided a sufficient record for our appellate review.

We begin with the presumption that the civil court proceedings and records at issue in this case must be open to the public, including the news media, under Article I, Section 18. However, the legislature has determined that this right of access is outweighed by the compelling countervailing governmental interest in protecting the confidentiality of the medical peer review process. The General Assembly has recognized the public's compelling interest in such confidentiality by enacting N.C.G.S. § 131E-95 and making the confidentiality of medical peer review investigations part of our state's public policy. Neither plaintiff nor the *Observer* challenged the constitutionality of the statute on direct appeal to the Court of Appeals. As a result, no issue concerning the constitutionality of the legislature's adoption of this public policy is before this Court. However, we need not and do not rely upon the legislature's public policy judgment in this regard in order to conclude that the trial court did not err.

In each of its oral orders closing motions hearings and sealing records in this case, the trial court independently recognized this compelling state interest, explaining in each instance that it closed the hearing because the arguments and records presented would involve confidential peer review information. Each of the written orders closing court proceedings and sealing documents and court records included similar independent findings and conclusions to the effect that, *inter alia*, the matters at issue pertained to confidential medical peer review information and that disclosing the medical review records and materials "could cause harm to plaintiff and defendant and the peer review process if left unsealed in the public record during the course of pending litigation." The findings and conclusions by the trial court are specific enough to allow us to determine whether the trial court's orders sealing documents and closing court were properly entered to serve a compelling public

interest. After reviewing the sealed Confidential Materials which were presented or considered in connection with the medical peer review hearings in question, we conclude that they all pertained to medical peer review matters and that the trial court properly sealed them. We reach the same conclusion as to the closing of the court hearings and the sealing of the videotapes and transcripts of the closed court hearings.

The public's interest in access to these court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members. Because such open and honest communication in medical peer review proceedings helps to assure high quality public medical care, maintaining and protecting this confidentiality is in the public's best interest. Further, we conclude that the compelling countervailing public interest in such high quality public medical care overcomes the qualified public right to open civil court proceedings and records of those proceedings.

In order to safeguard the confidentiality of medical peer review information, it was appropriate under the circumstances of this case for the trial court to restrict access to the courtroom and to seal documents which were submitted to the presiding judge for consideration in ruling upon the motions seeking closure but which were never filed as part of the public records of the court. Further, there was no reasonable alternative to closure of the hearings and sealing of the documents in this case. The trial court could not allow such information to enter the public domain while the trial court determined whether it should be treated as confidential, then later withdraw it from the public domain and prevent its broader dissemination. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 496, 43 L. Ed. 2d at 350. For the foregoing reasons, we conclude that the public's qualified right of access to civil court proceedings and records guaranteed by Article I, Section 18 of our state Constitution was not violated by the orders of the trial court in this case. Therefore, we reverse that part of the decision of the Court of Appeals which relates to those proceedings and records.

[12] Having concluded that our state Constitution does not mandate public access to the sealed documents and record in this case, we must consider next the question of whether the United States Constitution provides the public, including the *Observer*, the right to

attend the civil court proceedings and to view the records in this case. This issue was properly presented in the Court of Appeals. As that court resolved the issue of public access to the court hearings and records on state constitutional grounds, it did not reach this question of federal law. We must address it now.

The United States Supreme Court has never held that there is a constitutional right of public access to civil court proceedings or related court files. However, the Supreme Court has held that a qualified right of the public to attend *criminal* trials is implicit in the First Amendment. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 73 L. Ed. 2d 248, 255-57 (1982); *Richmond Newspapers*, 448 U.S. at 580-81, 65 L. Ed. 2d at 991-93 (plurality opinion). The Supreme Court has also extended this right of access to include *voir dire* proceedings in which the jury is selected for a criminal trial, *Press-Enterprise I*, 464 U.S. 501, 78 L. Ed. 2d 629, and to preliminary hearings similar to a trial before a magistrate in criminal cases, *El Vocero de Puerto Rico*, 508 U.S. 147, 124 L. Ed. 2d 60; *Press-Enterprise II*, 478 U.S. 1, 92 L. Ed. 2d 1. The Supreme Court has stated that openness in criminal trials " 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.' " *Press-Enterprise II*, 478 U.S. at 9, 92 L. Ed. 2d at 10 (quoting *Press-Enterprise I*, 464 U.S. at 508, 78 L. Ed. 2d at 637).

In *Press-Enterprise II*, the Supreme Court departed somewhat from its prior analysis of the public's right of access to the criminal courts as a right implicit in the First Amendment. In that case, the Supreme Court applied the twin tests of experience and logic in determining whether the First Amendment right of access attached to a trial-like preliminary hearing in a criminal case. *See Press-Enterprise II*, 478 U.S. at 8-13, 92 L. Ed. 2d at 9-13. The experience test requires evaluation of "whether the place and process have historically been open to the press and general public." *Id.* at 8, 92 L. Ed. 2d at 10. The logic test requires consideration of "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the proceeding in question meets both of these considerations, then a qualified First Amendment right of public access must be applied. *Id.* at 9, 92 L. Ed. 2d at 10.

However, even if a particular court proceeding passes the tests of experience and logic, the public's *qualified* right of access under the

First Amendment may be limited by overriding rights or interests. *Id.*; *Globe Newspaper Co.*, 457 U.S. at 606, 73 L. Ed. 2d at 257. The Supreme Court has held that the circumstances in which the public may be barred from a criminal trial are limited, and that "the State's justification in denying access must be a weighty one." *Globe Newspaper Co.*, 457 U.S. at 606, 73 L. Ed. 2d at 257. "Where . . . the State attempts to deny the right of access [to criminal cases] in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07, 73 L. Ed. 2d at 257. The presiding judge must consider reasonable alternatives to closing the proceeding. *Press-Enterprise II*, 478 U.S. at 14, 92 L. Ed. 2d at 14. Criminal court proceedings cannot be closed unless the trial court makes findings "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510, 78 L. Ed. 2d at 638; *see also Press-Enterprise II*, 478 U.S. at 13-14, 92 L. Ed. 2d at 13-14.

Where the State meets its burden of showing a compelling governmental interest, a trial court may "in the interest of the fair administration of justice impose reasonable limitations on access to a trial." *Richmond Newspapers*, 448 U.S. at 581 n.18, 65 L. Ed. 2d at 992 n.18 (plurality opinion). For example, the Supreme Court has made clear that the public's right of access to the criminal courts may be forced to yield to the government's interest in inhibiting disclosure of sensitive information, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); *Globe Newspaper Co.*, 457 U.S. at 606-07, 73 L. Ed. 2d at 257-59; to a criminal defendant's right to a fair trial, *Press-Enterprise II*, 478 U.S. at 13-14, 92 L. Ed. 2d at 13-14; and to the interest of protecting victims of sex crimes from public scrutiny and embarrassment, *id.* at 9 n.2, 92 L. Ed. 2d at 11 n.2.

Although the Supreme Court has never decided the question of whether the public has a First Amendment right to attend civil court proceedings or to view civil court records, the Court has noted that civil trials historically have been presumptively open to the public. *Richmond Newspapers*, 448 U.S. at 580 n.17, 65 L. Ed. 2d at 992 n.17 (plurality opinion); *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15, 61 L. Ed. 2d 608, 625 n.15 (1979). Several lower federal courts have held that certain civil proceedings are presumptively open under the First Amendment. *See, e.g., Stone v. University of Md. Medical Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988) (record in civil case); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d

Cir. 1984) (hearing on motions for preliminary injunctions); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-16 (7th Cir. 1984) (hearing on motion to terminate shareholder derivative claims). Although these lower courts have emphasized the strength of the First Amendment presumption of access, they have refused to define this right of access as absolute. For example, one court has stated, "Where the First Amendment guarantees access, . . . access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Stone*, 855 F.2d at 180 (applying First Amendment access standard for criminal trials from *Press-Enterprise I*, 464 U.S. at 510, 78 L. Ed. 2d at 638, to a district court order sealing the court record of a wrongful discharge action brought by a medical school professor).

In recognizing the First Amendment right of access in criminal cases, the Supreme Court stressed "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' " *Globe Newspaper Co.*, 457 U.S. at 604, 73 L. Ed. 2d at 255 (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 16 L. Ed. 2d 484 (1966)). In explaining in *Globe Newspaper* why the First Amendment guarantees a right of access to criminal trials, the Supreme Court emphasized two features of the criminal justice system. It noted that "the criminal trial historically has been open to the press and general public." *Id.* at 605, 73 L. Ed. 2d at 256. It also observed that access to criminal trials

> enhances the quality and safeguards the integrity of the fact-finding process . . . [and] fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.

Id. at 606, 73 L. Ed. 2d at 256-57 (footnotes omitted). Similar, but not identical, fundamental principles apply to the public's access to civil court proceedings as well.

Applying the experience and logic test set forth for criminal cases in *Press-Enterprise II*, it is questionable whether the First Amendment presumptive public right of access would attach to the matters at issue in this case. For many years now, the workings of medical review committees and the materials that they consider have been closed to the public and have been deemed confidential. In

1981, the General Assembly enacted former N.C.G.S. § 131-170, the statutory predecessor of N.C.G.S. § 131E-95, on the theory that " 'external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity.' " *Cameron v. New Hanover Mem'l Hosp.*, 58 N.C. App. at 436, 293 S.E.2d at 914, (quoting *Matchett*, 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320-21), *quoted in Shelton*, 318 N.C. at 82, 347 S.E.2d at 828. Thus, it is not at all clear that the portions of the motions hearings and the documents pertaining to Presbyterian's peer review investigation of Dr. Virmani would pass the experience prong of the public access test.

It is also questionable whether these medical peer review matters would pass the logic test. By enacting N.C.G.S. § 131E-95 and its statutory predecessor, the General Assembly has recognized that public access plays a negative role in the functioning of the medical peer review process. The trial court independently reached the same conclusion in this case.

Assuming *arguendo* that the United States Supreme Court would hold that the qualified First Amendment right of public access applies to civil cases, we conclude that the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and that no alternative to closure will adequately protect that interest. Therefore, we conclude that the trial court properly closed the hearings and properly sealed the Confidential Materials, videotapes, and transcripts of the closed hearings. However, for reasons previously stated in this opinion, the trial court erred in ordering that the exhibits attached to the complaint when it was initially filed with the clerk of court be withdrawn from the public record and sealed.

That part of the decision of the Court of Appeals vacating the orders of the trial court which sealed the exhibits attached to the complaint when it was originally filed is affirmed; the decision of the Court of Appeals vacating the orders of the trial court is otherwise reversed. Therefore, the decision of the Court of Appeals is affirmed in part and reversed in part. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Mecklenburg County, for modification of its prior orders in a manner consistent with this opinion and for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CORNELIUS ALVIN NOBLES

No. 156A98

(Filed 25 June 1999)

1. **Constitutional Law, North Carolina— presence at capital trial—excusal of prospective juror—private conversation—harmless error**

The trial court violated defendant's nonwaivable right to be present at every stage of his capital trial by excusing a prospective juror following an unrecorded private conversation with the prospective juror. However, defendant's absence from the trial court's communication with the prospective juror was harmless beyond a reasonable doubt where the trial transcript reveals that the juror was properly excused because he was over the age of sixty-five. N.C.G.S. §§ 9-6(a), 9-6.1; N.C. Const. art. I, § 23.

2. **Criminal Law— capital trial—court's conversation with prospective juror—failure to record—harmless error**

While the trial court violated N.C.G.S. § 15A-1241 by failing to record its ex parte communication with a prospective juror in a capital trial before excusing the juror, this error was harmless where the trial transcript reveals that the prospective juror was properly excused because he was over the age of sixty-five.

3. **Appeal and Error— improper excusal of jurors—silent record**

Defendant failed to show that two prospective jurors were excused after private conversations in violation of defendant's nonwaivable right to be present at every stage of his capital trial where the record does not reflect that any actions were ever taken by the trial judge to excuse the two jurors.

4. **Appeal and Error— preservation of issues—constitutional issue—failure to raise in trial court**

The constitutionality of a hypothetical question asked four prospective jurors as to whether each juror herself could vote to

recommend the death penalty was not presented on appeal where none of the prospective jurors was actually excused on the basis of her response to this question, and the issue was not raised and determined in the trial court.

5. Jury— capital case—jury selection—death penalty views—excusal for cause

The trial court did not abuse its discretion in excusing four prospective jurors for cause based upon their answers to death-qualifying questions where (1) the first juror answered "Probably so" when asked whether her "feelings about the death penalty would prevent or substantially impair the performance of her duty as a juror in accordance with the evidence and the law in this case," defendant attempted to rehabilitate the juror, and the juror then stated that she was not sure if she could follow the court's instructions; (2) the second juror informed the prosecutor that she would be unable to set aside her personal feelings about the death penalty and follow the instructions, she told the trial court that she could not return a recommendation of death no matter what the evidence or facts, and after attempted rehabilitation by defendant, she replied affirmatively when asked by the prosecutor whether her death penalty views would prevent or substantially impair her ability to serve as a juror in accordance with the evidence and the law in a death penalty case; (3) the third juror indicated that she could never vote to return the death penalty regardless of what the evidence and law might be, and although she stated during rehabilitation that she could set aside her feelings and consider the death penalty, she again told the prosecutor that her feelings about the death penalty would prevent or substantially impair the performance of her duty as a juror and then told the court that she could not return a recommendation of death no matter what the facts were; and (4) the fourth juror stated that she might not be able to recommend a death sentence based on her religious principles and personal feelings, that those feelings could prevent or substantially impair the performance of her duty as a juror in a death penalty case, and although she later indicated that she could consider both possible penalties, she then told the court that she did not know whether she could recommend the death penalty.

6. Jury— voir dire—knowledge of case—question not improper stake-out—waiver

In a prosecution for first-degree murder and discharging a firearm into occupied property, the prosecutor's question to prospective jurors as to whether they knew or had read anything about the case which informed the jurors that the vehicle into which defendant fired was occupied by defendant's wife and three small children was not an improper stake-out question. Further, defendant waived his right to complain on appeal about the prosecutor's mention of the fact that defendant's three children were in the vehicle at the time of the shooting by failing to object during trial.

7. Jury— voir dire—outline of felony murder—not inadequate statement of law

The prosecutor's questions to prospective jurors in which he defined felony murder as a killing which occurs during the commission of a violent felony, such as discharging a firearm into an occupied vehicle, did not constitute inaccurate or inadequate statements of the law because they failed to inform the jurors of the State's burden of proving that defendant knew the vehicle was occupied since the prosecutor never intended to list any elements of the offense, and defendant never requested that he do so. Moreover, defendant suffered no harm from the prosecutor's substitution of "vehicle" for "property" when using the crime as a sample felony.

8. Evidence— photographs—not victim impact evidence

The publication to the jury of portrait-style photographs of defendant's three children who were in a vehicle when defendant fired into the vehicle and killed his wife did not constitute impermissible victim impact evidence and was not improper.

9. Evidence— murder of wife—quarrels and ill-treatment—relevancy

When a husband is charged with the murder of his wife, the State is permitted to present evidence of frequent quarrels and ill-treatment as bearing on intent, malice, motive, premeditation and deliberation.

10. Appeal and Error— preservation of issues—objection to relevancy—hearsay issue not presented—waiver

Defendant's objection to the reading to the jury of a summons and warrants charging domestic crimes on the ground of relevancy was insufficient to preserve for appellate review the issue of whether the contents of the summons and warrants were inadmissible hearsay. Moreover, defendant waived objection to the admission of this evidence where defendant elicited testimony and himself testified on both direct and cross-examination regarding information contained in the summons and warrants and other witnesses testified about that information without objection.

11. Appeal and Error— preservation of issues—failure to object or allege plain error

Defendant waived appellate review of the issue of the admission of allegedly hearsay testimony where defendant did not object on the ground of hearsay and has not alleged plain error.

12. Evidence— hearsay—state of mind exception

Statements made by a murder victim to her brother about domestic violence incidents reflected the victim's state of mind and were admissible under N.C.G.S. § 8C-1, Rule 803(3).

13. Appeal and Error— preservation of issues—objection after answer—absence of motion to strike—waiver

Defendant waived his objection to testimony where the objection was lodged after the witness had answered and defendant made no motion to strike the answer.

14. Appeal and Error— submission of transcript—admission of evidence—absence of appendix or reproduction in brief—waiver of appellate review

Assignments of error to the admission of testimony regarding defendant's alleged threats and violent conduct directed to members of the victim's family are deemed waived for failure to comply with the Rules of Appellate Procedure where the transcript of the proceedings was filed pursuant to Rule 9(c)(2), and defendant cited only various transcript pages but failed either to attach the pertinent portions of the transcript or to include a verbatim reproduction in his brief of the specific questions and answers which he wants the appellate court to review for error.

15. Firearms and Other Weapons— discharging firearm into occupied vehicle—seven counts—sufficient evidence

The State presented sufficient evidence to support defendant's conviction of seven distinct charges of discharging a firearm into an occupied vehicle, although witnesses testified that they heard only four gunshots and that only four shell casings were recovered at the crime scene, where the State's evidence tended to show the existence of seven bullet holes in various parts of the victim's vehicle, that defendant's firearm had the capacity to hold nine bullets and was empty at the murder scene, and that earlier on the day of the murder the victim's vehicle did not have any bullet holes or broken glass.

16. Firearms and Other Weapons— discharging firearm into occupied vehicle—consolidation of counts not required

The trial court did not err by denying defendant's motion to consolidate seven counts charging defendant with discharging a firearm into an occupied vehicle where the evidence tended to show that defendant's actions were seven distinct and separate events and that each bullet hit the vehicle in a different place.

17. Criminal Law— jury request—failure to conduct jurors to courtroom—harmless error

The trial court erred by failing to conduct the jurors to the courtroom following a request by the jury for certain items of evidence as required by N.C.G.S. § 15A-1233(a). However, defendant was not prejudiced by the trial court's failure to follow the requirements of the statute where defense counsel agreed with the trial court when it thought it had discretion whether to bring the jury to the courtroom, there was unanimous agreement among the State, the defendant, and the trial judge concerning the items requested by the jury, and the prosecution and defendant consented to permitting the jury to have those items.

18. Criminal Law— deadlocked jury—further deliberations—verdict not coerced—mistrial properly denied

The trial court in a prosecution for first-degree murder and discharging a firearm into occupied property did not (1) coerce a verdict by instructing the jury to continue deliberations or (2) err by denying defendant's motion for a mistrial due to the deadlock where the jury had deliberated only ten hours over three days when the motion for mistrial was made and deliberated a total of eleven hours before returning its verdicts; the trial court

instructed the jurors on their duties under N.C.G.S. § 15A-1235(b) to consult with each other, to decide individually, and to reexamine one's views if necessary but not to surrender one's honest convictions; and statements by jurors and their subsequent actions validated the trial court's conclusion that further deliberations would be worthwhile.

19. Criminal Law— mistrial—remark by victim's father—absence of prejudice

A remark by a murder victim's father from the audience in the presence of the jury that defendant was not being railroaded, made in response to defendant's statements that he was being railroaded into a death sentence, was not so prejudicial to defendant as to render the trial court's denial of his motion for a mistrial a manifest abuse of discretion reversible on appeal.

20. Appeal and Error— abandonment of contention—failure to cite authority or make argument

Defendant abandoned his contention that the trial court erred by denying his motion to have a hesitant juror polled individually and outside the presence of other jurors by failing at trial and in his brief to cite any authority or put forth any argument in support of his motion.

21. Jury— repolling of jury—motion after jury dispersed—waiver

Defendant waived his right to repoll the entire jury in a first-degree murder prosecution by failing to make a timely motion before the jury was dispersed where the jury returned its guilty verdict and was polled, court was recessed for the weekend, and defendant did not make his motion until Monday morning.

22. Jury— capital trial—excusal of juror after guilty verdict—medical reason—exercise of discretion

The trial judge did not fail to exercise his discretion in excusing a juror for medical reasons following a guilty verdict in the guilt-innocence phase of a capital trial because he stated that he did not have "much choice" or "a whole lot of choice."

23. Jury— capital trial—excusal of juror after guilty verdict—medical reason—no abuse of discretion

The trial court did not abuse its discretion in excusing a juror for medical reasons following a guilty verdict in the guilt-inno-

cence phase of a capital trial where the juror gave the trial court a note from her physician that stress from jury duty could cause problems with her pregnancy. N.C.G.S. § 15A-2000(a)(2).

24. Appeal and Error— plain error—failure to argue in brief—waiver

Although defendant specifically and distinctly contended in his assignment of error to the trial court's instruction on an aggravating circumstance in a capital trial that the instruction amounted to plain error, defendant waived appellate review of this assignment of error by failing to argue in his brief that the instruction amounted to plain error.

25. Sentencing— capital sentencing—aggravating circumstance—risk of death to more than one person—instruction on weapon—plain error

The trial court's instruction on the (e)(10) aggravating circumstance that "a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person" relieved the State of the burden to prove an element of the (e)(10) aggravating circumstance since it effectively took from the jury's consideration whether the weapon used by defendant in this case is normally hazardous to the lives of more than one person. This error was plain error entitling defendant to a new capital sentencing proceeding. N.C.G.S. § 15A-2000(e)(10).

26. Criminal Law— prosecutor's closing argument—capital sentencing—mother's refusal to testify—implication not supported by record

The prosecutor's jury argument in a capital sentencing proceeding, made in an attempt to rebut defendant's mitigating circumstances related to defendant's home environment, that defendant's own mother would not "come up here to testify" constituted an improper argument not supported by the evidence that testimony by defendant's mother would not have benefited her son's case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Lanier (Russell J., Jr.), J., on 10 September 1997 in Superior Court, Sampson 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 20 July 1998. Heard in the Supreme Court 10 May 1999.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Cornelius Alvin Nobles was indicted on 28 October 1996 for first-degree murder and four counts of discharging a firearm into occupied property. On 18 July 1997 defendant was indicted for three additional counts of discharging a firearm into occupied property. He was tried capitally and found guilty of first-degree murder on the basis of felony murder. He was also found guilty of six counts of discharging a firearm into occupied property. 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 consecutive sentences of forty to fifty-seven months each for defendant's convictions of five counts of discharging a firearm into occupied property and arrested judgment for the conviction of the sixth count of discharging a firearm into occupied property because it was the predicate felony supporting the felony-murder conviction.

The State's evidence tended to show that on 28 August 1996 defendant shot and killed his wife, Ronita Nobles ("victim"). On 25 August 1996 defendant had been charged with assault on the victim; he was released on bond on 27 August 1996 but was to have no contact with the victim. On the evening of 28 August 1996, defendant was driving down Paul Ed Dail Road near Kenansville, North Carolina, in his Mercedes when he noticed his wife's Nissan pickup truck leaving the driveway of their house. Defendant stopped his car in the road and flashed his lights at the truck. He then got out of his car and shouted at the truck twice. The truck left the driveway and headed in defendant's direction. Defendant then took his gun out of his back pocket and began shooting at the truck. The driver's side of the truck hit defendant and ran over his foot, causing him to slam against the driver's side of the truck. The truck ran off the side of the road into a ditch.

As the truck was heading toward the ditch, Russell Brock was driving down Paul Ed Dail Road in the opposite direction of the victim's truck. Defendant returned to his car and proceeded to back up toward the truck. Defendant and Brock approached the truck at approximately the same moment. Defendant opened the driver's door and pulled the victim from the truck. Defendant told Brock that the victim was his wife and that he had shot her. Defendant then removed his two-year-old daughter from her car seat located in the passenger's seat; next, he removed his twin nine-month-old children, who were in car carriers, from the back seat of the truck. The children were unharmed.

Shortly thereafter members of the Duplin County Rescue Squad and the Duplin County Sheriff's Department arrived. The emergency medical technician found no signs of life in the victim at the murder scene. Seven bullet holes were found in the truck. Defendant was arrested at the scene.

Additional facts will be presented as needed to discuss specific issues.

JURY SELECTION ISSUES

In his first argument defendant contends that the trial court committed reversible error under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution when it had unrecorded private communications with three prospective jurors. Defendant argues that the excusals violated his nonwaivable right to be present at every stage of his capital trial. He also contends that the excusals violated his right to a "true, complete, and accurate record of all statements from the bench and all other proceedings" pursuant to N.C.G.S. § 15A-1241(a).

The Confrontation Clause of the North Carolina Constitution guarantees the right of every accused to be present at every stage of his trial. N.C. Const. art. I, § 23; *State v. Jones*, 346 N.C. 704, 708-09, 487 S.E.2d 714, 717 (1997). Furthermore, defendant's right to be present at every stage of his capital trial is nonwaivable. *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990). When the trial court excludes defendant from its private communications with prospective jurors at the bench prior to excusing them, it has committed reversible error unless the State can prove that the error was harmless beyond a reasonable doubt. *Id.*

A review of the jury selection process reveals that following the trial court's hearing of hardship excuses, six prospective jurors were excused, and the remaining sixty-three prospective jurors were divided into five panels. Lester Tanner was assigned to panel IV; Marjorie Gilbert was assigned to panel V; and David Mixon, when he appeared in the courtroom two days later, was also assigned to panel V. During the morning of the second day of jury selection, the following exchange transpired:

> THE COURT: All right. . . . [W]e're going to take about ten minutes. Be at ease, do what you need to do and be back here at quarter until.
>
> The record will reflect—what was the gentleman's name that we excused?
>
> COURT REPORTER: Tanner.
>
> THE COURT: Because he was over sixty-five.
>
> MS. THOMAS [prosecutor]: Was it Benny Peterson.
>
> THE CLERK: Benny Peterson's the one we had this morning.
>
> COURT REPORTER: I thought it was Tanner.
>
> MS. THOMAS: Yeah, Tanner. Lester Tanner.
>
> THE COURT: And, I'd advised the defense counsel that [sic] after we had returned and probably before we came into session.

As for prospective jurors Gilbert and Mixon, apart from being sworn in and assigned to panel V, there is no further mention of them in the record; and Gilbert and Mixon were not on the panel when the roll was called for the *voir dire* of panel V.

[1] Although the record is not clear whether Judge Lanier actually engaged in a private conversation with prospective juror Tanner prior to his excusal or whether defendant and his counsel were excluded from such conversation, for purposes of this appeal, we will assume that Judge Lanier did in fact violate defendant's nonwaivable constitutional right to be present at every stage of his trial. However, this error was harmless beyond a reasonable doubt.

In *State v. Adams*, 335 N.C. 401, 408, 439 S.E.2d 760, 763 (1994), the trial court heard excuses from three prospective jurors off the record and ultimately excused them. In performing a harmless error

analysis, this Court held that since "the transcript reveal[ed] that the substance of the unrecorded communications with the three jurors was adequately reconstructed by the trial judge[,] . . . the defendant's absence from the conference was harmless." *Id.* at 409, 439 S.E.2d at 763. Similarly, in *State v. Lee*, 335 N.C. 244, 262-63, 439 S.E.2d 547, 555-56, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), this Court held that it was harmless error when the record revealed both the substance of private communications between the trial court and prospective jurors and that there were proper grounds for the excusals. *See also State v. Hartman*, 344 N.C. 445, 456, 476 S.E.2d 328, 334 (1996) (concluding that defendant's absence from the trial court's private exchange with a prospective juror was harmless beyond a reasonable doubt since the record indicated that she was properly excused based upon medical reasons), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997); *State v. Williams*, 339 N.C. 1, 31, 452 S.E.2d 245, 263 (1994) (finding harmless error since the transcript revealed the substance of the *ex parte* communications and defendant was not harmed by his absence from the private conversation), *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995); *State v. Payne*, 328 N.C. 377, 389, 402 S.E.2d 582, 589 (1991) (holding that questioning of prospective jurors in defendant's absence was harmless beyond a reasonable doubt as prospective jurors who were excused were either ineligible to serve or excused for manifestly unobjectionable reasons).

Defendant, however, contends that *Smith* and its progeny mandate a new trial. We disagree. In *Smith* the trial court invited prospective jurors to the bench to privately discuss reasons for excusal. *State v. Smith*, 326 N.C. at 793, 392 S.E.2d at 363. "After each of these unrecorded private bench conferences, the trial court excused the prospective juror, indicating that it was within the discretion of the court to excuse that particular juror." *Id.* Since there was no record from which to determine the substance of the private discussions, this Court held that "the State has failed to carry its burden [of proving] that the trial court's errors were harmless beyond a reasonable doubt." *Id.* at 794, 392 S.E.2d at 364. Again in *State v. Moss*, 332 N.C. 65, 74, 418 S.E.2d 213, 219 (1992), this Court granted the defendant a new trial because "[n]othing in the record . . . establishe[d] the nature and content of the trial court's private discussions with the prospective jurors." *See also State v. Cole*, 331 N.C. 272, 275, 415 S.E.2d 716, 717 (1992) (granting new trial when prospective jurors excused after unrecorded bench conferences and record was silent, thus preventing a determination that the error was harmless); *State v. McCarver*,

329 N.C. 259, 260-61, 404 S.E.2d 821, 821-22 (1991) (holding that the excusal of prospective jurors following unrecorded bench conferences "in the discretion of the Court and for good cause shown" was not sufficient to prove that the error was harmless beyond a reasonable doubt).

In the case *sub judice* the substance of the unrecorded communication with prospective juror Tanner was adequately revealed in the trial transcript. The transcript shows that Tanner was properly excused "[b]ecause he was over sixty-five." *See* N.C.G.S. §§ 9-6(a), 9-6.1 (1986). Therefore, defendant's absence from the trial court's communication with Tanner was harmless beyond a reasonable doubt.

[2] Defendant further notes that N.C.G.S. § 15A-1241 requires complete recordation of jury selection in capital trials. N.C.G.S. § 15A-1241(a) (1997) ("trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings"). Thus, the trial court also erred by failing to record its *ex parte* communication with Tanner. *See State v. Williams*, 339 N.C. at 31, 452 S.E.2d at 263. However, for the reasons stated above, we conclude that this failure was harmless.

[3] As for prospective jurors Gilbert and Mixon, defendant argues that the record shows that they were also excused off the record. We cannot agree since the record does not reflect that any actions were ever taken by Judge Lanier to excuse Gilbert and Mixon. As this Court stated in *Adams*, defendant bears the burden of demonstrating error from the record on appeal. *State v. Adams*, 335 N.C. at 409, 439 S.E.2d at 764. Thus, "defendant must show from the record that the trial judge examined off the record prospective jurors other than those named. It is not enough for defendant to assert that there may have been other impermissible *ex parte* communications. The record must reveal that such communications in fact occurred." *Id.* at 409-10, 439 S.E.2d at 764. Therefore, "whatever incompleteness may exist in the record precludes defendant from showing that error occurred as to any [prospective] juror other than those the trial judge excused or deferred on the record." *Id.* at 410, 439 S.E.2d at 764; *see also State v. Fleming*, 350 N.C. 109, 121, 512 S.E.2d 720, 730 (1999) (finding no harm to defendant where a prospective juror was erroneously called for *voir dire* to an already occupied seat and the record discloses no *voir dire* of her); *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988) (holding that "[w]here the record is

silent upon a particular point, the action of the trial court will be presumed correct"). Thus, this assignment of error is meritless.

Defendant next contends that the trial court erred in excusing four prospective jurors for cause based on their answers to death-qualifying questions, thereby denying defendant his statutory and constitutional rights. Defendant argues that prospective jurors Brenda Rose, Beverly Smith, Melody Tanner, and Angela Naylor unequivocally stated that they could consider both the death penalty and life imprisonment as possible penalties based on the evidence presented; thus, they were improperly excused for cause based on their responses to the unconstitutional, hypothetical question, "[C]ould you, yourself, vote to give somebody the death penalty?"

The test for determining when a prospective juror may be excused for cause is whether his views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The fact that a prospective juror "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" is not sufficient. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968). The decision to excuse a prospective juror is within the discretion of the trial court because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Wainwright v. Witt*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852.

[4] First, we note that defendant never objected to the allegedly unconstitutional, hypothetical question of whether the prospective juror herself could vote to recommend the death penalty propounded by the prosecutor in the case of prospective jurors Rose and Smith, and by the trial court in the case of prospective jurors Tanner and Naylor. Since none of the prospective jurors was actually excused based on her response to this question, and since "[t]his Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court," *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985), we need not address defendant's allegation that this question is unconstitutional.

[5] Next, applying the *Wainwright* standard set out above, we conclude that the trial court did not abuse its discretion in excusing

these prospective jurors for cause. Since all four prospective jurors clearly demonstrated their inability to render a verdict in accordance with the laws of the state, the trial court did not abuse its discretion by granting the State's for-cause challenges. *See* N.C.G.S. § 15A-1212(8) (1997) (providing that a challenge for cause may be made on the grounds that, regardless of the facts and circumstances, a juror would be unable to render a verdict in accordance with the laws of North Carolina).

When the prosecutor asked Rose whether her "feelings about the death penalty would prevent or substantially impair the performance of [her] duty as a juror in accordance with the evidence and the law in this case," she responded, "Probably so." The State challenged her for cause, and defendant attempted to rehabilitate her; however, after watching and listening to the entire *voir dire* and then hearing Rose state that she was not sure if she could follow the court's instructions, the trial court determined that "we can belabor this all day and she's going to be in the same position. I'm going to excuse her." Thus, we hold that defendant has failed to demonstrate how the trial court abused its discretion in granting the State's for-cause challenge of Rose.

Prospective juror Smith informed the prosecutor that she would be unable to set aside her personal feelings about the death penalty and follow the instructions. She also told the trial court that she could not return a recommendation of death no matter what the evidence or the facts. Defendant attempted to rehabilitate her; however, when the prosecutor later asked Smith whether her "feelings about returning a death penalty verdict would prevent or substantially impair [her] ability to serve as a juror in accordance with the evidence and the law in a death penalty case," Smith replied, "Yes, sir." The trial court then granted the State's challenge for cause. On appeal defendant contends that he should have been afforded another opportunity to rehabilitate Smith. We cannot agree. Defendant never asked the trial court for another opportunity to question Smith; further, "defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). Since Smith unequivocally stated that she could not recommend the death penalty under any circumstances, we hold that the trial court did not abuse its discretion in excusing her for cause.

The State challenged prospective juror Tanner after she indicated that "in no event and under no circumstances could [she] ever vote to return a death penalty regardless of what the evidence and the law might be." During rehabilitation Tanner replied that she could set aside her feelings and consider the death penalty. Nevertheless, she again told the prosecutor that her "feelings about the death penalty [would] prevent or substantially impair the performance of [her] duty as a juror in accordance with the evidence and the law in this case" and then told the trial court that she "could not return a recommendation that the defendant be sentenced to death no matter what the evidence or the facts were." Based on Tanner's *voir dire*, we hold that the trial court properly granted the State's challenge for cause.

Finally, defendant contends that prospective juror Naylor was improperly excused based on her ambivalence and equivocation regarding the death penalty. We disagree. Naylor stated that she might not be able to recommend a death sentence based on her religious principles and personal feelings and that these feelings could "prevent or substantially impair the performance of [her] duty as a juror in accordance with the evidence and the law in a case where the death penalty is an issue." Although she later indicated that she could consider both penalties, she then told the trial court that she did not know whether she could recommend the death penalty. The trial court found that Naylor was ambivalent and that "her personal and religious beliefs would impair, substantially impair her ability to follow the instructions" and granted the State's for-cause challenge. While the *voir dire* of this prospective juror may have indicated her ambivalence toward the death penalty, we hold that she was properly excused for cause because that testimony also demonstrated that she would be unable to render a verdict in accordance with the trial court's instructions and the laws of the state. *See State v. Benson*, 323 N.C. 318, 323, 372 S.E.2d 517, 520 (1988); *State v. Brown*, 320 N.C. 179, 189-90, 358 S.E.2d 1, 10, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

[6] Next, defendant argues that the trial court erred by permitting the State to "stake out" prospective jurors during *voir dire*. He contends that he was prejudiced by the prosecutor's informing prospective jurors that the vehicle into which defendant discharged his firearm was occupied by his wife and three small children. He further contends that the trial court erred by allowing the prosecutor to inadequately state the law regarding the felony-murder rule.

This Court has repeatedly held that questions which attempt to "stake out" the jurors and determine what kind of verdict the jurors would render under a given set of circumstances are improper. *See State v. Robinson*, 339 N.C. 263, 273, 451 S.E.2d 196, 202 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). However, "[t]he nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court." *State v. Bond*, 345 N.C. 1, 17, 478 S.E.2d 163, 171 (1996), *cert. denied*, —— U.S. ——, 138 L. Ed. 2d 1022 (1997).

During *voir dire* in this case, the prosecutor consistently inquired whether prospective jurors knew or read anything about defendant's case; and in doing so the prosecutor noted that defendant was charged with discharging a firearm into an occupied vehicle, which at the time was occupied by his wife and three small children. At the one instance in which defendant objected to the mentioning of this uncontested fact, the trial court found that "the information that [the prosecutor] is seeking would trigger a memory [by the prospective juror] if she had any of it and I think that would be as much to [defendant's] benefit as to [the State's]." We conclude that this is not a stake-out question, since it does not seek "to discover in advance what a prospective juror's decision will be under a certain state of the evidence." *State v. Richmond*, 347 N.C. 412, 425, 495 S.E.2d 677, 683, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 88 (1998). Furthermore, defendant failed to object to the prosecutor's mention of the fact that defendant's three children were in the vehicle at the time of the shooting, except during the *voir dire* of one prospective juror who was peremptorily excused by the State; the rule is that when defendant fails to object during trial, he has waived his right to complain further on appeal. *See State v. Strickland*, 290 N.C. 169, 180, 225 S.E.2d 531, 540 (1976).

[7] Likewise, we find no error in the prosecutor's outline of the felony-murder rule. During *voir dire* the prosecutor consistently informed prospective jurors that there are two ways that an individual can be guilty of first-degree murder: premeditation and deliberation or felony murder. The prosecutor routinely defined felony murder as a killing which occurs during the commission of a violent felony, such as discharging a firearm into an occupied vehicle. Defendant contends that by failing to inform prospective jurors of the State's burden of proving that defendant knew that the vehicle was occupied, the prosecutor inadequately stated the law. We disagree.

We note that defendant objected to only two instances during which the prosecutor discussed felony murder, and in both instances the prosecutor rephrased the question without objection. More important, though, an examination of the transcript reveals that the prosecutor's questions do not constitute inaccurate or inadequate statements of the law. An example of a felony for which a person can be found guilty of first-degree murder under the felony-murder rule is discharging a firearm into occupied property. *See* N.C.G.S. § 14-34.1 (1993). The prosecutor never intended, nor did defendant request the prosecutor, to list any elements of the offense. Moreover, defendant suffered no harm from the prosecutor's substitution of "vehicle" for "property" when using the crime as a sample felony. "[T]he questions certainly were not of such a character that the trial court's decision not to intervene *ex mero motu* constitutes an abuse of discretion." *State v. Jones*, 347 N.C. 193, 204, 491 S.E.2d 641, 648 (1997).

We hold that these questions did not seek to predetermine what kind of verdict prospective jurors would render; rather, they were designed to determine only if prospective jurors could follow the law and serve as impartial jurors. Therefore, defendant's assignment of error is meritless.

GUILT-INNOCENCE PHASE

Defendant next contends that the trial court erred by allowing publication to the jury of portrait-style photographs of each of defendant and the victim's three children. Defendant submits that publication of these three photographs of the children constituted prejudicial victim-impact evidence and violated his constitutional rights.

[8] During his testimony the victim's father identified four photographs, one of the victim and one each of the victim's children; and the prosecutor requested that they be published to the jury. Defendant, through his counsel, objected; the trial court sustained the objection as to the photographs of the children, but allowed publication of the victim's photograph, to which defendant has not assigned error. When the trial court sustains an objection, the objecting party has no basis for appeal absent a motion to strike or a request for a curative instruction. *State v. Barton*, 335 N.C. 696, 709-10, 441 S.E.2d 295, 302 (1994). Although we note that the trial court did later permit the witness to display the children's photographs to the jury from the witness stand, defendant did not object to this ruling. In any event, defendant's contention that the trial court allowed

inadmissible victim-impact evidence is meritless. The publication of the children's photographs to the jury, along with their names and birth dates, did not constitute "testimony which in any way described how the defendant's crimes impacted the victim's family and friends." *State v. Lee*, 335 N.C. at 279, 439 S.E.2d at 565. Thus, defendant's argument is dismissed.

In his next argument, defendant contends that the trial court erred by admitting hearsay evidence over his objection and by failing to intervene *ex mero motu* to prevent improper argument by the prosecution based upon that evidence.

[9] The challenged evidence concerns the relationship between defendant and the victim as testified to by seven witnesses. In addition to arguing that the testimony was inadmissible hearsay, defendant argues that the testimony was irrelevant. However, this Court has held that when a husband is charged with the murder of his wife, the State is permitted to present evidence of "frequent quarrels . . . and ill-treatment . . . as bearing on intent, malice, motive, premeditation and deliberation." *State v. Syriani*, 333 N.C. 350, 377, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993); *see also State v. Scott*, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (concluding that defendant's frequent arguments with the victim were admissible). Therefore, we reject defendant's argument that the evidence was irrelevant.

[10] Defendant first complains about the testimony of Duplin County Magistrate C.A. Miller. Miller testified, over objection, to the victim's statements regarding defendant's 23 August 1996 assault on her which resulted in an arrest warrant being issued against defendant. Defendant also objected to this arrest warrant being introduced into evidence and portions of it being read to the jury. In addition, defendant objected to the introduction of, and subsequent testimony regarding, a criminal summons against defendant for communicating threats to the victim, a warrant for domestic criminal trespass, and a judgment showing that defendant pled guilty in both cases.

Defendant is correct that, generally, allegations for and the contents of a warrant are inadmissible at trial as hearsay. *See State v. Wilson*, 322 N.C. 117, 137, 367 S.E.2d 589, 601 (1988). However, only general objections were lodged against the admission into evidence of the State's exhibits and succeeding testimony. Defendant stated the basis only for his objection to the reading of the domestic tres-

pass warrant, and the basis proffered was relevancy; but we have already stated that this evidence was relevant. Therefore, the objections are insufficient to preserve this issue for appellate review. *See State v. Robinson*, 339 N.C. at 276, 451 S.E.2d at 204.

Even assuming *arguendo* that defendant has properly preserved this issue, he is still not entitled to a new trial. During cross-examination of Miller, defendant elicited information regarding the assault on 23 August 1996; moreover, when defendant took the stand, he testified, on both direct and cross-examination, regarding the information that was contained in the summons and warrants. Furthermore, Edna Walker, the daughter of the victim's neighbor, later testified at length, without objection, regarding the 23 August 1996 assault. "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979); *see also State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989); *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

Defendant further challenges the admission of hearsay statements made by the victim to six different witnesses. These witnesses were rebuttal witnesses for the State. They testified to various domestic violence incidents between defendant and the victim and were called to, *inter alia*, rebut defendant's assertion that only once had he put his hands on the victim.

[11] During the testimony of Nannette Smith, defendant objected only once on the grounds of hearsay; and the trial court ruled that the testimony had "already been testified to." At other times defendant did not object on the grounds of hearsay, nor has defendant alleged plain error to the admission of other alleged hearsay evidence during Smith's testimony. Accordingly, defendant has waived appellate review of this issue. *See State v. Scott*, 343 N.C. at 332, 471 S.E.2d at 616 (holding that a question to which defendant did not object at trial or to which plain error has not been alleged has not been properly preserved for appellate review).

[12] Next, Ronald Trotter, the victim's brother, testified. Although defendant objected on numerous occasions, most of the objections were sustained or overruled on the basis that the same or similar evidence had been previously admitted. We hold that, as to the remaining hearsay objections, they were properly overruled by

the trial court since the statements reflected the victim's state of mind and were therefore admissible under Rule 803(3). *See* N.C.G.S. § 8C-1, Rule 803(3) (1992); *State v. Murillo*, 349 N.C. 573, 587, 509 S.E.2d 752, 760 (1998). By failing to object or allege plain error, defendant has again waived appellate review to the remainder of Trotter's testimony.

[13] Next, Delphine Smith testified regarding an incident when defendant broke the windows in the house, and the flying glass injured one of defendant's children. The only applicable objection defendant made was lodged after Smith had already responded to the question, and defendant made no motion to strike the answer. Thus, defendant has waived the objection, *see State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985), as well as further appellate review by failing to assign plain error.

Defendant also complains about certain testimony by Donald Brinson. However, defendant neither objected to this question nor alleged plain error; therefore, he has waived this argument. *See State v. Scott*, 343 N.C. at 332, 471 S.E.2d at 616. Likewise, during direct examination of Gregory Brinson and Edna Walker, defendant failed to object or to assign plain error to questions regarding alleged hearsay statements made by the victim to these witnesses. Accordingly, defendant's argument has not been properly preserved for appellate review. *See id.*

Finally, defendant argues that the trial court should have intervened *ex mero motu* to prevent the prosecution from making improper arguments to the jury based on the inadmissible hearsay evidence. Defendant does not refer this Court to any particular transcript pages containing allegedly improper remarks as required by Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure; however, a review of that portion of the prosecution's closing argument based on the allegedly inadmissible hearsay evidence reveals no gross impropriety requiring the trial court to intervene *ex mero motu*. *See State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998) (holding that when defendant fails to object at trial, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*). Moreover, since we have previously rejected defendant's argument that the evidence was improperly admitted, the prosecution was permitted to base its argument upon this evidence. *See State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (stating that "[c]ounsel may argue the facts in evi-

dence and all reasonable inferences that may be drawn therefrom"), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). Accordingly, this assignment of error is overruled.

[14] By other assignments of error, defendant contends that the trial court violated his constitutional and statutory rights by denying his motion to suppress, by overruling his objections to irrelevant and unfairly prejudicial evidence of alleged threats to others, and by failing to intervene *ex mero motu* to prevent improper argument based upon that evidence.

The trial court granted defendant's motion *in limine* to bar testimony as to specific instances of defendant's alleged criminal acts against someone other than the victim. Nonetheless, defendant alleges that the trial court allowed testimony regarding alleged threats and violent conduct directed against various members of the victim's family. These assignments of error are deemed waived for failure to comply with 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).

State v. Call, 349 N.C. 382, 408, 508 S.E.2d 496, 513 (1998). As in *Call*, defendant cites only various transcript pages and fails either to attach the pertinent portions of the transcript or to include a verbatim reproduction in his brief of the specific questions and answers which he wants this Court to review for error. *See id.* at 408-09, 508 S.E.2d at 513. We acknowledge that defendant reproduces a portion of the prosecutor's allegedly improper jury argument in his brief; however, he fails to advance any argument or cite any authority regarding any impropriety as required by the Rules of Appellate Procedure. *See* N.C. R. App. P. 28(a), (b)(5). Accordingly, these assignments of error have been waived and are overruled.

Defendant next contends that the trial court erred by denying his motions to dismiss the charges of discharging a firearm into an occupied vehicle, to consolidate these charges, and to set aside the verdict with respect to these charges.

On 28 October 1996 defendant was indicted for four counts of discharging a firearm into an occupied vehicle. On 18 July 1997 defendant was indicted for three additional counts of discharging a firearm into an occupied vehicle. Although at trial defendant moved to dismiss all charges at the close of all the evidence, defendant has abandoned review as to the four original charges of discharging a firearm into an occupied vehicle since he makes no argument on those charges in his brief. N.C. R. App. P. 28(b)(5). Defendant argues that there was insufficient evidence of the additional charges to go to the jury; thus, defendant submits that the trial court erred by denying his motion to dismiss these three charges.

In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *See State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). The State must present substantial evidence of each element of the offense charged. *See id.* "[T]he trial court should consider all evidence actually admitted, whether competent or not, that is favorable to the State." *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied," *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988); however, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed," *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

[15] The offense of discharging a firearm into an occupied vehicle requires, *inter alia*, that a person willfully or wantonly discharge a firearm into a vehicle while it is occupied. *See* N.C.G.S. § 14-34.1 (1993). However, defendant's sole contention is that the State presented insufficient evidence to support seven distinct charges of discharging a firearm into an occupied vehicle. Defendant bases this assertion on the fact that witnesses testified that they heard only four gunshots and that only four shell casings were recovered at the scene of the crime.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, we conclude that substantial evidence exists that defendant discharged his firearm into the victim's truck seven times. The State's evidence at trial tended to show the existence of seven bullet holes in the victim's vehicle. There were two bullet holes in the windshield, one near the middle of the windshield and one near the edge of the windshield on the passenger's side; there was a bullet hole below the windshield on the driver's side and one near the headlight on the driver's side; there was a bullet hole on the top of the truck's bed on the driver's side and one in the bed of the truck; and the driver's side door window was burst, which, based on the evidence, was caused by the fatal gunshot to the victim. Defendant's firearm had the capacity to hold nine bullets and was empty at the murder scene. Further, a State's witness testified that as of four o'clock on the day of the murder, the truck did not have any bullet holes or broken glass. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss the three additional charges of discharging a firearm into an occupied vehicle.

[16] Defendant further argues that the trial court erred by denying his motion to consolidate these charges. However, as discussed above, the evidence tended to show that defendant's actions were seven distinct and separate events. "Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place." *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995). Therefore, we conclude that the trial court properly denied defendant's motion to consolidate the charges of discharging a firearm into an occupied vehicle.

Finally, defendant argues that the trial court erred by denying his motion to set aside the verdict with respect to the three additional charges. The scope of this Court's review on appeal, however, "is confined to a consideration of those assignments of error set out in the record on appeal." N.C. R. App. P. 10(a). Such assignments of error are sufficient only when they direct "the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1). While the assignment of error addressing this argument in defendant's brief does contain references to the transcript, none of these referenced transcript pages indicate that defendant moved to

set aside the verdict; thus, this portion of the question presented is not properly before this Court.

[17] Defendant next contends that the trial court's failure to conduct the jurors to the courtroom following a request by the jurors constitutes reversible error. We disagree.

During deliberations at the guilt-innocence phase, the jury sent a note to the trial court requesting certain items of evidence. The trial court, after discussing with both parties which items were the subject of the request, in its discretion and with the consent of both parties, granted the jury's request. We agree with defendant that the trial court erred by failing to conduct the jury to the courtroom; however, we disagree with defendant that this error entitles him to a new trial.

N.C.G.S. § 15A-1233(a) mandates that "[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." Although he did not object to the failure of the trial court to conduct the jury to the courtroom, defendant is not precluded from raising this issue on appeal. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Since "no instructions were given by the trial court to fewer than all jurors," no constitutional violations exist. *State v. McLaughlin*, 320 N.C. 564, 570, 359 S.E.2d 768, 772 (1987); *see also State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995); *State v. Ashe*, 314 N.C. at 36, 40, 331 S.E.2d at 657, 659. In order to be entitled to a new trial, defendant must demonstrate that there is a reasonable possibility that a different result would have been reached had the trial court's error not occurred. *State v. McLaughlin*, 320 N.C. at 570, 359 S.E.2d at 772. Defendant cannot meet this burden. Not only did defendant's counsel agree with the trial court when it erroneously thought that it had discretion whether to bring the jury to the courtroom, but there was unanimous agreement among the State, the defendant, and the trial judge concerning the items requested by the jury; and the prosecution and defendant consented to permitting the jury to have those items. Therefore, defendant has not met his burden of showing prejudice as a result of the trial court's failure to follow the requirements of N.C.G.S. § 15A-1233(a). In his brief, defendant also contends that the trial court erred regarding a subsequent jury request for documents. However, defendant's assignment of error contains no mention of this incident; thus, it is beyond our scope of review. *See* N.C. R. App. P. 10(c)(1), 28(b)(5). In any event, the trial court brought the

jury back into the courtroom and followed the statutory requirements of N.C.G.S. § 15A-1233. We perceive no prejudice to defendant from the trial court's granting of the jury's subsequent request. Accordingly, this assignment of error is overruled.

[18] In his next argument, defendant contends that the trial court erred by denying his motions for mistrial and by instructing the jury to continue deliberations despite being deadlocked. Defendant argues that the trial court's coercion of the jury into reaching a verdict along with the victim's father's comments entitle him to a new trial.

The jury began deliberations around mid-afternoon on Tuesday, 2 September 1997. Later that afternoon the jury requested to see certain exhibits; still later that day the jury came back into the courtroom to ask a question. The trial court then recessed until 9:00 a.m. Wednesday. During the morning of 3 September 1997, the jury requested to see further exhibits; and after lunch the jury asked for the charge on first-degree felony murder and murder based on malice, premeditation, and deliberation. Subsequently, the jury sent a note to the trial court, was conducted back to the courtroom, and the following discussion occurred:

> THE COURT: All right. Madame Foreman, I understand that from your note that you're having difficulty in arriving at a verdict. Is that correct?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: Is this a difficulty that you think further deliberations will assist? In other words, do you think if you all deliberate more, you can sort of hang this thing out?
>
> FOREPERSON: I doubt it.
>
> THE COURT: All right. Well, then without asking you, you know, exactly what the verdict that you're considering are [sic], what kind of a numerical division do you have? Don't tell me which way it is but I mean five to seven, six to six?
>
> FOREPERSON: Ten to two.
>
> THE COURT: All right. Well, now, ladies and gentlemen, to be quite honest with you, you've, you know you've deliberated what I know seems to be a long time for you but for this type of case, this is not an ordinately long period of deliberations.

But I'm going to reread you a part of the instructions that I gave you earlier.

Now, as jurors, you all have [a] duty to consult with one another and to deliberate with a view towards reaching an agreement. If it can be done without violence to individual judgment. Each of you must decide the case for yourselves, however. But only after an impartial consideration on the evidence with your fellow jurors. In the course of your deliberation, you should not hesitate to re-examine your own views and change your opinion if you're convinced that you are in error but none of you should surrender your honest conviction as to the weight or effect of the evidence solely for the purpose of satisfying the opinion of a fellow juror or . . . solely for the purpose of returning a verdict. Your verdict should speak the truth. Your vote should speak your truth. Now, having said that, I'm going to ask that you return to the jury room and do a little bit more deliberating. And, you know, if you can resolve your differences. If you cannot honestly do it, well, so be it. I don't want you to think that I'm trying to force you into a verdict. That is not the purpose of the remarks I gave you. Do you understand that?

. . . .

. . . Well let's let them deliberate another thirty minutes or so and then we'll take their temperature. You know, I don't object to coming, you know coming back tomorrow. We'll just have to see.

Since the jury had not reached a verdict, the trial court recessed for the evening.

On Thursday morning the jury was escorted into the courtroom; but before the trial court had an opportunity to ask the jury to resume deliberations, defendant interrupted.

THE COURT: All right. Well, I'm going to ask that you return to your jury room and resume your deliberations. Remember the instructions—

MR. NOBLES [defendant]: I'm not going to be quite [sic]. Okay. Judge—

MR. ANDREWS [prosecutor]: Your Honor—

MR. NOBLES: I'm not going to sit idly by—

THE COURT: Sir, you're going to be quiet as long as the jury's present.

MR. NOBLES: And, let them railroad me into a death sentence. Okay. I mean I have the stuff right here—and I'm

THE COURT: Take the jury—take the jury, take the jury out.

MR. NOBLES: I'm not going to do it. I'm not going to let them sit here and railroad me into a death sentence.

(Jury is returning to the jury room.)

MR. TROTTER [victim's father]: You're not being railroaded. You—

THE COURT: Sir, you sit. You sit down.

THE BAILIFF: You could be put in jail.

MR. NOBLES: God have mercy.

THE BAILIFF: Calm down.

MR. NOBLES: I pray for you and you seek my end. God have mercy.

(Defense counsel trying to speak with defendant.)

MR. NOBLES: I'm not going to hush.

THE BAILIFF: Get some backup.

(JURY IS OUT OF THE COURTROOM)

Out of the presence of the jury, defendant expressed his thoughts to the trial court; and the jury was again brought back to the courtroom, only to be interrupted again by defendant.

(Jury returns to the courtroom.)

MR. NOBLES: The fact that I was handcuffed to a floor for eleven hours and then they said up there I never gave a statement.

THE COURT: Sir, you will be quiet while the jury is in.

MR. NOBLES: It's a railroad job. That's all it is.

Following this exchange the jury was reinstructed by the trial court and sent back for deliberations. Defense counsel then moved for a mistrial based on the jury's failure to reach a verdict after almost ten

hours of deliberations over three days and the courtroom outburst precipitated by defendant, which included a response from the audience. The trial court denied the motion. When the court next reconvened the jury in the courtroom, the following colloquy ensued:

> THE COURT: All right. Madame Foreman, I am now inquiring as how you folks are coming towards reaching a verdict. Are you still where you started?
>
> FOREMAN: Eleven to one.
>
> THE COURT: Okay. Now, do you think further deliberations would enable you to reach a verdict?
>
> FOREMAN: It's kind of tough to say.
>
> THE COURT: What about the rest of you?
>
> JUROR NUMBER TEN: Possibly.
>
> THE COURT: You know, like I say, we're not trying to force you into any kind of verdict nor are we trying to make anybody forget or overrule their own deeply held convictions. And, the reason for my inquiry is you know to as to whether we do need to resume deliberations or not.
>
> JUROR NUMBER NINE: We do. We do need to resume.

The trial court then recessed for lunch, and at 2:00 p.m. the jury resumed deliberations. Shortly thereafter the jury returned its verdicts. At defendant's request the jurors were polled, and all assented to the verdicts. In all the jury had deliberated approximately eleven hours, spanning three days.

In determining whether the trial court coerced a verdict by the jury, this Court must consider the totality of the circumstances. *See State v. Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995). "An inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive. Without more, it is not a violation of the defendant's right to a jury trial." *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988). Some of the factors to be considered include whether the trial court conveyed the impression that it was irritated with the jury for not reaching a verdict, whether the trial court intimated that it would hold the jury until it reached a verdict, and whether the trial court told the jury that a retrial would burden the court system. *See id.* The record demonstrates that the trial court did none of these things. The fact that the jury delibera-

tions lasted nearly eleven hours and spanned three days does not show that the trial court coerced a verdict. *See id.* at 465, 368 S.E.2d at 609.

Likewise, we find no merit to defendant's argument that the trial court erred in denying his motion for mistrial due to deadlock. "Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). After discovering that the jury was having difficulty reaching a verdict, the transcript reveals that the trial court properly reinstructed the jury as to its duty under N.C.G.S. § 15A-1235(b) to consult with one another, to decide for oneself, to reexamine one's views if necessary, but not to surrender one's honest convictions. The trial court then asked the jury to continue deliberating, and soon thereafter the court recessed for the evening. The next morning the jury continued deliberating, and shortly before lunch the jury informed the trial court that further deliberations might be worthwhile. Not long after the lunch recess, the jury reached it verdicts.

The statements of the jurors and their subsequent actions validate the trial court's conclusion that further deliberations would be worthwhile. When the totality of the circumstances are considered, and giving proper deference to the trial court's discretion, we conclude that the trial court did not abuse its discretion by denying defendant's motion for mistrial. *See State v. Porter*, 340 N.C. at 337, 457 S.E.2d at 724-25. The decision to convict a person of first-degree murder and six counts of discharging a firearm into an occupied vehicle is a serious matter; considerable deliberation is warranted.

[19] Further, defendant argues that the remarks by the victim's father from the audience during jury deliberations prejudiced his case. According to N.C.G.S. § 15A-1061, "[t]he 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." The jury heard one statement from the victim's father in response to defendant's contention that he was being railroaded; defendant failed to request any type of curative instruction. We hold that the outburst was not so prejudicial to defendant as to render the denial of the motion for mistrial a manifest abuse of dis-

cretion reversible on appeal. *See State v. Ward*, 338 N.C. 64, 93, 449 S.E.2d 709, 724 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). Furthermore, we find no merit to defendant's contention that the trial court violated its statutory duty to make a true, complete, and accurate record of his trial. *See* N.C.G.S. § 15A-1241. Defendant's assignments of error are overruled.

[20] Next, defendant contends that the trial court erred by denying his motion to repoll a hesitant juror individually and his alternative motion to repoll the entire jury. Defendant argues that juror Edith Pope had difficulty assenting to the guilty verdict during the jury poll and that the denial of his motions to repoll entitles him to a new trial. We disagree.

The transcript reveals that during the polling of the jury, juror Pope did not respond for a few seconds after being asked, "Is this still your verdict? Do you still assent thereto?" She then responded, "Yes." Following the jury poll, defendant requested that juror Pope "be polled individually and outside the presence of the other jurors." The trial court denied the motion, but allowed defendant until Monday morning to present authority for his request to individually repoll juror Pope outside the presence of the other jurors.

At trial and in his brief before this Court, defendant failed to cite any authority or put forth any argument in support of his motion to have juror Pope polled individually and outside the presence of the other jurors. As such, this contention is deemed abandoned. *See State v. Locklear*, 349 N.C. 118, 165, 505 S.E.2d 277, 305 (1998) (holding that, pursuant to N.C. R. App. P. 28(b)(5), assignments of error not supported by reason, argument, or authority will be taken as abandoned), *cert. denied*, — U.S. —, — L. Ed. 2d — (Apr. 19, 1999) (No. 98-8310).

[21] Moreover, defendant also waived his right to repoll the entire jury. N.C.G.S. § 15A-1238 grants defendant the right to have the jury polled before the jury has dispersed. In this case, the jury was polled, defendant's request to have juror Pope repolled individually and outside the presence of the other jurors was denied, and the court was recessed for the weekend. After being dispersed for the weekend, defendant made his alternative motion to repoll the entire jury on Monday morning. Defendant waived his right to repoll the jury by failing to make a timely motion. *See State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 403 (1991) (holding that giving the jury a thirty-minute break means the jury has been "dispersed" within the meaning of

N.C.G.S. § 15A-1238). Further, the record does not support defendant's intimation that the trial court did not accept the verdict and that the verdict was not final. This assignment of error is without merit.

[22] By his next contention defendant argues that the trial court failed to exercise discretion or abused its discretion in excusing juror Jodie Williams for hardship following the verdict in the guilt-innocence phase and prior to the sentencing proceeding of his trial.

After completion of the guilt-innocence phase, juror Williams, who was pregnant, gave the trial court a note from her physician that she needed to be excused from jury duty on account of stress. The trial judge informed the parties that he did not know if we have "a whole lot of choice." After juror Williams indicated that her physician told her that jury duty could cause problems with her pregnancy, the trial judge excused her for medical reasons, noting, "Well, I don't see that I have much choice, gentlemen." Defendant objected for the record.

First, defendant contends that the trial court failed to exercise discretion in excusing juror Williams since the record reveals that it repeatedly stated that it had "no choice" regarding juror Williams' request. We disagree. N.C.G.S. §§ 15A-1215(a) and 15A-2000(a)(2) provide that an alternate juror may replace any juror who "dies, becomes incapacitated or disqualified, or is discharged for any reason" before the jury begins its deliberations on the issue of penalty. The trial court never stated that it had "no choice." Instead, given juror Williams' medical condition, the trial court determined that it did not have "much choice" or "a whole lot of choice." We hold that the record demonstrates that the trial court did exercise its discretion in excusing juror Williams.

[23] Next, defendant argues that the trial court abused its discretion by excusing juror Williams. As previously stated, N.C.G.S. § 15A-2000(a)(2) expressly permits the replacement of a juror after the guilt-innocence phase and prior to the sentencing proceeding. Moreover, in *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980), we held that the trial court "has broad discretion in supervising the selection of the jury . . . [and that i]t is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel." Thus, we detect no abuse of discretion from the trial court's decision to excuse a juror whose physician had determined that jury duty could cause complications with her preg-

nancy. *See State v. Holden*, 321 N.C. 125, 151-52, 362 S.E.2d 513, 530 (1987) (holding no abuse of discretion where trial court found that it had "no alternative but to dismiss" juror after guilt phase upon learning that juror would not impose the death sentence under any circumstances), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988); *see also State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989) (ascertaining no abuse of discretion in judge's decision to replace juror who had child-care problems, after both parties had presented all their evidence in guilt-innocence phase), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990); *State v. McLaughlin*, 323 N.C. 68, 101, 372 S.E.2d 49, 70 (1988) (failing to find an abuse of discretion where juror excused between guilt-innocence phase and sentencing proceeding was distraught and highly emotional), *cert. denied*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990).

Finally, defendant appears to argue that the excusal of juror Williams was arbitrary since the trial court refused to excuse juror Jonathan Stegal when he presented a note from his physician that jury duty could cause medical complications. However, the record reveals that the trial court took steps to ensure that being on the panel would not create any serious health problems to juror Stegal; and since defendant did not object to juror Stegal remaining on the panel, it can only be assumed that juror Stegal was not at medical risk. Further, defendant has not assigned as error the failure to excuse juror Stegal; therefore, any argument related to this issue is deemed abandoned. *See* N.C. R. App. P. 28(b)(5). Thus, we find no merit to defendant's argument.

SENTENCING PROCEEDING

In another assignment of error, defendant contends that the trial court erroneously instructed the jury regarding one of the aggravating circumstances submitted. Defendant argues that the trial court's instruction relieved the State of its burden to prove each element of the (e)(10) aggravating circumstance, that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-2000(e)(10) (1997).

[24] Defendant did not object to these instructions at trial; our review, therefore, is limited to review for plain error. *See* N.C. R. App. P. 10(c)(4). Although in his assignment of error he "specifically and distinctly contended" pursuant to Rule 10(c)(4) of the Rules of Appellate Procedure that the error amounted to plain error, defend-

ant failed to argue in his brief that the trial court's instruction amounted to plain error. *See* N.C. R. App. P. 28(a), (b)(5). Accordingly, defendant has waived appellate review of this assignment of error. *See State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995). Nevertheless, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review defendant's contention based on plain error. *See State v. Williams*, 350 N.C. 1, 10, 510 S.E.2d 626, 633 (1999); *State v. Adams*, 347 N.C. 48, 62, 490 S.E.2d 220, 227 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 878 (1998); *State v. Holden*, 346 N.C. 404, 434-35, 488 S.E.2d 514, 530-31 (1997), *cert. denied*, — U.S. —, 140 L. Ed. 2d 132 (1998). "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. at 435, 488 S.E.2d at 531.

[25] During the capital sentencing proceeding, the trial court instructed the jury regarding the (e)(10) aggravating circumstance as follows:

> The second aggravating circumstance which you may consider is 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? A 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 that 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 risk. I instruct you that a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim he was using a weapon and that this weapon would normally be hazardous to the lives of more than one person and that the defendant used the weapon and thereby created a risk of death to more than one person and that the risk was great and that the defendant knew that he was thereby creating such a great risk, you would find this aggravating circumstance and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one

> or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.

Defendant relies on *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998), in support of his position that the trial court's instructions relieved the State of its burden to prove each and every element of the (e)(10) aggravating circumstance. *See State v. White*, 300 N.C. 494, 499, 268 S.E.2d 481, 485 (1980) (holding that principles of due process require the State to prove beyond a reasonable doubt every essential element of the charged crime) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975)). We agree.

In *Davis* this Court held that "the jury must determine whether the weapon in its normal use is hazardous to the lives of more than one person." *State v. Davis*, 349 N.C. at 48-49, 506 S.E.2d at 481. However, in the case *sub judice* the trial court's instruction that "a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person" effectively took from the jury's consideration whether the weapon used in this case is normally hazardous to the lives of more than one person. We conclude that this error relieved the State of its burden to prove this element of the aggravating circumstance in violation of due process principles; further, the trial court's instructions constituted plain error. Accordingly, defendant is entitled to a new capital sentencing proceeding.

[26] We now address one further issue raised by the parties since it is likely to arise again at defendant's new sentencing hearing. Defendant contends that the trial court erroneously overruled his objection to the prosecution's improper jury argument during the sentencing proceeding. During his jury argument the prosecutor, in an attempt to rebut defendant's mitigating circumstances related to defendant's home environment, argued as follows:

> Who might be the best person in the world to testify about his home situation? His mother, who lives out there on Paul Ed Dail Road. She wouldn't even come up here.
>
> MR. HALL [defense counsel]: Objection.
>
> THE COURT: Well,—
>
> MR. ANDREWS [prosecutor]: I'll rephrase it, Your Honor.
>
> THE COURT: Okay. Please do.

MR. ANDREWS: She didn't even come up here to testify—

MR. HALL: Objection.

MR. ANDREWS: On his behalf.

THE COURT: Overruled at this point.

MR. ANDREWS: His own mother. Does that say something to you about whether or not these flimsy mitigating circumstances are really true or not?

Thus, the prosecution left the jury to infer that had defendant's mother testified, it would not have been beneficial to her son's case. Although the record is silent as to the reasons why defendant's mother did not testify, extenuating circumstances appear to have existed. In any event, the insinuation made by the prosecutor was not supported by the record.

> It is fair to say that the average jury, in a greater or less[er] degree, has confidence that these obligations [of fairness], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935). Thus, defendant suffered prejudice when the trial court erroneously overruled his objection to the prosecutor's impermissible line of argument.

We do not pass on defendant's other assignments of error as the questions they pose may not arise at a new sentencing proceeding. We conclude that the guilt-innocence phase of defendant's trial was free from prejudicial error. However, we also conclude that the trial court committed reversible error during the sentencing proceeding by erroneously instructing the jury regarding the (e)(10) aggravating circumstance. Therefore, we vacate defendant's death sentence and remand for a new capital sentencing proceeding.

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. LAWRENCE EUGENE PETERSON, JR.

No. 328A97

(Filed 25 June 1999)

1. Jury— capital sentencing—instructions regarding parole

The trial court did not err in a capital sentencing hearing by not instructing the jury that life imprisonment meant life imprisonment without parole at the beginning of the jury selection process as well as on each and every other occasion in which the issue of life imprisonment arose. The trial court complied with the provisions of the capital sentencing statute which provide for such an instruction, nothing in the record demonstrates that the jury did not believe the trial court or did not follow the instructions, and the trial court did not permit the prosecutor to inject inaccurate and misleading information into the sentencing proceeding which defendant was not permitted to rebut. N.C.G.S. § 15A-2002.

2. Jury— capital sentencing—excusal for cause

The trial court did not abuse its discretion in a capital sentencing proceeding by concluding that a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath and excusing him for cause.

3. Sentencing— capital sentencing—mitigating circumstances—no significant history of prior criminal activity

The trial court did not err in a capital sentencing proceeding by submitting to the jury the statutory mitigating circumstance that defendant possessed no significant history of prior criminal activity even though defense counsel objected to the submission and believed that the evidence did not support it. Defendant's prior history consists of robbery and armed robbery convictions arising from a single event when he was nineteen years old; the crimes in this case were committed when he was twenty-five years old; defendant served his time for the prior offenses; and all the evidence indicated that he had put his criminal past behind him, established a stable marriage, and held several jobs to make his living. The prosecution did not argue that defendant requested this mitigator and the trial court was careful to instruct the jury that defendant did not request its submission but that the

submission was required as a matter of law. The submission of the no significant history of prior criminal activity mitigator did not prejudice defendant nor injure the defense team's credibility. N.C.G.S. § 15A-2000(f)(1).

4. Sentencing— capital sentencing—mitigating circumstances—defendant's age

The trial court did not err in a capital sentencing proceeding by not submitting the statutory mitigating circumstance of defendant's age at the time of the crime. While defendant presented evidence that he led a restrained childhood under a strict guardian and did not make many friends, the record reveals no evidence from which a jury could conclude that defendant was mentally immature and uncontroverted evidence showed that defendant completed his GED, that his reading skills were at a normal level for his educational level, that he established a stable marital relationship, that he handled his own finances, that he worked for his father-in-law when his father-in-law was ill, that he worked at American Express as a customer service representative, and that he worked at McDonald's as a crew leader. N.C.G.S. § 15A-2000(f)(7).

5. Sentencing— capital sentencing—mitigating circumstances—peremptory instructions

The trial court did not err in a capital sentencing proceeding by refusing to give peremptory instructions concerning nonstatutory mitigating circumstances where, despite defendant's contention, he did not make a specific request for any peremptory instructions.

6. Criminal law— prosecutor's closing argument—capital sentencing

The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the prosecutor's closing argument as to the victim's last thoughts and that she died because of greed. Considered in context, the argument was not urging jurors to consider facts without an evidentiary basis but was arguing permissible inferences by asking the jurors to consider defendant's apparent motive.

7. Criminal law— prosecutor's closing argument—capital sentencing

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the prosecutor's closing argument that the jury was the conscience of the community. The prosecutor did not ask the jurors to render their decision based on community sentiment and it has been stated repeatedly that the prosecutor may properly urge the jury to act as the voice and conscience of the community.

8. Criminal law— prosecutor's closing argument—capital sentencing

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu where the prosecutor argued as to the victim being a fine woman who had been married almost forty-five years; as to the randomness of the killing and that the victim had not provoked defendant; and that murder was defendant's business and that this murder was committed for pecuniary gain.

9. Sentencing— capital sentencing—instructions—extenuating circumstances

The pattern jury instruction used by the trial court to define the term "mitigating circumstance" in capital sentencing is internally consistent and meaningful and does not confuse jurors to such a degree that it violates principles of due process and fundamental fairness.

10. Sentencing— capital sentencing—instructions—no conflict with issues and recommendation form

The trial court did not err in a capital sentencing proceeding where defendant contended that the court's oral instructions concerning the issues and recommendation as to punishment form conflicted with the information on the form. The oral instructions reflect nothing more than that the trial court, as promised, took up the four issues on the form in greater detail in explaining the form to them. No conflict exists between the issue as stated on the form and the trial court's instructions.

11. Sentencing— capital sentencing—not vague and overbroad—consideration of mitigating factors

The trial court did not err in a capital sentencing proceeding where defendant contended that the death penalty statute is

vague and overbroad and that the jury did not give just consideration to undisputed mitigating factors. The record reflects that evidence was presented which reasonable jurors could conclude would not permit their finding the statutory mitigating circumstances; the jury could have found that the nonstatutory mitigating circumstances did not possess any mitigating value even if they found that all of the nonstatutory mitigating circumstances existed, so that their failure to find these circumstances despite uncontroverted evidence does not render their decision arbitrary or reflect a lack of due consideration; and defendant is in error in asserting that all the nonstatutory mitigating circumstances were undisputed.

12. Sentencing— capital sentencing—death sentence not arbitrary

The jury's findings of two aggravating circumstances in a capital sentencing proceeding were supported by the evidence and nothing in the record suggests that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

13. Sentencing— capital sentencing—death penalty—proportionate

A death penalty for a first-degree murder was proportionate where defendant, using an assault rifle, gunned down a totally defenseless elderly woman after she had already given him all the money from the cash register in the family-run grocery store. This case is not substantially similar to any of the cases in which the death sentence was found disproportionate and is more similar to cases in which the death sentence was found proportionate.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms, J., on 12 December 1996 in Superior Court, Richmond County, upon defendant's plea of guilty to first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment was allowed by the Supreme Court on 14 September 1998. Heard in the Supreme Court 13 April 1999.

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

Thomas R. Sallenger for defendant-appellant.

PARKER, Justice.

Defendant was indicted on 19 February 1996 for the 5 July 1995 robbery with a dangerous weapon and first-degree murder of sixty-seven-year-old Jewel Scarboro Braswell, the proprietor of a grocery and general store in Richmond County. On 2 December 1996, prior to jury selection, defendant entered a plea of guilty to first-degree murder on the basis of premeditation and deliberation and a plea of guilty to robbery with a dangerous weapon. At the conclusion of a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use of violence and that the murder was committed for pecuniary gain. Of the three statutory and twelve nonstatutory mitigating circumstances submitted to the jury, none was found by any of the jurors. The jury recommended a sentence of death for the first-degree murder, and the trial court sentenced defendant accordingly. The trial court also sentenced defendant to 103 to 133 months' imprisonment for the robbery conviction.

The evidence presented at the sentencing hearing showed that around 9:00 a.m. on the morning of 5 July 1995, defendant, twenty-five years old at the time, pawned some appliances at a local pawn shop in Winston-Salem and redeemed his Chinese SKS semiautomatic assault rifle, a weapon that can be bought in many department stores and that holds ten rounds of ammunition per magazine clip. Around midday he bought some gas and a soft drink in Richmond County at Braswell's Grocery. Mr. Lewis Braswell, sixty-seven, waited on defendant and gave him his change. Defendant asked Mr. Braswell if he could pull his car over and rest for a while, and Mr. Braswell replied that that would be fine. Mrs. Jewel Braswell, also sixty-seven years old and the wife of Lewis Braswell for forty-four years, then came over from their home, directly adjacent to the store, and took care of the store while Mr. Braswell went home to eat lunch.

While in his kitchen, Mr. Braswell heard defendant's voice over the intercom connecting the house to the store; so he walked back to the store. Looking in the back window of the store, he saw his wife showing defendant out the front door and telling him, "Drive careful out there; there's a lot of traffic on the road today." Mr. Braswell then returned to his house to eat lunch. He then heard defendant's voice over the intercom a second time and, thinking something was not right, went back to the store again. Halfway there, he heard the rapid firing of gunshots.

When Mr. Braswell reached the rear window of the store, he observed defendant, alone, walking out the front door with what looked like a rifle in his left hand down by his side. Mr. Braswell entered and found his wife behind the cash register, bloodied and with no pulse. Mr. Braswell grabbed his twelve-gauge shotgun, ran out the front door, and saw defendant pulling away. Braswell fired two shots, striking defendant's vehicle; but defendant got away, driving north. Mr. Braswell then called for an ambulance and for the police.

Law enforcement officers quickly tracked defendant's vehicle. Ultimately, defendant swerved off the road onto the right-hand shoulder, exited the vehicle, and was arrested. The officers found the assault rifle on the back seat with the safety off, one round in the chamber, and four more bullets in the magazine. Defendant produced $69.00 from his pants pocket as the proceeds from the robbery and killing. He also gave a statement to police indicating that when he went back into the store with the rifle, he ordered the victim to open the cash register and give him the money, and then shot the victim.

The pathologist who performed the autopsy on Mrs. Braswell testified that he found five gunshot wounds that passed completely through her body. Four of those wounds caused massive hemorrhaging and damage to the lungs, liver, bowel, and spinal cord: (1) one entered the right chest and exited out the right back; (2) another entered just above the right clavicle and exited further down on the right back; (3) a third entered the base of the neck and exited out the right shoulder region; (4) another entered the right upper abdomen and exited above the right buttock region; and (5) the fifth wound was to the little finger of the right hand. The cause of death was any of the four primary wounds. There were only a few tiny pieces of bullet fragments left in the body. In the counter area of the store, behind where Mrs. Braswell had been sitting when she was shot, investigators found five bullet holes and numerous bullet fragments. Investigators also found five shell casings in the store.

In support of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance, the State introduced into evidence copies of three 1989 indictments and judgments showing that defendant had pled guilty to two counts of common law robbery and one count of armed robbery in connection with crimes committed in downtown Asheville in 1989. Defendant served his sentence for those offenses and was released from prison in 1994.

Defendant presented evidence from several of his managers and supervisors, who were shocked when they heard that defendant was charged with murder. Defendant's wife testified that they had moved to Winston-Salem when her father became ill and required assistance with his construction business. Defendant helped run the business for five or six months during his father-in-law's illness. She testified that she never saw defendant exhibit any bizarre behavior and that he sometimes suffered from depression but took no medication for it. Defendant and his wife's family maintained a close relationship, gathering for cookouts at least twice a week and helping each other with household chores. Defendant's father-in-law testified that defendant did a good job running the construction business while he recuperated. He detected nothing in defendant's character or demeanor suggesting he suffered from any mental disability.

Dr. William B. Scarborough, Jr., an expert in psychology, testified that he examined defendant and diagnosed him with "major depression of a recurrent type with what we call some psychotic features" but admitted that he possessed no evidence that defendant suffered from a psychotic episode at the time of the murder. Dr. Scarborough also found alcohol dependence and could not rule out marijuana dependence. Dr. Scarborough described defendant's childhood as "constricted," as he was raised primarily by his great-grandmother, who was critical and mean, rarely allowed defendant and his brother to venture outside of her yard, and whipped the boys with whatever she had in her hand.

On appeal to this Court, defendant brings forward seventeen assignments of error. For the reasons stated herein, we conclude that defendant's capital sentencing proceeding was free from prejudicial error and that the death sentence is not disproportionate.

JURY SELECTION

[1] By one assignment of error, defendant contends that the trial court erred in failing to instruct the jury, at the beginning of the jury selection process, regarding defendant's ineligibility for parole if sentenced to life in prison. Defendant points specifically to the court's ruling on defendant's objection during the State's *voir dire* when the prosecutor, in explaining the sentencing proceeding and what it means when the jury "recommends" a sentence to the court, stated:

> [PROSECUTOR]: Since the defendant has pled guilty . . . the issue before the jury is going to be a recommendation of punish-

ment to the Court. . . . Do not be misled by the phrase "recommendation." . . . [The judge] will enter the recommendation that the jury comes back with as their verdict. You will be given two choices, either death, the death penalty, or life imprisonment.

[DEFENSE COUNSEL]: We're going to object. It would be life in prison without parole.

COURT: Overruled.

[PROSECUTOR]: The defendant will be sentenced according to your recommendation by the judge. Do you understand that? Does everybody understand that?

Defendant concedes that later in the proceedings, during the charge to the jury prior to deliberation, the trial court instructed the jury that life imprisonment meant life imprisonment without parole. We also note that the jury was informed, by defense counsel during *voir dire* and by both the prosecution and defense counsel during closing arguments, that life imprisonment means life imprisonment without parole. Nevertheless defendant asserts that his due process rights were violated when the trial court also failed to instruct the jury during *voir dire*, as well as on each and every other occasion in which the issue of life imprisonment arose, that life imprisonment meant life imprisonment without parole. We do not agree.

The trial court in this case complied with the provisions of the capital sentencing statute, which provides in part that "[t]he judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (1997). Nothing in the record demonstrates that the jury did not believe the trial court or did not follow its instructions as given in the charge. *See State v. Smith*, 347 N.C. 453, 460, 496 S.E.2d 357, 361, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 91 (1998); *State v. Neal*, 346 N.C. 608, 617-18, 487 S.E.2d 734, 740 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 131 (1998). Similarly, the trial court did not, as defendant asserts, permit the prosecutor to inject inaccurate and misleading information into the sentencing proceeding which defendant was not permitted to rebut. The prosecutor's statement was not an incorrect statement of law. Defendant has shown neither error nor prejudice, and this assignment of error is overruled.

[2] In the next assignment of error, defendant contends that the trial court denied his rights under both the North Carolina Constitution

and the United States Constitution by erroneously allowing the State's excusal for cause of prospective juror Calvert. The test for determining when a juror may be excused for cause is whether his views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The decision as to whether a juror's views would prevent or substantially impair the performance of his duties is within the trial court's broad discretion. *State v. Gregory*, 340 N.C. 365, 394, 459 S.E.2d 638, 655 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). The fact that a prospective juror "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" is not sufficient to support an excusal for cause. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968). Here, defendant argues that the excusal of prospective juror Calvert violated the standard in *Wainwright*, and that Mr. Calvert's objections to the death penalty were general. After reviewing the transcript, we disagree.

Prospective juror Calvert was clear when he stated, "I cannot willfully tell somebody that they are to die." The prosecutor continued questioning him, asking, "Are those feelings so strong that you could not consider the death penalty as a possible verdict in the case?" He answered, "Yes, sir." Finally, Mr. Calvert answered "yes, sir" when the prosecutor inquired if Mr. Calvert's feelings were so strong that he could not consider death as a possible verdict regardless of the evidence. Based on this colloquy, we cannot say that the trial court abused its discretion in concluding that prospective juror Calvert's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. We overrule this assignment of error.

SENTENCING ISSUES

[3] In another assignment of error, defendant contends that the trial court erred by submitting to the jury the (f)(1) statutory mitigating circumstance that defendant possessed no significant history of prior criminal activity, *see* N.C.G.S. § 15A-2000(f)(1) (1997), even though defense counsel objected to the submission and believed that the evidence did not support the submission. Defendant contends that this injured the defense team's credibility before the jury and saddled the defense with an impossible mitigating circumstance that it could not

defend, thereby violating defendant's Sixth Amendment rights to effective assistance of counsel and to develop and present his own theory of the case without outside interference.

Preliminarily, we note that a trial court is required by statute to submit to the jury any statutory mitigating circumstance supported by the evidence regardless of whether the defendant objects to it or requests it. *State v. Bonnett*, 348 N.C. 417, 443, 502 S.E.2d 563, 580 (1998), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 907 (1999). Thus, there is no Sixth Amendment violation.

The test for submitting the (f)(1) mitigating circumstance is whether a rational juror could conclude from the evidence that the defendant had no significant history of prior criminal activity. *State v. Jones*, 346 N.C. 704, 715, 487 S.E.2d 714, 721 (1997). A significant history for purposes of N.C.G.S. § 15A-2000(f)(1) is one that is likely to have influence or effect upon the recommendation of the jury as to the crime for which the defendant is being sentenced. *Id.* When the trial court is deciding whether a rational juror could reasonably find the (f)(1) circumstance to exist, the "nature and age of the prior criminal activities" are important considerations. *State v. Geddie*, 345 N.C. 73, 102, 478 S.E.2d 146, 161 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 43 (1997).

In *State v. Walker*, 343 N.C. 216, 469 S.E.2d 919, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996), the defendant was tried and convicted of first-degree murder based on premeditation and deliberation and conspiracy to commit murder. At sentencing, evidence was presented that the defendant had a history that included one conviction for attempted second-degree murder; and there were also reports, although no convictions, that the defendant had sold drugs. *Id.* at 223, 469 S.E.2d at 922-23. In that case the defendant's previous crime occurred when he was eighteen years old, while the crime for which he was being sentenced occurred when he was twenty-seven, with no intervening convictions. *Id.* We held that a reasonable juror could infer from this evidence that the defendant's prior criminal activity was not significant and that submission of the (f)(1) mitigator was not prejudicial to the defendant. *Id.* at 223, 469 S.E.2d at 923.

Similarly, in the present case, defendant's prior history consists of robbery and armed robbery convictions arising from a single event on 6 August 1989, when defendant was nineteen years old. Defendant served his time for those offenses; and all the evidence indicated that defendant had put his criminal past behind him, established a stable

marriage, and held several jobs to make his living. He had no other convictions. Defendant committed the crimes in this case on 5 July 1995, when he was twenty-five years old. Thus, we hold as we did in *Walker* that the submission of the (f)(1) mitigator did not prejudice defendant. Nor did it injure the defense team's credibility before the jury. The prosecution did not argue that defendant requested the (f)(1) mitigator, and the trial court was careful to instruct the jury that defendant did not request its submission but that its submission was "required as a matter of law because there is some evidence from which you could but are not required to find this mitigating circumstance." Defendant's assignment of error is overruled.

[4] In the next assignment of error, defendant contends that 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-five years old at the time of the offense, he argues that there was evidence from which a jury could conclude that defendant was mentally immature and that the trial court was thus required to submit the issue to the jury. Defendant cites as evidence to support his position the testimony of the expert psychologist that defendant was raised under the tutelage of a very strict great-grandmother, that he and his brother were severely limited in their socialization skills as young teenagers, that defendant had few friends and did not maintain relationships or date while he was growing up, and that he was ridiculed because of his physical appearance.

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, 333 (1983). " 'Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances.' " *Id.* (quoting *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894, 54 L. Ed. 2d 180 (1977)). However, while defendant has presented evidence that he led a restrained childhood under a strict guardian and did not make many friends, our review of the record reveals no evidence from which a jury could conclude that defendant was mentally immature. To the contrary, uncontroverted evidence showed that defendant completed his GED; that his reading skills were at a normal level

for someone of his educational level; that he established a stable marital relationship; that he handled his own finances, including paying bills and obtaining financing for a new car; that he worked for his father-in-law when his father-in-law was ill and needed assistance; that he worked at American Express as a customer service representative; and that he worked at McDonald's as a crew leader. Based on this evidence, we conclude that the trial court did not err in failing to submit the age statutory mitigating circumstance.

[5] In defendant's next assignment of error, he contends that the trial court erroneously refused to give peremptory instructions concerning nonstatutory mitigating circumstances despite a defense request that it give such peremptory instructions. Defendant cites the transcript page upon which the request was supposedly made; but upon review of the entire transcript, we cannot find any such request. The passage cited by defendant is as follows:

> [DEFENSE COUNSEL]: Your Honor, this is fine. Are there any peremptory . . . mitigating instructions?
>
> COURT: No. The only mitigating factor, number one, second paragraph under number one. That's the language I decided I better give after seeing that case.
>
> [DEFENSE COUNSEL]: That would be appropriate.

Moreover, following the trial court's final instructions to the jurors, and outside the jury's presence, defense counsel voiced no objection to the instructions as given without any peremptory instructions.

This Court has held that "[b]efore the defendant will be entitled to a peremptory instruction upon a mitigating circumstance, he must specifically request a peremptory instruction." *State v. Womble*, 343 N.C. 667, 684, 473 S.E.2d 291, 301 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997); *see also State v. Skipper*, 337 N.C. 1, 41, 446 S.E.2d 252, 274 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). The failure of a trial judge to give a peremptory instruction will not be held error where the defendant did not make a request for such instruction. *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979). As we said in *Johnson*, "the trial judge should not . . . be required to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor. In order to be entitled to such an instruction defendant must timely request it." *Id.* Since in this case defendant did not make a specific request for any peremptory instructions, we overrule this assignment of error.

[6],[7] In another argument defendant contends that the trial court erred by overruling defendant's objections to portions of the prosecutor's closing argument. Defendant cites as improper the following arguments:

> [PROSECUTOR]: . . . [A]nd members of the jury, what were [Mrs. Braswell's] last thoughts as [defendant] stood over her? Could it . . . perhaps have been, "Why? Why did I have to die this way?"
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Overruled.
>
> [PROSECUTOR]: Why? I ask you to ask yourself that question. Why did Jewel Braswell have to die in that store, the store she and her husband ran . . . for forty-seven years? . . . Why? Could she have identified him? Probably not. Would they have caught him? Maybe not. He was going in the opposite direction from where he told Mr. Braswell he was going. That's the question that haunts us today, that the Braswells will ask themselves from now on. Why? And, members of the jury, there can be but one answer. Why did she die? (Writing "Greed" on board) Greed. One man's greed for more.
>
> . . . .
>
> [PROSECUTOR]: Members of the jury[,] you are the conscience of the community. Your verdict will send a message to this defendant that the people—
>
> [DEFENSE COUNSEL]: Objection to this statement.
>
> COURT: Overruled.
>
> [PROSECUTOR]: —of this county shall not put up with this. By your verdict—
>
> [DEFENSE COUNSEL]: Object to this.
>
> COURT: Overruled.
>
> [PROSECUTOR]: —you will send a message to this defendant: Beware. You cannot do this here. We will not tolerate your murder.

Defendant contends that the first argument went beyond, and invited the jurors to ignore, the evidence that had been presented and that

the second argument improperly appealed to the jurors to consider community and family sentiment in reaching their verdict.

As a general proposition, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, arguments are to be viewed in the context in which they are made and the overall factual circumstances to which they refer. *Womble*, 343 N.C. at 692-93, 473 S.E.2d at 306.

Applying these principles to the first argument cited by defendant, we find no impropriety. Considered in context, the prosecutor's argument was not urging the jurors to consider facts without an evidentiary basis; rather, the prosecutor was arguing permissible inferences by asking the jurors to consider defendant's apparent motive for committing the robbery and murder in this case. The second argument is likewise not improper. The prosecutor did not ask the jurors to render their decision based on community sentiment or " 'to lend an ear to the community rather than a voice.' " *State v. Jones*, 339 N.C. 114, 161, 451 S.E.2d 826, 852 (1994) (quoting *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985)), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). This Court has repeatedly stated that the prosecutor may properly urge the jury to act as the voice and conscience of the community. *See, e.g., State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997); *State v. Campbell*, 340 N.C. 612, 635, 460 S.E.2d 144, 156 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996); *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

[8] Defendant also cites two other portions of the prosecutor's closing argument to which defendant did not object at the time but which he now contends were improper. In the first instance the prosecutor argued as follows: "Jewel Braswell was a fine woman. She was a beautiful woman. She was a wife, forty-five years lacking ten days. Forty-five years his partner in life. And she was more than that." In the second instance the prosecutor argued:

> And you know, the randomness of it, it could have as easily been you in that store or your mother or your family or your husband or your wife. Jewel Braswell didn't do anything to provoke him.

> Murder is this defendant's business, and death is his calling card. Was this murder committed for pecuniary gain? Yes.

When counsel has failed to object, the standard of review on appeal is whether the argument was so grossly improper that the trial court abused its discretion in not intervening *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. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). We hold that the trial court did not abuse its discretion by failing to intervene *ex mero motu* during these two portions of the prosecutor's closing argument. These assignments of error are overruled.

[9] In the next assignment of error, defendant contends that the pattern jury instruction used by the trial court to define the term "mitigating circumstance" confuses jurors to such a degree that it violates principles of due process and fundamental fairness and defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as his rights guaranteed by Article I, Sections 18, 19, 23 and 27 of the North Carolina Constitution. The crux of defendant's argument on appeal is his contention that the use of the word "extenuating" in the instruction creates an unavoidable internal conflict. The pattern instruction provides as follows:

> A mitigating circumstance is a fact or group of facts, which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first-degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first-degree murders.

N.C.P.I.—Crim. 150.10 (1997). Defendant argues that "extenuating," as defined in *Webster's New World Dictionary* and other dictionaries, necessarily contains the meaning "serving as an excuse or justification" and that this conflicts directly with the mandate of the pattern instruction that a mitigator is not something that serves as a justification or excuse for a killing. We find defendant's analysis to be misguided. The *American Heritage Dictionary* 479 (2d college ed. 1991) defines the term "extenuate" first as "[t]o lessen or attempt to lessen the magnitude or seriousness of by providing partial excuses." *Black's Law Dictionary* 584 (6th ed. 1990) defines "Extenuating Circumstances" as "Such as render a delict or crime less aggravated, heinous,

or reprehensible than it would otherwise be, or tend to palliate or lessen its guilt. Such circumstances may ordinarily be shown in order to reduce the punishment or damages." Defendant ignores the definition meaning simply "to lessen"; instead, he seizes upon that part of the definition of "extenuate" meaning "to serve as an excuse." Clearly, in context, the word "extenuating" is employed to mean "to lessen" or "to palliate." Further, defendant misreads the instruction and would, in effect, apply his interpretation of "extenuating" to the word "killing" in the first clause when the term in fact applies only to the word "culpability" in the second clause. Thus, the instruction is internally consistent and meaningful since it provides that a mitigating circumstance is a fact which, while it does not serve as a justification or excuse for a killing or reduce the degree of the crime, nevertheless extenuates, or lessens, the call for extreme punishment. Finally, this Court has previously upheld the definition of mitigating in the pattern jury instruction. *See State v. Cagle*, 346 N.C. 497, 510, 488 S.E.2d 535, 544, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 614 (1997). Defendant's assignment of error is overruled.

[10] In defendant's next assignment of error, he contends that he suffered deprivations of his constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as by Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution when the trial court gave oral instructions concerning the "Issues and Recommendation as to Punishment" form which conflicted with the written information on the form itself. Defendant further contends that the oral instructions were correct and that the written instructions, which have a greater impact on the jury by virtue of their being taken into the jury deliberation room, were erroneous in that they provided no guidance for the situation in which no mitigating circumstances were found. The written form provided the following as to sentencing Issue IV:

> 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 trial court's oral instructions provided as follows:

> Now, in the event you do not find the existence of any mitigating circumstances, you must still answer this issue. Now, in such

case you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence or significance as to be sufficiently substantial to call for the imposition of the death penalty.

Defendant argues that the lack of guidance in the written form allowed the jurors to impermissibly embark on their own course of decision-making in accordance with the written instructions. Defendant's position is without merit. The issues on the "Issues and Recommendation as to Punishment" form are not instructions, rather they are questions to be answered as required by the capital sentencing proceeding statute, N.C.G.S. § 15A-2000(c)(1)-(3). The oral instructions reflect nothing more than that the trial court, as promised to the jurors, "[took] up these four issues with [them] in greater detail, one by one," in explaining the form to them. No conflict exists between the issue as stated on the form and the trial court's oral instructions. The oral instruction merely advised the jurors how to handle Issue IV in the event the jurors found no mitigating circumstances. This assignment of error is overruled.

[11] In defendant's next assignment of error, he contends that North Carolina's death penalty statute is vague, overbroad, and lacking in sufficient guidance and allowed the jury to apply the death penalty in an arbitrary manner in his case. Specifically, defendant asserts that the jury simply concluded that it would impose the death penalty against him and that it did not give just consideration to the "numerous undisputed mitigating factors" he had submitted. Defendant's contention, however, is flawed.

Three statutory mitigating circumstance were submitted to the jury: that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000 (f)(6); and the catchall, any other circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). As noted earlier defendant objected to the submission of the (f)(1) mitigator. The record reflects that evidence was presented during the proceeding which reasonable jurors could conclude would not permit their finding these circumstances, namely, that defendant's pleading guilty to two counts of robbery and one count of robbery in 1989 was significant prior criminal activity and that defendant's capacity was not impaired at the time of the crimes.

Defendant also submitted twelve nonstatutory mitigating circumstances; presumably, these are the circumstances he contends are "undisputed." In order for a juror to accept a circumstance as mitigating, the juror must conclude both that the circumstance exists and also that it has mitigating value. *State v. Lynch*, 340 N.C. 435, 475-76, 459 S.E.2d 679, 699-700 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996); *State v. Green*, 336 N.C. 142, 173-74, 443 S.E.2d 14, 32-33, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). In this case, even if the jurors could have found that all the nonstatutory mitigating circumstances existed, they could also have found that the circumstances did not possess any mitigating value. For example, defendant submitted the following circumstances: "The defendant lacked a significant relationship with his father as a child," and "[t]he defendant was gainfully employed at the time of his arrest." Although uncontroverted evidence was presented establishing the existence of these circumstances, the jurors' failure to find them does not render their decision arbitrary or reflect a lack of due consideration of the mitigating evidence.

Moreover, defendant is simply in error when he asserts that all the nonstatutory mitigating circumstances are "undisputed." For example, he submitted the circumstance that "[t]he defendant cooperated with law enforcement officers at the scene of his arrest in Montgomery County." Evidence was presented, however, from which jurors could reasonably conclude that defendant led police on a high-speed chase, endangered others on the road, and appeared to contemplate reaching into the back seat for his assault rifle before finally deciding to give himself up. Defendant cites nothing else from the record to support his assertion that the jurors failed to give just consideration to factors in mitigation of his sentence. This assignment is overruled.

PRESERVATION ISSUES

Although not designated preservation issues, defendant raises six additional issues which have been decided contrary to his position previously by this Court: (i) whether the trial court erred in instructing the jury that defendant has the burden of proving mitigating circumstances by a preponderance of the evidence; (ii) whether the trial court erred in instructing the jurors that they could find a nonstatutory mitigating circumstance only if the jurors found both that the circumstance existed based on the evidence presented and that the circumstance possessed mitigating value; (iii) whether the trial

court erred in instructing the jurors in accordance with the pattern jury instructions that they "may" consider the mitigating circumstances found when balancing the mitigating and aggravating circumstances in Issue III and in determining the substantiality of the aggravating circumstances in Issue IV; (iv) whether the instructions on Issue III that the jurors could proceed to Issue IV if they determined in Issue III that the mitigating circumstances were insufficient to "outweigh" the aggravating circumstances constituted error; (v) whether the trial court erred by submitting the (e)(6), pecuniary gain, aggravator in a case in which the evidence does not show that defendant was hired or paid to commit the murder; and (vi) whether the death penalty statute is unconstitutionally vague and overbroad, imposed in a discretionary and discriminatory manner, imposed on the basis of arbitrary and capricious factors, and imposed without proper guidance.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings. 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

[12] 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 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.

[13] 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. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

Defendant pled guilty to first-degree murder based on premeditation and deliberation. Defendant also pled guilty to the charge of robbery with a dangerous weapon. 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 committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6).

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) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); 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 none of the statutory mitigators. Of the twelve nonstatutory mitigating circumstances submitted, no juror found that any existed and had mitigating value.

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 dis-

proportionate 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. Defendant notes that *Benson* involved a defendant who entered a plea of guilty and acknowledged his wrongdoing before the jury. 323 N.C. at 328, 372 S.E.2d at 522-23. But that case is clearly distinguishable. In *Benson* the defendant pled guilty solely upon the felony murder theory; and the case involved only one aggravating circumstance, pecuniary gain, N.C.G.S. § 15A-2000(e)(6). *Id.* The jury in *Benson* also found several mitigating circumstances. *Id.* In *Benson*, the defendant robbed a store manager of money as the manager was making a deposit at the bank; the defendant fired a shotgun, hitting the victim in the upper part of the legs, then took the money the victim had been carrying and ran. *Id.* at 320-21, 372 S.E.2d at 518. In contrast to *Benson*, the present case involves a guilty plea to first-degree murder on the theory of premeditation and deliberation; and the jury found two aggravators and specifically declined to find any mitigating circumstances, including the circumstance that defendant voluntarily, and in writing, "acknowledged wrongdoing" in connection with the offenses.

In none of the cases in which the death penalty was found to be disproportionate has the jury found the (e)(3) aggravating circumstance. *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 facts reveal that defendant, using an assault rifle, gunned down a totally defenseless elderly woman after she had already given him all the money from the cash register in the family run grocery store.

We also consider cases in which this Court has found the death penalty to be proportionate. Although we review all the cases in the pool of similar cases when engaging in this statutory duty, as we have repeatedly stated, "We will not undertake to discuss or cite all of

those cases each time we carry out that duty." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We conclude 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 sentencing proceeding, free from prejudicial error, and that the sentence of death ordered by the trial court upon the jury's recommendation is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU; IN THE MATTER OF THE FILING DATED MAY 1, 1995 AND AMENDED APRIL 1, 1996 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. 307A98

(Filed 25 June 1999)

1. Insurance— automobile rates—income on invested capital

The Commissioner of Insurance cannot order automobile rates based on underwriting profit provisions that require the consideration of investment income on capital and surplus. A fair and reasonable profit must be calculated without considering investment income from capital and surplus while considering the returns of businesses of comparable risk; if the Legislature believes income on invested capital should be considered in insurance ratemaking cases, it should so provide.

2. Insurance— automobile rates—dividends and deviations—due consideration

The Insurance Commissioner, in the exercise of sound discretion and expertise, properly gave due consideration to dividends and deviations in an automobile ratemaking case. The test for reviewing orders of the Insurance Commissioner is whether the Commissioner's conclusions of law are supported by material and substantial evidence in light of the whole record; here, the

Commissioner attempted to provide a uniform premium rate by looking at historical figures provided by both parties, concluded that the traditional five percent of premium or margin would provide a reasonable and adequate amount of profit for insurance companies, further concluded that any extra amount of payment of dividends and deviations is unreasonable and would produce rates that are excessive and unfairly discriminatory, and concluded that the five percent of premium or margin would encourage inefficient, high cost companies to improve and would reward efficient, low cost companies. The established rate level is not inadequate, excessive, or unfairly discriminatory and the proposed rate will provide a fair and reasonable profit and no more.

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

Chief Justice MITCHELL dissenting.

Appeal 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. 662, 501 S.E.2d 681 (1998), affirming in part and reversing and remanding in part orders entered 4 October 1996 and 31 October 1996 by the Commissioner of Insurance. On 5 November 1998, the Supreme Court granted discretionary review of an additional issue. Heard in the Supreme Court 9 March 1999.

North Carolina Department of Insurance, by Kristin K. Eldridge and Sherri L. Hubbard, for appellant/appellee State ex rel. Commissioner of Insurance.

Young Moore and Henderson P.A., by R. Michael Strickland; Marvin M. Spivey, Jr.; William M. Trott; and Terryn D. Owens, for appellant/appellee North Carolina Rate Bureau.

WAINWRIGHT, Justice.

The North Carolina Rate Bureau (Rate Bureau) was established by statute to represent all insurance companies that sell personal automobile insurance in this State. *See* N.C.G.S. § 58-36-1(1) (Supp. 1998). The Rate Bureau's duties include the publication of rates for motor vehicle liability insurance. *Id.*

The Commissioner of Insurance (Commissioner) is elected by the people for a four-year term and is the chief officer of the Insurance

Department. N.C.G.S. § 58-2-5 (1994). The Commissioner is charged with executing laws relating to insurance. N.C.G.S. § 58-2-1 (1994). The Commissioner's duties include: faithfully executing all laws governing insurance companies and the authority to adopt rules to enforce that law; preventing practices injurious to the public; furnishing the necessary forms for statements required by companies, associations, orders, or bureaus; reporting to the Attorney General any violations of law relating to insurance companies; instituting civil actions or criminal prosecutions for violations of the insurance statutes; giving a statement or synopsis of any insurance contract upon proper application by any citizen; administering all oaths required in the discharge of his official duty; compiling and making available to the public the lists of rates charged, including explanations of coverages provided by insurers; and adopting rules governing what constitutes an uninsurable facility. N.C.G.S. § 58-2-40 (Supp. 1998).

The Commissioner allows insurance companies to write insurance in North Carolina only after subscribing to and becoming members of the Rate Bureau. N.C.G.S. § 58-36-5(a) (1994). On behalf of these insurance companies, the Rate Bureau files with the Insurance Department rate proposals including classifications, schedules, and rules. N.C.G.S. § 58-36-65(a) (1994). Insurance rate proposals must be approved by the Commissioner as desirable and equitable for drivers of nonfleet private passenger motor vehicles. *Id.* If the Commissioner disapproves the Rate Bureau's proposals, the Commissioner may require the Rate Bureau to file modifications of the classifications, schedules, and rules. *Id.*

Various standards exist for the making and use of insurance rates. In general, rates must not be excessive, inadequate, or unfairly discriminatory. *See* N.C.G.S. § 58-36-10(1) (1994). Three basic principles of law pertain to the setting of insurance rates: (1) the Commissioner must set rates that will produce a fair and reasonable profit and no more, *In re N.C. Fire Ins. Rating Bureau*, 275 N.C. 15, 33, 165 S.E.2d 207, 220 (1969); (2) what constitutes a fair and reasonable profit "involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk," *id.* at 39, 165 S.E.2d at 224; and (3) the underwriting business, which includes the collection and investment of premiums, is the only basis for calculating the profit provisions, *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 440, 269 S.E.2d 547, 584 (1980).

The Commissioner's duty when setting automobile rates is to determine whether the proposed rates will produce a fair and reasonable profit, but no more. The insurance industry obtains profits from two sources of income: (1) returns generated by the collection and investment of premiums (profits from underwriting business), and (2) returns generated by investing capital and surplus funds (profits from investment business). *See id.* at 446, 269 S.E.2d at 587. In North Carolina, there is no prescribed methodology for calculating the return on profits (profit methodology), and this Court has specifically recognized that creativity is acceptable within the parameters of the applicable statutes. *Id.* at 449, 269 S.E.2d at 589.

In the instant case, on 1 April 1996 the Rate Bureau requested rate increases of 5.7% for private passenger automobile insurance and 10.1% for motorcycle insurance. Subsequent to hearings, by orders dated 4 October 1996 and 31 October 1996, the Commissioner disapproved the proposed rate changes and ordered a rate reduction for private passenger automobiles of 8.3% and a rate increase for motorcycles of 3.2%.

On 16 June 1998, the Rate Bureau appealed the denial of its request for a rate increase to the Court of Appeals. That court unanimously affirmed the Commissioner on all issues except the profit methodology. *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 129 N.C. App. 662, 673, 501 S.E.2d 681, 689 (1998). On 21 July 1998, the Court of Appeals denied the Rate Bureau's petition for rehearing. The instant case is before this Court by virtue of the dissent below as to profit methodology. In addition, this Court allowed the Rate Bureau's petition for discretionary review as to the additional issue of whether the Commissioner properly gave "due consideration" to dividends (savings returned to policyholders) and deviations (discounts on policy rates) in his calculation when setting the automobile rates.

[1] The first issue on appeal is whether the Court of Appeals erred in concluding the Commissioner cannot order rates based on profits from the underwriting business along with profits from the investment income on capital and surplus. The Court of Appeals held that the Commissioner should have only used the profit provisions from the underwriting business to calculate the return on profits. *Id.* at 666, 501 S.E.2d at 685. The Court of Appeals concluded that the profit methodology used was identical to the method that was previously rejected by that court in *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 124 N.C. App. 674, 685, 478 S.E.2d 794, 802 (1996), *disc. rev.*

denied, 346 N.C. 184, 486 S.E.2d 217 (1997). *Rate Bureau*, 129 N.C. App. at 666, 501 S.E.2d at 685.

The Commissioner contends his ratemaking calculations were based on the profit provisions from the underwriting business calculated without considering investment income from capital and surplus. The Commissioner asserts that once the profit from the underwriting business was calculated, he compared that calculation by using the following profit equation:

underwriting business profits
+
investment income from capital and surplus =
total profits of the insurance industry

The Commissioner contends the two calculations in the instant case differ from the calculation previously rejected by the Court of Appeals in *Rate Bureau*, 124 N.C. App. at 685-86, 478 S.E.2d at 802. The Commissioner explains that in the prior case, he calculated the target total return of the insurance industry based on the total returns of industries of comparable risk. He then subtracted the investment income on capital and surplus from this total return and arrived at a total return on insurance operations. This return on operations was used to derive the profit provisions.

In the instant case, the Commissioner began with a direct estimate and justification of the return on operations, rather than a total return, and derived his profit provisions from this estimated return on operations without explicitly including in his calculations investment income from capital or surplus. The Commissioner reasons that this method keeps the two calculations distinct, whereas the rejected method in the prior case combined the investment income from capital and surplus into the actual ratemaking calculation.

N.C.G.S. § 58-36-10(2) lists the factors considered in ratemaking and provides, in pertinent part, the following:

> Due consideration shall be given to actual loss and expense experience within this State . . . ; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insur-

> ers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

We note the statute makes no provision for consideration of investment income from capital and surplus. This Court has previously stated:

> In the absence of a legislative formula or standards, the Commissioner has had no alternative but to look to the rate-making procedures recognized in the industry and in other States. . . . Thus, the Rate Office and the Commissioner adopted the industry view that *the reasonableness of a profit to be allowed to a company writing automobile liability insurance was determinable on the basis of a percentage of the gross premium rather than on the basis of a rate of return on invested capital.*

In re N.C. Auto. Rate Admin. Office, 278 N.C. 302, 314-15, 180 S.E.2d 155, 164 (1971) (emphasis added).

> In 1981, this Court formulated the fundamental rule as follows:
>
> "In determining whether an insurer has made a reasonable profit, the amount of business done rather than its capital should be considered, and profits should be determined by subtracting losses and expenses from the total of premiums actually received, *to the exclusion of profit on capital and surplus*, and excess commissions paid to agents *but considering interest on unearned premiums and related elements.*"

Rate Bureau, 300 N.C. at 444, 269 S.E.2d at 586 (quoting 2 Ronald A. Anderson, *Couch Cyclopedia of Insurance Law* § 21:38, at 494 (2d ed. 1959)). The reason for the fundamental rule is that "the required capital assets of a casualty insurance company are primarily reserves to guarantee its ability to discharge its liability rather than for use as working capital in the prosecution of its business." *Auto. Rate Admin. Office*, 278 N.C. at 314, 180 S.E.2d at 164. Accordingly, a fair and reasonable profit must be calculated without considering investment income from capital and surplus while considering the returns of businesses of comparable risk.

In other cases where the Commissioner has considered investment income on capital and surplus as part of the target returns, the Court of Appeals has followed the fundamental rule by consistently remanding the Commissioner's order with instructions that the underwriting profit provisions be recalculated to produce the original target returns without the consideration of investment income on capital and surplus. *See Rate Bureau*, 124 N.C. App. at 685-86, 478 S.E.2d at 802; *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 97 N.C. App. 644, 647, 389 S.E.2d 574, 576, *disc. rev. denied*, 326 N.C. 804, 393 S.E.2d 905 (1990); *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 95 N.C. App. 157, 161-62, 381 S.E.2d 801, 804 (1989); *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 75 N.C. App. 201, 228, 331 S.E.2d 124, 143, *disc. rev. denied*, 314 N.C. 547, 335 S.E.2d 319 (1985).

This Court has stated that if the legislature believes income on invested capital should be considered in insurance ratemaking cases, it should so provide. *State ex rel. Hunt v. N.C. Reinsurance Facility*, 302 N.C. 274, 298, 275 S.E.2d 399, 411 (1981). In the instant case, the Commissioner's argument that rates are unfair if they do not consider investment income on capital and surplus is an argument that should be made to the legislature, not the courts. *See id.* This Court has made it clear that unless the legislature changes the law, investment income from capital and surplus cannot be considered when setting insurance rates. Thus, the Court of Appeals was correct in concluding the Commissioner cannot order rates based on underwriting profit provisions that require the consideration of investment income on capital and surplus.

[2] The additional issue on appeal is whether the Court of Appeals erred in holding that the Commissioner gave proper "due consideration" to dividends and deviations in his calculation when setting the automobile rates. Dividends and deviations are factors to be considered by the Commissioner in determining rates. N.C.G.S. § 58-36-10(2) provides that "due consideration" shall be given to the factors of dividends and deviations when ruling on a rate request. Dividends are savings given back to the policyholders by their insurance companies based on the return of excess premium deposits after the policy period. *See* N.C.G.S. § 58-36-60 (1994). Deviations are up-front discounts from the manual rates. Manual rates are the rates determined and published by the Commissioner in order to produce a fair and reasonable profit, and no more, for the average insurance company. Every insurance company is required to charge the manual rates unless the company has filed with and received approval from the

Commissioner to charge a lower rate, i.e., a "rate deviation." N.C.G.S. § 58-36-30 (Supp. 1998). The purpose of rate deviations is to attract more policyholders. Dividends and deviations are viewed as savings passed on to those policyholders whose insurance companies are more efficient and have lower costs than other insurance companies.

In the instant case, the Commissioner found that because an average insurance rate is used, some insurance companies will do better than average and others will not. Consequently, those who do better will be able to grant dividends and deviations of up to the traditional 5% of premium or margin. The Commissioner found that the average insurance rate already included the traditional built-in provision for dividends and deviations of approximately 5% of the premium or margin. The Commissioner contends that the Rate Bureau's attempts to apply an additional rate increase for the explicit purpose of paying dividends and deviations would lead to an increase in rates by essentially counting these factors twice (first, in the automatic premium or margin for dividends and deviations in the average manual rate, and second, in the additional rate increase proposed by the Rate Bureau for the explicit purpose of paying dividends and deviations). In contrast, the Rate Bureau contends the Court of Appeals' decision fails to recognize that the rates set by the Commissioner will not provide sufficient premiums to pay all the losses and expenses and will not leave a fair and reasonable profit for the average insurance company.

In his order, the Commissioner stated:

> The argument between the parties, pared down to its simplest form, is whether the prospective rate level should be determined by the actual revenue retained by insurers at the end of the period or whether the prospective rate level should be set without regard to the discretionary collection and retention of premiums by insurers. In other words, the question is whether insurers' profit is the amount they have left after they have granted deviations and paid out policyholder dividends or whether insurers' profit is measured to include deviations and policyholder dividends.

As previously noted, N.C.G.S. § 58-36-10(2) requires that "due consideration" be given to the factors of dividends and deviations when ruling on a rate request. The Rate Bureau contends "due consideration" means that dividends and deviations must explicitly be reflected in the Commissioner's calculations and requires the

Commissioner to include for each statutory rating factor the value, positive or negative, that is reasonably expected or required. *See Rate Bureau*, 75 N.C. App. at 224-25, 331 S.E.2d at 141. "Nothing in the language of the statute requires that the Commissioner provide for [dividends and deviations] so long as the rate level established on the statutory rate criteria is not inadequate, excessive, or unfairly discriminatory." *Id.* Thus, "due consideration" does not require that a numerical adjustment of the rates be made in order to reflect the effects of dividends and deviations. *Rate Bureau*, 124 N.C. App. at 681-82, 478 S.E.2d at 799. This Court has stated that the General Assembly did not intend

> to make any one, or all, of [the statutory rating standards] conclusive. . . . The weight to be given the respective factors is for the Commissioner to determine in the exercise of his sound discretion and expertise, but he may not arrive at his determination as to the propriety of the filing by shutting his eyes to experience shown by evidence of reasonably probative value simply because it is not presented to him in the customary statistical form.

State ex. rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau, 292 N.C. 471, 488-89, 234 S.E.2d 720, 729-30 (1977).

Although the Commissioner must give "due consideration" to the various factors, the ultimate question he must determine is

> whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave for the insurers (considered as if the Bureau were a single company with the composite experience of all companies issuing [automobile] insurance in North Carolina) a fair and reasonable profit and no more. The purpose of the entire statutory plan is to provide for the public, at reasonable cost, insurance in financially responsible companies. The public interest extends as truly to the financial responsibility of the insurer as it does to the reasonable cost of the insurance to the insured, and vice versa.

Id. at 489, 234 S.E.2d at 730 (citation omitted).

The test for reviewing orders of the Insurance Commissioner is whether the Commissioner's conclusions of law are supported by material and substantial evidence in light of the whole record. *Rate Bureau*, 124 N.C. App. at 678, 478 S.E.2d at 797. Any order of the Commissioner concerning premium rates, supported by substantial evidence, is presumed to be correct and proper. N.C.G.S. § 58-2-80

(1994). However, " 'it is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting.' " *Rate Bureau*, 124 N.C. App. at 678, 478 S.E.2d at 797 (quoting *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 96 N.C. App. 220, 221, 385 S.E.2d 510, 511 (1989)).

In the instant case, the Commissioner attempted to provide a uniform premium rate by looking at the historical figures provided by both parties, including future projections, and found that the average manual rate already included the traditional 5% of premium or margin for dividends and deviations. The Commissioner found the 5% of premium or margin for dividends and deviations was equivalent to approximately $100,000,000, which could be paid by the insurance companies in the form of a dividend and/or deviation. The Commissioner concluded the 5% of premium or margin would provide a reasonable and adequate amount of profit for insurance companies. The Commissioner further concluded that any extra amount for payment of dividends and deviations in excess of the traditional 5% of premium or margin is unreasonable and would produce rates that are excessive and unfairly discriminatory. Finally, the Commissioner concluded that the 5% of premium or margin would encourage inefficient, high-cost companies to improve and would reward efficient, low-cost companies to attract new policyholders.

After careful review of the record, we hold that the Commissioner, in the exercise of his sound discretion and expertise, properly gave "due consideration" to dividends and deviations because the established rate level is not inadequate, excessive, or unfairly discriminatory. The proposed rate will provide a fair and reasonable profit and no more.

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

AFFIRMED.

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

Chief Justice MITCHELL dissenting.

As the majority acknowledges, N.C.G.S. § 58-36-10(2) requires that *due* consideration be given to, among other factors, dividends and deviations when ruling on a rate request. The majority is also correct in noting that no one, or all, of the factors required to be consid-

ered should be treated as conclusive. *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 471, 488-89, 234 S.E.2d 720, 729-30 (1977). The weight to be given any factor is for the Commissioner to determine in his discretion. *Id.* However, I believe that the Commissioner is required to give each factor some weight and that this must be reflected in his order. Otherwise, a reviewing court is faced with an inadequate appellate record and must, as here, simply accept the Commissioner's conclusory statements that he has taken all of the statutory factors into account. It is not enough for the Commissioner to note in conclusory fashion that dividends and deviations crossed his mind when he was entering his order. I believe that the order of the Commissioner in the present case does not adequately reflect the consideration the Commissioner gave the factor of dividends and deviations or indicate the weight, if any, he gave to that factor. For that reason, I respectfully dissent.

LUIS ROMAN, DECEASED EMPLOYEE, MAYRA E. ROMAN, ISID E. ROMAN, NOEMI E. ROMAN, OSCAR A. ROMAN, AND JESSICA C. ROMAN v. SOUTHLAND TRANSPORTATION COMPANY, EMPLOYER; RISCORP OF NORTH CAROLINA, CARRIER

No. 19A99

(Filed 25 June 1999)

Workers' Compensation— compensable claim—truck driver injured while pursuing robber

An evenly divided Supreme Court affirmed without precedential value the decision of the Court of Appeals in a workers' compensation action which reversed the Commission's award of benefits in an action arising from a truck driver being shot and killed by security guards firing at a robber's car while the truck driver was pursuing the robber after the robbery of a truck stop.

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

Justice ORR dissenting.

Justices FRYE and PARKER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 571, 508 S.E.2d

543 (1998), reversing the opinion and award entered by the Industrial Commission on 22 July 1997. Heard in the Supreme Court 12 April 1999.

Waggoner, Hamrick, Hasty, Monteith and Kratt, P.L.L.C., by S. Dean Hamrick and John W. Bowers, for plaintiff-appellants.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Erica B. Lewis, for defendant-appellees.

WAINWRIGHT, Justice.

In January 1994, decedent Luis Roman (Roman) began working as a long-distance truck driver for Southland Transportation Company (Southland). On 7 April 1994, Southland dispatched Roman to pick up a load of furniture in Chicago, Illinois, and to deliver it to Rocky Mount, North Carolina. En route to Rocky Mount, Roman stopped to refuel his truck shortly after midnight at the Flying J Truck Stop (Flying J) in Gary, Indiana. Inside the Flying J, Roman witnessed a robber reach across the counter into the open cash-register drawer, remove cash, and run outside to his car in the Flying J parking lot. After the cashier screamed for help, Roman and another truck driver ran after the robber and began "pulling and yanking on the steering wheel" of the robber's moving automobile as it accelerated, causing the automobile to make erratic circles in the parking lot. Flying J security guards fired at the robber's car and accidentally fatally wounded Roman while Roman was positioned inside the window of the robber's car. The security guards and other individuals apprehended the robber shortly thereafter.

Roman's estate filed a workers' compensation claim, which Southland denied. A deputy commissioner with the Industrial Commission reviewed the claim and concluded that Roman sustained a compensable injury by accident arising out of and in the course of his employment, and the full Commission adopted his conclusion. The Commission found that Southland's driver's handbook and safety manual had encouraged Roman to assist members of the public and that Roman's acts were beneficial to his employer based on both the good will and improved image Southland received. Further, the Commission found that Southland benefitted from a reciprocal exchange of assistance between Roman and the Flying J employees, similar to the fact situation in *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1955). Therefore, the Commission held that

> [w]here a truck driver takes his employer's vehicle on a long distance assignment and in the course of his employment encounters an emergency situation to which he responds, for the benefit of his employer who had encouraged him to assist members of the public in need of assistance, . . . the employee's resulting injury/death is compensable . . . .

A divided panel of the North Carolina Court of Appeals reversed the Commission's decision based on the theory that granting compensation would remove the "arising out of the employment" requirement. *Roman v. Southland Transp. Co.*, 131 N.C. App. 571, 577, 508 S.E.2d 543, 547 (1998). Contrary to the Commission's decision, the Court of Appeals held that there was no evidence of "reciprocal courtesies," so the *Guest* decision could not be used to support an award for benefits. *Id.* at 575, 508 S.E.2d at 546. The Court of Appeals concluded that the facts of the instant case were more similar to those provided in *Roberts v. Burlington Indus.*, 321 N.C. 350, 364 S.E.2d 417 (1988). Furthermore, the Court of Appeals concluded that Roman's decision to render aid created the danger and that the risk was not a hazard of the trip. *Roman*, 131 N.C. App. at 577, 508 S.E.2d at 547 (citing *Roberts*, 321 N.C. at 359, 364 S.E.2d at 423). Therefore, the Court of Appeals held that although Roman's courageous behavior was commendable, his employer Southland could not be held liable. *Id.*

On appeal as of right to this Court by virtue of the dissent below, we must determine whether the Court of Appeals erred in reversing the Commission's decision that Roman's death arose out of his employment with Southland. Whether an employee's injury arose out of and in the course of his employment is a mixed question of law and fact. *Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E.2d 807, 809-10 (1982). If there is evidence to support the Commission's findings concerning this issue, we are bound by those findings. *Id.* The Commission's opinion and award can be reversed only if there is a patent legal error. *Id.* at 505, 293 S.E.2d at 809.

The North Carolina Workers' Compensation Act provides that an employee's death is compensable only when such death results from an injury "arising out of" and "in the course and scope of" his employment. N.C.G.S. § 97-2(6), (10) (Supp. 1998). "Arising out of the employment" and "in the course of the employment" are two separate requirements a claimant must establish to receive compensation. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196,

198 (1982). "Arising out of the employment" refers to the origin or cause of the accidental injury, while "in the course of the employment" refers to the time, place, and circumstances of the accidental injury. *Bartlett v. Duke Univ.*, 284 N.C. 230, 233, 200 S.E.2d 193, 194-95 (1973). Although the Workers' Compensation Act is liberally construed so that benefits are not denied based on a technical, narrow, and strict interpretation, the rule of liberal construction cannot be used to attribute a foreign meaning to the plain and unmistakable import of the words employed. *Guest*, 241 N.C. at 452, 85 S.E.2d at 599.

In general, an employee's workers' compensation claim is compensable if he acts for the benefit of his employer to an appreciable extent. *Id.* at 452, 85 S.E.2d at 600. In contrast, a claim is not compensable if the employee acts solely for his own benefit or purpose, or if he acts solely for a third person. *Id.*

> "Acts of an employee for the benefit of third persons generally preclude the recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of employment. . . . However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established."

Id. at 452, 85 S.E.2d at 599-600 (quoting William R. Schneider, 7 Schneider's Workmen's Compensation § 1675 (perm. ed. 1950)) (footnotes omitted) (alteration in original).

Furthermore, a claim is compensable if the employment was a contributing cause of the injury. *Roberts*, 321 N.C. at 355, 364 S.E.2d at 421. As this Court has previously explained, an injury arises out of one's employment "when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the per-

formance of some service of the employment." *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964), *quoted in Bartlett*, 284 N.C. at 233, 200 S.E.2d at 195. However, if the risk is one to which everyone may be subjected, instead of a hazard peculiar to the employee's work, the injury is not compensable. *Guest*, 241 N.C. at 453, 85 S.E.2d at 600-01.

Plaintiffs contend Roman was acting in the scope of his employment for the following reasons: He was driving a truck for Southland, he stopped at a gas station authorized by Southland, he was confronted by a robbery situation at the gas station while he was on the job, he was required to obtain a receipt from the Flying J for tax records, and Southland's handbook encouraged him to assist members of the general public. Plaintiffs point to the fact that Roman was not only helping members of the public at large, but he was specifically assisting individuals who had a special business relationship with Southland. Thus, plaintiffs conclude this case should be analyzed pursuant to *Guest*, 241 N.C. 448, 85 S.E.2d 596.

As previously noted by this Court, the facts of *Guest* are distinguishable from cases where the act of the employee is characterized as "chivalric" or "an errand of mercy" or "the act of a good Samaritan" because those acts are wholly unrelated to the employment. *Id.* at 455, 85 S.E.2d at 601. In *Guest*, the plaintiff-employee and another coworker were sent by their employer to fix two flat tires. The plaintiff and the co-worker fixed the tires, and in the performance of this work, they went to a gas station to inflate the tires. The men received permission from the gas-station operator to get free air to inflate their tires. While the employees were putting air in the tires, the gas-station operator asked the employees to help push a stalled vehicle away from the gas-station pumps. While pushing the stalled vehicle, the plaintiff-employee was struck and killed by another moving vehicle. This Court concluded that the courtesies and assistance extended by the employee were in reciprocity for the courtesy of free air. *Id.* at 453, 85 S.E.2d at 600. Thus, this Court held that "when at the time and place of injury mutual aid is being exchanged between the employee [on behalf of the employer] and [a third party], . . . the aid received and the aid given are so closely interwoven that an injury to the employee under such circumstances must be held connected with and incidental to his employment." *Id.* In that type of case, this Court has held that the employee has reasonable grounds to feel that his refusal to give assistance might result in the third-party's refusal to give the gratuitous benefit to the employer. *Id.*

In the instant case, Southland and the Flying J were not engaged in a gratuitous reciprocal exchange of assistance. Any benefit Roman would receive from the Flying J would not be gratuitous because Roman would have compensated the Flying J for the gas. Roman could not reasonably have believed that his refusal to stop the robber for the Flying J would result in the Flying J's reciprocal refusal to supply fuel or a fuel receipt to Southland.

In *Guest* and *Roberts*, the plaintiff-employees were traveling because of their employment when they were killed. Both employees found themselves in situations where they could render assistance to strangers, and both were killed as a result of their help. However, the facts of this case are more analogous to *Roberts*, 321 N.C. 350, 364 S.E.2d 417.

In *Roberts*, the plaintiff-employee was driving his car home after a business trip. He drove down an exit ramp and noticed that a car had struck a pedestrian. A bystander had already arrived at the scene of the accident to offer assistance. The plaintiff-employee stopped his car and offered to assist by contacting the highway patrol. He suggested that the bystander move up the exit ramp to warn oncoming traffic about the accident. The plaintiff-employee was standing by the pedestrian's body when he was struck by a car and killed.

As this Court said in *Roberts*, the required travel by the employee merely placed him in a position to seize the opportunity to rescue the person. *Id.* at 359, 364 S.E.2d at 423. The required travel did not increase the risk that the employee would be injured because not all hazards or risks are incidental to the employment. *Id.* Similar to the employee in *Roberts*, it was Roman's individual decision to apprehend the robber which actually created the danger and risk that he might be shot by the security guards.

Finally, contrary to plaintiffs' assertions in the instant case, Southland's handbook required its drivers to improve the public's perception of truck drivers merely by avoiding accidents, acting in a courteous manner, and obeying the law. The handbook did not give any instructions about assisting others in distress or emergency situations unrelated to the truck drivers' employment. The handbook cannot reasonably be interpreted to require Southland truck drivers to apprehend criminals in order to improve the public's perception of truck drivers. Further, as the deputy commissioner concluded in *Roberts*, "any resulting good will toward defendant-employer is too remote and immeasur[able] for his actions on this occasion to be con-

sidered of any appreciable, even indirect, benefit to said employer." *Id.* at 353, 364 S.E.2d at 420. When the specific and crucial findings of fact are made, we believe the basic principles of both *Guest* and *Roberts* control the instant case.

With Chief Justice Mitchell and Justices Lake and Wainwright voting to affirm and Justices Frye, Parker and Orr voting to reverse, the decision of the Court of Appeals is affirmed without precedential value.

AFFIRMED.

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

Justice ORR dissenting.

The dispositive issue in this case, as noted in the Court of Appeals' majority opinion, is whether the Industrial Commission correctly concluded that Roman's fatal injury "arose out of his employment." Here, the uncontradicted facts show that Roman was killed while trying to apprehend the individual who had just robbed the Flying J Truck Stop where Roman had stopped to refuel while on a long-distance delivery run for his employer, Southland Transportation Company (Southland).

As indicated by the majority, for a claim to arise out of the employment and be compensable, the employee must "act[] for the benefit of his employer to an appreciable extent," but the claim will not be compensable "if the employee acts *solely* for his own benefit or purpose or if he acts *solely* for a third person." (Emphasis added.) Here, the Industrial Commission concluded that based upon the facts, Roman sustained a compensable injury by accident.

The responsibility of a reviewing appellate court is to determine if there is evidence of record to support the findings of fact and whether those findings of fact support the applicable conclusions of law and, ultimately, the award. Here, there was sufficient evidence, in my opinion, to support the following findings of fact:

> 6. On or about April 8, 1994, at 12:00 a.m., Mr. Roman was located inside the Flying J convenience store-restaurant when Robert Bankston stole seventy dollars from an open cash register operated by Kathy Adams. Ms. Adams screamed for help. The fuel desk cashier, Dona Becker, was at the fuel desk counter inside

the store when the robbery by Mr. Bankston took place. Ms. Becker "yelled, 'stop him.' " . . . Ms. Becker ran out of the store at that time.

7. Pursuant to the screams of both Ms. Adams and Ms. Becker, Luis Roman and another truck driver chased Mr. Bankston out of the store. Bankston entered a Ford Escort and attempted to drive away. Mr. Roman grabbed the steering wheel of the Ford Escort and forced Bankston to drive in circles in the Flying J Truck Stop parking lot. At some point, Mr. Roman was able to position himself through the window of the Ford Escort on the driver's side.

. . . .

9. Mr. Roman was shot and killed by one of the security guards while he was positioned inside the window of the Ford Escort.

. . . .

11. Plaintiff's job duties included performing activities that will help the public like truck drivers better. The defendant-employer provided a driver's handbook and safety manual that expressly informed its employees that their jobs as truck drivers as well as the future of the company and the trucking industry depended upon good public relations.

12. Mr. Roman's attempt to apprehend Bankston is an activity that would improve the public perception of truck drivers. His actions were not for the benefit of a third party only, but, rather, were beneficial to his employer and to himself as his employer's employee.

While a different finder of fact might determine otherwise (as the Court of Appeals and this Court's majority appear to do), we have repeatedly stated that the Commission is the ultimate finder of fact and that if there is *any* credible evidence to support the findings, the reviewing court is bound by it. *See Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). This includes determining the credibility of witnesses and reaching inferences from the evidence. *See id.*

The above-cited findings of fact sufficiently support the Commission's conclusion that Roman sustained a compensable injury arising out of and in the course of his employment. The employer has contended that Roman's acts were gratuitous gestures

unrelated to his employment that benefitted only the third party, Flying J. While Southland and the majority might well in good faith so find, that simply is not their prerogative. The Industrial Commission, the ultimate fact-finder, found, with some credible evidence to support it, that Roman's acts also benefitted his employer and himself as an employee of the employer. Thus, I would vote to reverse the Court of Appeals and affirm the Industrial Commission.

While this case has generated much discussion over whether *Guest* or *Roberts* controls, a straightforward application of workers' compensation law simply mandates that we affirm the Industrial Commission's decision. *Roberts v. Burlington Indus.*, 321 N.C. 350, 364 S.E.2d 417 (1988); *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1955). In both *Roberts* and *Guest*, this Court ultimately affirmed the decision of the Industrial Commission, the fact-finding body charged with the administration of the Workers' Compensation Act. It is not at all clear, on the close facts of this case, that the Industrial Commission committed a "patent legal error" in concluding that Roman's death arose out of his employment. Accordingly, I would reverse the decision of the Court of Appeals, thus affirming the decision of the Industrial Commission.

Justices FRYE and PARKER join in this dissenting opinion.

WILLIE ELAINE SPIVERY WORD, ADMINISTRATOR CTA OF THE ESTATE OF BERTHA C. SPIVERY v. DOROTHY GALLOWAY JONES, BY AND THROUGH HER GUARDIAN, HARRIET B. MOORE

No. 336PA98

(Filed 25 June 1999)

1. Negligence— sudden incapacitation—instructions

The North Carolina Supreme Court, in a case of first impression before it, adopted the following as the elements of the defense of sudden incapacitation: The defendant was stricken by sudden incapacitation; this incapacitation was unforeseeable to the defendant; the defendant was unable to control the vehicle as a result of this incapacitation; and this sudden incapacitation caused the accident. The defendant has the burden of proving each of these elements by a preponderance of the evidence.

2. Negligence— sudden incapacitation—unconsciousness

The Court of Appeals erred in an action arising from an automobile accident by holding that jury instructions on sudden incapacitation should have included an instruction on unconsciousness. While unconsciousness may be more easily understood and applied to measure sudden medical incapacitation, the crux of the defense is that a defendant by reason of sudden incapacitation becomes unable to control the vehicle. The resolution of disputed facts has historically been left to the jury upon proper instructions.

3. Negligence— sudden incapacitation—disjunctive instruction—new trial

A plaintiff in an action arising from an automobile accident was entitled to a new trial where the jury charge given by the court on sudden incapacitation allowed the jury to find for defendant if defendant was either unable to control her vehicle or not capable of sense perception or judgment necessary for proper operation of her vehicle. Because the judge used the disjunctive, it cannot be said that the jury found that defendant was unable to control her vehicle because of sudden incapacitation.

4. Negligence— sudden incapacitation—Alzheimer's

The trial court did not err in an action arising from an automobile accident where plaintiff contended that the court improperly extended the sudden incapacitation defense by submitting sudden incapacitation based upon Alzheimer's. During the trial, defendant presented three medical explanations supporting the defense of sudden incapacitation which went directly to the elements: Alzheimer's disease, TIA, and arrhythmia. The testimony of defendant's two medical experts was neither objected to nor controverted.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 100, 502 S.E.2d 376 (1998), reversing a judgment entered by Barnette, J., on 19 May 1997 in Superior Court, Wake County, and remanding for new trial. Heard in the Supreme Court 9 February 1999.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein, for plaintiff-appellant and -appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner and Edward C. LeCarpentier III; and Law Offices of H. Spencer Barrow, by H. Spencer Barrow, for defendant-appellant and -appellee.

PARKER, Justice.

This negligence action arose out of an automobile accident that occurred on 14 October 1993. Plaintiff's testate, Bertha C. Spivery, was a passenger in the front seat of an automobile being driven by her daughter, Denise Holder, in a westerly direction on New Bern Avenue. Defendant Dorothy Galloway Jones was driving south on Trawick Road to the intersection of New Bern Avenue. At that point New Bern Avenue is a divided highway with two lanes for eastbound travel and two lanes for westbound travel. Defendant turned left in an easterly direction onto New Bern Avenue; however, she turned into the inside westbound lane of oncoming traffic. Defendant traveled approximately three-tenths of a mile before her automobile collided head-on with the automobile driven by Ms. Holder. The right front of defendant's automobile struck the right front of the automobile driven by Ms. Holder. Defendant's automobile traveled approximately 136 feet before stopping after the collision. As a result of the accident, Ms. Spivery suffered permanent injuries. Although Ms. Spivery died after the commencement of this civil action, the parties agreed that Ms. Spivery's death was not the result of injuries received in the accident. As a result of defendant's medical condition, Harriet B. Moore was appointed guardian *ad litem* for defendant on 30 May 1996.

In her answer to plaintiff's complaint, defendant denied plaintiff's allegations of negligence and specifically pled as an affirmative defense "that the accident . . . was caused by a sudden and unexpected medical emergency which caused defendant to black out and lose consciousness prior to the occurrence of the accident." At trial defendant presented evidence tending to show that she had no recollection of the collision, that she had to be told that she was traveling the wrong way on New Bern Avenue, and that defendant did not apply the brakes either before or after the accident. Defendant also presented medical evidence that she had not been diagnosed with Alzheimer's disease prior to the accident and that a week before the

accident, her physician had cleared her to drive. Defendant's medical experts testified that, in their opinion, at the time of the accident defendant most likely experienced one of three medical conditions: (i) a sensory overload caused by Alzheimer's disease; (ii) a transient ischemic attack ("TIA"), often referred to as a mini-stroke; or (iii) a heart arrhythmia. Plaintiff's evidence tended to show that immediately before the accident, defendant was sitting upright behind the steering wheel, driving normally and that immediately after the accident, defendant was alert, asking about her dog and noting that she was on her way to a bank just up the street.

At the close of all the evidence at trial, plaintiff and defendant submitted proposed jury instructions to the trial court. Plaintiff objected to the instructions on the affirmative defense of sudden incapacitation based on the form of the proposed jury instructions and on the grounds that the evidence did not support submission of the defense. The trial court overruled plaintiff's objection and charged the jury on the issues of negligence and the sudden-incapacitation defense.

Following the jury charge plaintiff renewed her objection to the sudden-incapacitation defense and to the form of the instruction. The jury returned a verdict finding that plaintiff was not injured by defendant's negligence, and the court entered judgment on the verdict. Plaintiff's motions for judgment not withstanding the verdict and for a new trial were denied.

Plaintiff appealed, arguing, *inter alia*, that the trial court erred in its jury instructions on the affirmative defense of sudden incapacitation. The Court of Appeals, agreeing with plaintiff, held that the court's instructions "constituted reversible error because [its] instructions improperly expanded the scope of the sudden incapacitation defense" and granted a new trial. *Word v. Jones*, 130 N.C. App. 100, 106, 502 S.E.2d 376, 380 (1998). This Court allowed defendant's petition for discretionary review and plaintiff's conditional petition for discretionary review.

[1] The issue before this Court is whether the Court of Appeals erred in holding that the trial court did not properly charge the jury on the affirmative defense of sudden incapacitation, thereby entitling plaintiff to a new trial. The trial court's charge was as follows:

> Now, as I have indicated to you, usually the burden of proof on a negligence issue is on the plaintiff. In other words, the plaintiff's

usual burden would be to prove that the defendant, Dorothy Jones, drove her vehicle east in a westbound lane, and that this caused the accident; as a result of this accident, there was injury to Bertha C. Spivery. They have proved this. So, as you will notice, the burden of proof shifts on this issue, and I so instruct you. With respect to the defendant['s] . . . contention, the burden of proof is on the defendant, Dorothy Galloway Jones to show by the greater weight of the evidence[,] first, that she was stricken by a sudden medically caused incapacitation; two, that this medically caused incapacitation was unforeseeable to the defendant, Dorothy Galloway Jones; and three, that the defendant, Dorothy Jones, was unable to control her automobile because of this medically caused incapacitation. No. Let me repeat three. That the defendant, Dorothy Jones[,] was either unable to control her automobile because of this medically caused incapacitation, or that she was not capable of sense perception or judgment necessary for proper operation of her vehicle due to the medically caused incapacitation. And four, that this medically caused incapacitation caused the motor vehicle accident in question. Those are the four things that the defendant must prove by the greater weight of the evidence. If she has proven this, all of this to you, then she would not be negligent.

In her proposed jury instructions, plaintiff requested that the trial court instruct the jury with respect to the sudden-incapacitation defense as follows:

Members of the jury, with respect to this contention and allegation, the burden is on the defendant Jones to show by the greater weight of the evidence:

(1) That she was stricken by a sudden incapacitation.

(2) That this incapacitation was unforeseeable to defendant Jones.

(3) That the defendant Jones was unable to control her automobile because of this incapacitation.

(4) That the Defendant had no time to stop or cease the operation of her vehicle before hand because of the sudden incapacitation.

(5) That her mental or physical condition was such that she was not capable of sense perception and judgment.

(6) That she was not consciously aware of her actions.

(7) That this incapacitation caused the motor vehicle accident in question.

Addressing the correctness of the instructions, the Court of Appeals concluded that "[t]he trial court's additional instruction in the disjunctive [in number three], plus the failure to include as explanation that defendant 'had no time to stop or cease the operation of the vehicle beforehand because of said condition' and defendant 'was not consciously aware of her actions' " was erroneous. *Word v. Jones*, 130 N.C. App. at 106, 502 S.E.2d at 380. Defendant contends that the Court of Appeals' holding expands the elements of the defense by requiring an instruction that defendant be unconscious.

This Court has never examined the sudden-incapacitation defense; thus, this case is one of first impression for this Court. As recognized by the Court of Appeals in the present case, that court in an earlier opinion with Judge (now Justice) Orr writing for the panel set forth the elements of the defense as follows: (i) the defendant was stricken by a sudden incapacitation, (ii) this incapacitation was unforeseeable to the defendant, (iii) the defendant was unable to control the vehicle as a result of this incapacitation, and (iv) this sudden incapacitation caused the accident. *Mobley v. Estate of Johnson*, 111 N.C. App. 422, 425, 432 S.E.2d 425, 427 (1993). We now hold that these elements of the defense of sudden incapacitation as set forth in *Mobley* are a correct statement of the defense and adopt them as the law of this State. To prevail on this defense as a bar to recovery for otherwise-negligent conduct, a defendant has the burden of proving each of these elements by a preponderance of the evidence.

[2] In the present case the Court of Appeals in holding that the trial court erred by failing to instruct that "defendant was not consciously aware of her actions," stated:

> Practical considerations also support a requirement of loss of consciousness as an element of the sudden medical incapacitation defense. "Confusion" and "disorientation" are somewhat vague, imprecise, and subjective terms. They present the potential to foster fraud and abuse of the sudden medical incapacitation defense. "Unconsciousness" is a workable, objective test that is more easily understood and applied to measure sudden medical incapacitation.

Word v. Jones, 130 N.C. App. at 106, 502 S.E.2d at 380. The Court of Appeals relied upon language from *Wallace v. Johnson*, 11 N.C. App. 703, 182 S.E.2d 193, *cert. denied*, 279 N.C. 397, 183 S.E.2d 247 (1971), which implies that unconsciousness is a requirement. In that case the court stated:

> [B]y the great weight of authority the operator of a motor vehicle who becomes suddenly stricken by a fainting spell or other sudden and unforeseeable incapacitation, and is, by reason of such unforeseen disability, unable to control the vehicle, is not chargeable with negligence. Annotation, 28 A.L.R.2d 12 (1953), and cases cited. "But one who relies upon such a sudden unconsciousness to relieve him from liability must show that the accident was caused by reason of this sudden incapacity." 8 Am. Jur. 2d, *Automobiles and Highway Traffic*, § 693, p. 245.

Wallace v. Johnson, 11 N.C. App. at 705, 182 S.E.2d at 194.

Defendant argues that including the element of unconsciousness improperly narrows the affirmative defense. We agree. While unconsciousness may be "more easily understood and applied to measure sudden medical incapacitation," *Word v. Jones*, 130 N.C. App. at 106, 502 S.E.2d at 380, in cases where the evidence is unequivocal, the evidence is rarely that definitive, *see, e.g.*, *Smith v. Garrett*, 32 N.C. App. 108, 111, 230 S.E.2d 775, 778 (1977) (holding that it is for the jury to determine whether the sudden seizure preceded the accident). The crux of the defense is that a defendant by reason of sudden incapacitation becomes unable to control the vehicle. Where, as in this case, the evidence is conflicting and subject to more than one inference, the resolution of disputed facts has historically been left to the jury upon proper instructions. Whether a defendant suffered a sudden, unforeseen incapacitation is a matter of proof; and determination of that question should be no more difficult for a jury than is the determination of a myriad of other factual questions requiring jurors to discriminate between conflicting expert testimony and conflicting non expert testimony.

As noted in defendant's brief, requiring unconsciousness has the potential for under-inclusiveness depending upon how "consciousness" is defined. For example, a defendant suffering from the onset of a medical emergency may not be rendered immediately unconscious, yet may, in the moments before unconsciousness, be in such extreme pain as to be incapable of controlling the operation of a motor vehicle. Without the benefit of medical evidence, we are not prepared to

exclude from the applicability of the defense of sudden incapacitation situations which might render a defendant suddenly incapable of controlling a motor vehicle without rendering the defendant unconscious. We are satisfied that the four elements adopted above from *Mobley* provide a sufficient framework for a reasonable juror, upon proper instructions, to determine the legitimacy of the defense of sudden incapacitation without the additional element of unconsciousness. Accordingly, we hold that the Court of Appeals erred in holding that the jury instructions should have included an instruction on unconsciousness.

[3] Defendant also argues with respect to the instructions that the Court of Appeals erred in holding that the trial court improperly instructed the jury in the disjunctive on the third element. On this element the trial judge corrected himself and instructed: "No. Let me repeat three. That the defendant, Dorothy Jones[,] was either unable to control her automobile because of this medically caused incapacitation, or that she was not capable of sense perception or judgment necessary for proper operation of her vehicle due to the medically caused incapacitation." Again, quoting from *Wallace*, 11 N.C. App. at 707, 182 S.E.2d at 195, the Court of Appeals determined that this instruction along with the failure to instruct on loss of consciousness enabled the jury to determine that defendant's senses or judgment was impaired and that the impairment rendered her unable to control the vehicle although defendant was not unconscious.

We note initially that the jury instruction quoted in *Wallace v. Johnson*, *id.*, which has been relied on by plaintiff and the lower courts in this action, was *obiter dictum* in that opinion and that the instruction was neither approved nor ruled on by the Court of Appeals. In *Wallace* the plaintiff argued that the trial court shifted to the plaintiff the burden of disproving the affirmative defense of sudden incapacitation by failing to submit the issues to the jury in the form requested by the plaintiff. No challenge was made to the instruction. The form of the issues requested by the plaintiff was clearly improper, and the Court of Appeals quoted the instruction merely to show that the trial court did not in any way shift to the plaintiff the burden of disproving the affirmative defense. Hence, that instruction is neither authority nor precedent for what is required in an instruction charging the jury on the defense of sudden incapacitation.

Defendant in this case contends that even if the instruction was erroneous, plaintiff must also show prejudice for the error to consti-

tute reversible error. Rule 61 of the North Carolina Rules of Civil Procedure provides that erroneous jury instructions are not grounds for granting a new trial unless the error affected a substantial right. N.C.G.S. § 1A-1, Rule 61 (1990). In other words it must be shown that "a different result would have likely ensued had the error not occurred." *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983); *see also Barnard v. Rowland*, 132 N.C. App. 416, 429, 512 S.E.2d 458, 466 (1999) (holding that the party asserting error must show that he was prejudiced by the trial court's error).

As previously stated, in order to prove the third element of the affirmative defense, defendant must show that the sudden incapacitation resulted in defendant's inability to control her vehicle. However, under the given jury charge, the jury was able to find for defendant if defendant was either unable to control her vehicle *or* not capable of sense perception or judgment necessary for proper operation of her automobile. Since the judge used the disjunctive "or" instead of the conjunctive "and" when instructing on this element, we cannot say that the jury found that defendant Dorothy Jones was unable to control her vehicle because of a sudden incapacitation. *See Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (stating that when jury instructions are reviewed, they must be considered in their entirety). Thus, the instruction permitted defendant to prevail without the jury necessarily finding that defendant was unable to control her automobile. Consequently, we are unable to say as a matter of law that plaintiff was not prejudiced by this erroneous jury instruction and conclude that plaintiff is entitled to a new trial.

[4] Based on plaintiff's issue in her petition for discretionary review, plaintiff contends that submission of the sudden-incapacitation defense based upon Alzheimer's disease was error. Plaintiff argues that submitting that defense improperly extends the sudden-incapacitation defense to mental illnesses and deficiencies which do not excuse negligence; plaintiff further argues that Alzheimer's disease does not cause unconsciousness and that its effects are not unforeseen or sudden. Plaintiff's argument is without merit.

During the trial defendant presented three different medical explanations supporting the defense of sudden incapacitation: Alzheimer's disease, TIA, and arrhythmia. This evidence went directly to the elements of sudden incapacitation. The testimony of defend-

ant's two witnesses, both qualified as medical experts, in substantiation of her affirmative defense was neither objected to nor controverted by plaintiff. For example, defendant presented evidence that she had not previously been diagnosed with and had never before experienced any of the three possible medical conditions which tended to show the second element of the affirmative defense, namely whether the incapacitation was foreseeable. Therefore, the trial court properly submitted to the jury the issue of whether defendant suffered a sudden, unforeseen incapacitation which caused her to lose control of her vehicle and caused the accident. *See MacClure v. Accident & Cas. Ins. Co. of Winterthur, Switzerland*, 229 N.C. 305, 312, 49 S.E.2d 742, 748 (1948) (holding that when plaintiff introduces sufficient evidence to prove a *prima facie* case and defendant has made an affirmative defense, then the case should go to the jury). This procedure is particularly appropriate where, as here, plaintiff failed to make a motion for directed verdict at the close of evidence. *See Creasman v. First Fed. Sav. & Loan Ass'n of Hendersonville*, 279 N.C. 361, 366, 183 S.E.2d 115, 118 (1971) (stating that a "motion for directed verdict is . . . the only procedure by which a party can challenge the sufficiency of his adversary's evidence to go to the jury"), *cert. denied*, 405 U.S. 977, 31 L. Ed. 2d 252 (1972); 2 G. Gray Wilson, *North Carolina Civil Procedure* § 50-1, at 153 (2d ed. 1995). Further, by failing to move for a directed verdict at the close of all the evidence, plaintiff failed to preserve her right to move for a judgment notwithstanding the verdict. *Tatum v. Tatum*, 318 N.C. 407, 408, 348 S.E.2d 813, 813 (1986); *Graves v. Walston*, 302 N.C. 332, 338, 275 S.E.2d 485, 488-89 (1981). Accordingly, plaintiff's assignment of error is overruled.

Thus, we affirm the decision of the Court of Appeals reversing the trial court and remanding for new trial. However, to the extent that the Court of Appeals required elements of the sudden-incapacitation defense in conflict with or in addition to those enumerated in *Mobley*, that portion of the Court of Appeals' decision is hereby disavowed. As modified herein the decision of the Court of Appeals is affirmed.

MODIFIED AND AFFIRMED.

ZANNIE GARNER, PLAINTIFF v. RENTENBACH CONSTRUCTORS INCORPORATED, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ALLIED CLINICAL LABORATORIES, THIRD-PARTY DEFENDANT

No. 255PA98

(Filed 25 June 1999)

Employer and Employee— wrongful discharge—drug testing—failure to utilize laboratory

The trial court properly granted summary judgment for defendant in a wrongful discharge action arising from a failed drug test where plaintiff alleged that the discharge was wrongful because the test was not performed by an approved laboratory pursuant to N.C.G.S. § 95-232. While N.C.G.S. § 95-230 is an expression of the public policy of North Carolina, the public policy exception to the employment-at-will doctrine is not automatically triggered because defendant violated the statute by failing to use an approved laboratory. Such conduct may subject an employer to liability under the civil penalties provisions of the statute, but plaintiff in this case failed to forecast any evidence that at the time of the testing defendant knew or suspected that the laboratory did not qualify as an approved laboratory and failed to forecast any evidence suggesting that plaintiff's discharge was for an unlawful reason or a purpose that contravenes public policy. Under the doctrine of employment-at-will, an employer may certainly terminate an employee for suspected drug use as part of an effort to maintain a drug free workplace.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 624, 501 S.E.2d 83 (1998), reversing an order entered by McHugh, J., on 27 February 1997 in Superior Court, Guilford County, on a claim of wrongful discharge, and remanding for trial. Heard in the Supreme Court 8 March 1999.

Mark Floyd Reynolds II for plaintiff-appellee.

Carruthers & Roth, P.A., by Kenneth R. Keller, for defendant-and third-party plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Guy F. Driver, Jr., Barbara R. Lentz, and C. Matthew Keen, for third-party defendant-appellant.

FRYE, Justice.

The issue in this case is whether the termination of plaintiff's employment based on a positive reading of a drug test constitutes a wrongful discharge because the drug test was not performed consistently with a state statute. We conclude that, on the facts of this case, it does not.

Plaintiff, Zannie Garner, was hired by defendant, Rentenbach Constructors Inc., as a carpenter on 30 June 1993. The parties do not dispute that plaintiff was an at-will employee. In June 1994, defendant implemented a substance-abuse policy requiring employees to submit to random drug testing. Plaintiff received a copy of defendant's "Drug-Free Workplace Policy" and acknowledged its requirements in writing. On 26 July 1994, plaintiff was asked to give a urine sample for screening, and he agreed to do so. Third-party defendant, Allied Clinical Laboratories (Allied), performed the testing of plaintiff's urine specimen at its Chattanooga, Tennessee, laboratory. The urine sample attributed to plaintiff tested positive for the presence of cannabinoids (marijuana), and the results were reported to defendant by Allied. On 8 August 1994, plaintiff's employment was terminated. Plaintiff denies having used illegal drugs.

Plaintiff filed this action on 7 August 1995 alleging, *inter alia*, that his discharge from employment based on positive drug-screening results was wrongful because defendant violated N.C.G.S. § 95-232 by failing to have the testing performed by an "approved laboratory," as defined by N.C.G.S. § 95-231(1). Defendant filed an answer denying any wrongdoing and asserting a third-party complaint against Allied. Defendant contends that it relied on Allied's assurances that it was qualified and equipped to perform forensic urine drug testing and on Allied's report concerning the presence of cannabinoids in plaintiff's urine sample. Allied filed an answer denying liability.

In January 1997, defendant and Allied filed separate motions for summary judgment. Among the evidence considered by the trial court in ruling on the summary judgment motions were excerpts from a transcript of proceedings in plaintiff's unemployment benefits claim held before the Employment Security Commission on 31 October 1994. Uncontroverted evidence indicated that at the time plaintiff's urine sample was tested, Allied's Chattanooga laboratory had a general laboratory accreditation from the College of American Pathologists, which included general screening toxicology, but it was not accredited for forensic urine drug testing. Nor was the laboratory

certified by the United States Department of Health and Human Services, National Institute on Drug Abuse (NIDA), for forensic urine drug testing. The trial court also considered an affidavit of Wayne Amann, safety director for defendant, in which he stated that prior to using Allied to perform drug testing, he inquired and was assured by Allied that it was qualified and equipped to perform drug testing of Rentenbach employees and that its laboratories were " 'NIDA' certified."

The trial court granted defendant's motion for summary judgment, dismissing plaintiff's claim of wrongful discharge.[1] Allied's motion for summary judgment was denied. Plaintiff appealed. The Court of Appeals reversed the trial court's grant of summary judgment and remanded for trial. Discretionary review was allowed by this Court on 8 October 1998.

Recently, in *Kurtzman v. Applied Analytical Indus.*, 347 N.C. 329, 493 S.E.2d 420 (1997), this Court reaffirmed the well-established principle that North Carolina is an employment-at-will state.

> This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party. There are limited exceptions. First, . . . parties can remove the at-will presumption by specifying a definite period of employment contractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer. Finally, this Court has recognized a public-policy exception to the employment-at-will rule.

Id. at 331, 493 S.E.2d at 422 (citations omitted).

Our Court of Appeals first recognized a public-policy exception to the employment-at-will doctrine in *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). The plaintiff in *Sides* was a nurse who alleged that she was discharged in retaliation for her refusal to commit perjury in a

1. Plaintiff voluntarily dismissed a claim of defamation and abandoned a claim of intentional infliction of emotional distress by failing to address it in his brief before the Court of Appeals. The claim of wrongful discharge is the only one before this Court.

medical malpractice case against her employer. The Court of Appeals recognized the compelling public interest at stake and held that "notwithstanding that an employment is at will, [no employer] has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case." *Id.* at 342, 328 S.E.2d at 826.

This Court adopted a public-policy exception to employment at will in *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). In *Coman*, the plaintiff, a long-distance truck driver, alleged that his employer required him to drive in excess of the hours allowed by federal Department of Transportation regulations and ordered him to falsify his logs to show compliance with the regulations. The plaintiff refused to do so, and his pay was reduced by fifty percent, which amounted to a constructive discharge. The defendant's conduct violated not only the federal regulations, but also the public policy of North Carolina because the federal regulations had been adopted in the state administrative code and because "[a]ctions committed against the safety of the traveling public" are contrary to the established public policy of the State. *Id.* at 176, 381 S.E.2d at 447. This Court held that the plaintiff stated a cause of action for wrongful discharge, expressly adopting the following language from *Sides*:

> "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent."

Id. at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826).

Three years later, in *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), we were presented with a case in which three employees were told to work for reduced pay, below the statutory minimum wage, or they would be fired. Recognizing that payment of the minimum wage is the public policy of North Carolina, we held that the defendant-employer violated the public policy by firing the plaintiff-employees for refusing to work for less than the statutory minimum wage.

Plaintiff in this case contends that the statutory requirement that employee drug testing be performed by an approved laboratory is an

express declaration of policy by the General Assembly and that any employee drug testing performed inconsistently with the Controlled Substance Examination Regulation, N.C.G.S. ch. 95, art. 20 (1993 & Supp. 1998), violates public policy.

By enacting the Controlled Substance Examination Regulation, "[t]he General Assembly finds that individuals should be protected from unreliable and inadequate examinations and screening for controlled substances. The purpose of this Article is to establish procedural and other requirements for the administration of controlled substance examinations." N.C.G.S. § 95-230 (1993). Under North Carolina law, an employer or prospective employer "who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements" of the Controlled Substance Examination Regulation. N.C.G.S. § 95-232(a) (Supp. 1998). Among the procedural requirements in effect at the relevant time for this case was that an employer or prospective employer "shall use only approved laboratories for screening and confirmation of samples." N.C.G.S. § 95-232(c) (1993) (amended effective 6 July 1995). An "approved laboratory" is "a clinical chemistry laboratory which performs controlled substances testing and which has demonstrated satisfactory performance in the forensic urine drug testing programs of the United States Department of Health and Human Services or the College of American Pathologists for the type of tests and controlled substances being evaluated." N.C.G.S. § 95-231(1) (1993).

We agree that N.C.G.S. § 95-230 is an expression of the public policy of North Carolina. However, we do not agree with plaintiff that because defendant violated N.C.G.S. § 95-232 by failing to use an approved laboratory, the public policy exception to the employment-at-will doctrine is automatically triggered, giving rise to a claim for wrongful discharge.

Under the rationale of *Sides*, *Coman*, and *Amos*, something more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public-policy exception. An employer wrongfully discharges an at-will employee if the termination is done for "an *unlawful reason* or *purpose* that contravenes public policy." *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826 (emphasis added); *see also Amos*, 331 N.C. at 351, 416 S.E.2d at 168; *Coman*, 325 N.C. at 175, 381 S.E.2d at 447. As stated in *Amos*, the public-policy exception was "designed to vindicate the rights of employees fired *for reasons* offensive to the public policy of this State." *Amos*, 331 N.C. at 356, 416

S.E.2d at 171 (emphasis added). This language contemplates a degree of intent or wilfulness on the part of the employer. In order to support a claim for wrongful discharge of an at-will employee, the termination itself must be motivated by an unlawful reason or purpose that is against public policy.

This case comes to us from the Court of Appeals' reversal of the trial court's grant of summary judgment in favor of defendant. "The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Branks v. Kern*, 320 N.C. 621, 623, 359 S.E.2d 780, 782 (1987). "All inferences are to be drawn against the moving party and in favor of the opposing party." *Id.* at 624, 359 S.E.2d at 782. Likewise, on appellate review of an order for summary judgment, the evidence is considered in the light most favorable to the nonmoving party. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 650, 407 S.E.2d 178, 181 (1991).

The forecast of evidence in the instant case, when viewed in the light most favorable to plaintiff as the nonmoving party, shows that defendant violated the Controlled Substance Examination Regulation by failing to utilize an approved laboratory to conduct plaintiff's drug testing. Such conduct may indeed subject an employer to liability under the civil penalty provisions of the Controlled Substance Examination Regulation. *See* N.C.G.S. § 95-234 (1993). However, plaintiff in this case has failed to forecast any evidence that at the time of plaintiff's testing defendant knew, or even suspected, that Allied's laboratory in Chattanooga did not qualify as an approved laboratory under N.C.G.S. § 95-231(1). Plaintiff also has not forecast any evidence suggesting that his discharge was for an unlawful reason or for a purpose that contravenes public policy. In this case, defendant's allegedly unlawful conduct was the failure to comply with a regulatory statute governing employee drug-testing procedures. In contrast, defendant's *reason* for terminating plaintiff's employment was permissible. Under the doctrine of employment at will, an employer who may fire an employee for any reason or no reason at all may certainly terminate an employee for suspected drug use as part of an effort to maintain a drug-free workplace.

We do not condone defendant's failure to comply with the Controlled Substance Examination Regulation. Nor do we suggest that employers may take lightly the mandate and purpose of the law as set forth in N.C.G.S. § 95-230. However, on the evidence in the

record in this case, plaintiff fails to sustain his claim for wrongful discharge upon defendant's motion for summary judgment. Accordingly, we hold that the Court of Appeals erred by reversing the trial court's grant of summary judgment in favor of defendant.

REVERSED.

REBECCA DUNKLEY v. LEE H. SHOEMATE, ERIC B. MUNSON, DAVID S. JANOWSKY, PRESTON A. WALKER, MARY F. LUTZ, DOE ONE, DOE TWO, AND DOE THREE

No. 178PA98

(Filed 25 June 1999)

Attorneys— appearance as counsel—no contact with client

The trial court erred by denying plaintiff's motion for removal of defense counsel where defendant had been employed as a psychiatric resident at UNC Hospitals; an attempt to verify his credentials as a part of the licensing process revealed no record of him attending any medical school; he resigned and absconded; plaintiff filed an action alleging that defendant had engaged in nonconsensual sexual intercourse with her while falsely representing that he was a resident physician on the staff at UNC; a law firm retained to represent the UNC Liability Insurance Trust Fund filed a motion seeking permission to appear as counsel for defendant in this case on a limited basis in order to defend him in his absence, to protect the interest of UNC-LITF, and to respond to discovery requests to the extent possible; the court entered an order granting the firm's motion; and plaintiff filed this motion to remove the law firm as counsel for defendant. The law firm has had no contact with defendant and has not been authorized by him to undertake his representation in this or any other matter; no attorney-client relationship exists between defendant and the attorneys seeking to represent him. It was noted that Rule 24 of the North Carolina Rules of Civil Procedure provides a means by which an interested party may intervene in a pending lawsuit.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 255, 497 S.E.2d 713 (1998), reversing an order entered 26 July 1996 by Battle, J., in

Superior Court, Orange County, denying plaintiff's motion requesting the removal of counsel for defendant Shoemate. Heard in the Supreme Court 14 January 1999.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay, Donna R. Rutala, and G. Lawrence Reeves, Jr., for defendant-appellant Shoemate.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Kenyann Brown Stanford, on behalf of Nationwide Mutual Insurance Company and the Alliance of American Insurers, amici curiae.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Henderson Hill, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

ORR, Justice.

The sole question presented in this case is whether the trial court erred in failing to remove the law firm of Patterson, Dilthey, Clay & Bryson, L.L.P., as counsel for defendant Lee H. Shoemate. Pertinent facts and circumstances in this case are as follows.

On 5 January 1989, Shoemate, representing that he had received his undergraduate degree from the University of Texas and that he was an M.D./Ph.D. candidate at Harvard Medical School expecting to graduate in August of 1989, applied for a psychiatry residency at the University of North Carolina Hospitals at Chapel Hill ("UNC"). Shoemate was interviewed for the position on 10 January 1989, and defendant Walker of UNC's Department of Psychiatry received letters of recommendation ostensibly from Alvin F. Poussaint, M.D., associate dean, Harvard Medical School and Daniel Perschonok, Ph.D., lecturer on psychology, Harvard Medical School.

UNC offered Shoemate a residency on 20 February 1989, which he accepted, and on 15 May 1989, he entered into an employment contract with UNC under which he was appointed to the hospital's house staff as a resident in psychiatry. Shoemate's residency began on 18 July 1989.

On 25 September 1989, plaintiff was admitted as a patient to UNC for treatment of psychological illnesses, including depression. When plaintiff was discharged on 10 October 1989, she was given a treatment plan that included biweekly visits with a psychiatric therapist to be assigned by UNC. Plaintiff's care was assigned to Shoemate for a period of time including 14 August 1990.

During the second year of his residency, Shoemate, who had previously been granted a training license, applied to the North Carolina Board of Medical Examiners for a full medical license. A routine attempt to verify Shoemate's credentials as part of the licensing process revealed that the American Medical Association had no file on Shoemate and that there was no record of his attending Harvard or any other medical school. On or about 1 October 1990, after his false representations were discovered, Shoemate resigned and absconded. Subsequent attempts to locate him have been futile.

In *University of North Carolina v. Shoemate*, 113 N.C. App. 205, 437 S.E.2d 892, *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 413 (1994), UNC sought a declaratory judgment against Shoemate and Ruby Staton decreeing that UNC was not obligated to provide medical malpractice coverage to Shoemate after Staton, another of Shoemate's patients at UNC, filed a civil action against Shoemate and others alleging medical negligence. In a unanimous decision, the Court of Appeals found that although Shoemate's employment contract was void *ab initio*, "UNC did permit Shoemate to be represented as its agent." *Id.* at 215, 437 S.E.2d at 898. The court held that the University of North Carolina Liability Insurance Trust Fund ("UNC-LITF") "provides coverage against personal tort liability for any person or individual whether an employee, agent or officer of UNC, working within the course and scope of [his or her] health-care functions." *Id.* at 212, 437 S.E.2d at 896.

UNC-LITF retained the law firm of Patterson, Dilthey, Clay & Bryson, L.L.P. ("law firm"), to defend Shoemate in this suit to the extent that the trust fund provided coverage for Shoemate's acts. Since 1991, the law firm has attempted to contact defendant Shoemate with no success and therefore at no time has been authorized by him to appear on his behalf and defend this suit.

In this action filed on 13 July 1994, plaintiff alleged that on 14 August 1990, Shoemate engaged in nonconsensual sexual intercourse with her, while falsely representing that he was a medical doctor and a resident physician on staff at UNC. Plaintiff further alleged that fol-

lowing the alleged incident, Shoemate continued to treat her, informed her that this sexual contact was a necessary part of her treatment, and threatened to involuntarily commit her to a psychiatric hospital if she told anyone about the incident.

On 30 August 1994, the law firm filed a motion pursuant to Rule 16 of the General Rules of Practice for the Superior and District Courts seeking permission from the court to appear as counsel for Shoemate in this case on a limited basis in order to defend him in his absence, to protect the interests of UNC-LITF, and to respond to discovery requests to the extent that it could provide reliable responses without having communicated with Shoemate. On 14 September 1994, Superior Court Judge A. Leon Stanback, Jr., entered an order granting the law firm's motion to appear for defendant Shoemate on a limited basis.

While no appeal was taken from this order, we find no basis for allowing the motion to appear. First, there is no authority under Rule 16 for such an action. Second, no effort was made by UNC-LITF to intervene. All we have is a motion by a law firm asking to represent, in a limited capacity, a party to whom attorneys at the law firm have never spoken and who has not authorized the law firm to represent him.

The law firm, having been allowed to appear, then filed an answer on Shoemate's behalf asserting defenses including lack of personal jurisdiction over defendant, expiration of the statute of limitations, and denial of plaintiff's allegation of rape.

On 11 July 1996, plaintiff filed a motion to remove the law firm as counsel for defendant Shoemate. On 26 July 1996, after a hearing, Superior Court Judge Gordon F. Battle entered an order denying plaintiff's motion for removal of counsel. Plaintiff appealed to the Court of Appeals. The Court of Appeals dismissed the appeal of the denial of plaintiff's motion as interlocutory. *Dunkley v. Shoemate*, 121 N.C. App. 360, 465 S.E.2d 319 (1996). However, on appeal, this Court held that "[t]he interlocutory order of the superior court . . . affects a substantial right which the plaintiff will lose if the order is not reviewed before final judgment" and remanded the case to the Court of Appeals for a hearing on the merits. *Dunkley v. Shoemate*, 346 N.C. 274, 274, 485 S.E.2d 295, 295 (1997) (*per curiam*).

In a unanimous decision, the Court of Appeals held "that Patterson Dilthey lacks the authority to act on Shoemate's behalf"

and reversed the trial court's order. *Dunkley v. Shoemate*, 129 N.C. App. 255, 258, 497 S.E.2d 713, 715 (1998). The law firm argued that the Court of Appeals should overturn its decision in *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E.2d 397 (1995), *disc. rev. allowed*, 342 N.C. 655, 467 S.E.2d 713, *disc. rev. withdrawn*, 343 N.C. 122, 471 S.E.2d 65 (1996), in which the court held that counsel for the insurer lacked authority to act on the insured's behalf without the knowledge and consent of the insured. The court noted that it could not overturn *Amethyst Corp.* because "one panel of the Court of Appeals may not overturn the holding of another panel." *Dunkley*, 129 N.C. App. at 258, 497 S.E.2d at 715.

In *Amethyst Corp.*, as in this case, counsel for an insurance carrier attempted to represent the defendant despite the fact that counsel had no contact with the defendant and had not been authorized by the defendant to represent him. The plaintiff appealed after the trial court granted the defendant's motion to set aside an entry of default in the defendant's absence and without the defendant's knowledge or consent.

In holding that the insurer's counsel in *Amethyst* was without authority to move on the defendant's behalf to set aside the entry of default, the court correctly noted that "[n]o person has the right to appear as another's attorney without the authority to do so, granted by the party for which he [or she] is appearing." *Amethyst Corp.*, 120 N.C. App. at 532, 463 S.E.2d at 400. As the court in *Amethyst Corp.* further stated, "North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency," and "[t]wo factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent." *Id.* at 532-33, 463 S.E.2d at 400.

In addition to the Court of Appeals' decision in *Amethyst Corp.*, plaintiff relies on RPC 223, an ethics opinion issued by the North Carolina State Bar, and Rule 1.2(a) of the Rules of Professional Conduct of the North Carolina State Bar ("Rule 1.2"). Under RPC 223, "the client's failure to contact the lawyer within a reasonable period of time after the lawyer's last contact with the client must be considered a constructive discharge of the lawyer." Ethics op. RPC 223, N.C. State Bar Lawyers' Handbook 1999, at 198, 199 (Jan. 12, 1996). Once reasonable attempts to locate the client prove to be unsuccessful, RPC 223 requires that the lawyer withdraw from the representation

of a client who has disappeared. Rule 1.2(a) requires a lawyer to "abide by a client's decisions" and to "consult with the client as to the means by which they are to be pursued." R. Prof. Conduct N.C. St. B. 1.2(a), 1999 Ann. R. N.C. 503.

Although, as the law firm argues, RPC 223 is based on facts distinguishable from those in this case, RPC 223, Rule 1.2(a), and *Amethyst Corp.* correctly emphasize the principle that a lawyer cannot properly represent a client with whom he has no contact. Here, as in *Amethyst Corp.*, no attorney-client relationship exists between defendant and the attorneys seeking to represent him. The law firm has had no contact with defendant and has not been authorized by him to undertake his representation in this or any other matter. Therefore, we conclude that the trial court erred in failing to remove the firm from the representation of Shoemate. Accordingly, we affirm the Court of Appeals' holding that the law firm lacks the authority to act on Shoemate's behalf.

Having held that a law firm or attorney may not represent a client without the client's permission to do so, we note that Rule 24 of the North Carolina Rules of Civil Procedure provides a means by which an interested party, under certain circumstances, may intervene in a pending lawsuit. Under Rule 24(a)(2), anyone may be allowed to intervene in a pending lawsuit

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he [or she] is so situated that the disposition of the action may as a practical matter impair or impede his [or her] ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

N.C.G.S. § 1A-1, Rule 24(a)(2) (1990). Thus, intervention is an appropriate mechanism by which an interested party may attempt to protect its interests in pending litigation.

AFFIRMED.

STATE OF NORTH CAROLINA v. ERNEST WEST BASDEN

No. 159A93-3

(Filed 25 June 1999)

Discovery— capital cases—motions for appropriate relief

The trial court erred in a capital first-degree murder prosecution by denying defendant discovery pursuant to N.C.G.S. § 15A-1415(f) where, after sentencing, the trial court summarily denied defendant's motion for appropriate relief on 21 May 1996; defendant filed a motion to vacate this order, to which the State responded with a motion for summary denial; the trial court allowed defendant until 30 June 1996 to respond to the State's motion opposing his motion to vacate; N.C.G.S. § 15A-1415(f) became effective on 21 June 1996, requiring disclosure of law enforcement and prosecutorial files in capital cases; and defendant made a discovery request pursuant the statute when he filed his response to the State's motion. Defendant's motion to vacate the order denying his motion for appropriate relief was essentially a motion to reconsider the denial of his motion for appropriate relief and the trial court resurrected defendant's motion for appropriate relief by allowing defendant time to respond to the State's motion for summary denial of defendant's motion to vacate. A motion for appropriate relief was thereby pending before the trial court when N.C.G.S. § 15A-1415(f) became effective.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 31 July 1998 by Lanier (Russell, J., Jr.), J., in Superior Court, Duplin County, denying defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 8 February 1999.

Michael F. Easley, Attorney General, by Edwin W. Welch, Valerie Spalding, and Barry McNeil, Special Deputy Attorneys General, for the State.

J. Matthew Martin, Harry C. Martin, and John D. Loftin for defendant-appellant.

Paul M. Green on behalf of the North Carolina Academy of Trial Lawyers and the National Association of Criminal Defense Lawyers, amici curiae.

MITCHELL, Chief Justice.

In *State v. Green*, 350 N.C. 400, —— S.E.2d —— (1999), we determined that the discovery provided by N.C.G.S. § 15A-1415(f) applies retroactively to post-conviction motions for appropriate relief in capital cases, but only when such motions were filed before 21 June 1996 and had been allowed or were still pending on that date. As we conclude that defendant in this case filed his motion for appropriate relief prior to 21 June 1996 and it was still pending on that date, he is entitled to discovery under the statute. Accordingly, we reverse the trial court's order denying defendant's motion for discovery.

In 1993, defendant Ernest West Basden was sentenced to death and to a consecutive ten-year term of imprisonment for the murder of Billy Carlyle White and for conspiracy to commit murder. Upon review, we found no error. *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).

Defendant subsequently filed a motion for appropriate relief with the trial court on 30 January 1996 and a motion for discovery pursuant to then-existing law on 7 March 1996. The State responded with a motion for summary denial of defendant's motion for appropriate relief. Judge Lanier entered an order summarily denying and dismissing defendant's motion for appropriate relief on 21 May 1996.

On 29 May 1996, defendant filed a motion seeking to have the trial court vacate its 21 May 1996 order denying and dismissing his motion for appropriate relief. The State then filed a motion asking the trial court to summarily deny defendant's motion to vacate. By letter dated 13 June 1996, Judge Lanier informed defense counsel that he would not make a ruling until after he received defendant's written response to the State's motion. The trial court allowed defendant until 30 June 1996 to respond to the State's motion. Meanwhile, on 21 June 1996, N.C.G.S. § 15A-1415(f) became effective. When defendant filed his response to the State's motion on 30 June 1996, he also included a request for discovery under N.C.G.S. § 15A-1415(f). After considering all the motions filed by defendant and the State, Judge Lanier signed an order on 2 July 1996 summarily denying defendant's motion to vacate.

Shortly thereafter, an execution date was set for defendant by the warden of Central Prison. Defendant then filed a motion with the trial court to vacate his execution date. On 14 August 1996, following a

hearing, Judge Lanier signed an order vacating defendant's execution date.

Subsequently, defendant filed a petition for writ of certiorari in this Court seeking our review of the trial court's 2 July 1996 order. We denied the petition. Defendant then filed a motion to reconsider the denial of his petition for writ of certiorari with this Court. On 3 April 1998, this Court filed its decision in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998). In *Bates*, we concluded that N.C.G.S. § 15A-1415(f) requires the State to disclose to post-conviction defense counsel in capital cases the complete files used by all law enforcement and prosecutorial agencies in the investigation and prosecution of a defendant. Because we were unable to determine from defendant's petition and the State's response whether defendant had received all of the discovery to which he was entitled, we allowed defendant's motion for the limited purpose of remanding the case to the Superior Court, Duplin County, for reconsideration in light of *Bates*. *State v. Basden*, 348 N.C. 284, 501 S.E.2d 920 (1998).

On 31 July 1998, Judge Lanier entered an order in which he made findings of fact and concluded *inter alia* that defendant's motion for appropriate relief in this case had been denied and was no longer pending on 21 June 1996, the effective date of N.C.G.S. § 15A-1415(f), and that the discovery provision of the statute is not retroactive in such situations. Thus, the trial court denied defendant's motion for discovery.

Defendant petitioned this Court for a writ of certiorari to review the trial court's order denying his discovery motion and for a writ of mandamus. We allowed defendant's petition for writ of certiorari to consider the retroactivity issue but denied his petition for writ of mandamus.

Defendant contends that the trial court erred in denying his discovery motion. He argues before this Court that because he had a motion for appropriate relief still pending in the Superior Court, Duplin County, at the time N.C.G.S. § 15A-1415(f) became effective, he is entitled to the discovery provided for by that statute. We agree.

As noted above, we have previously addressed the issue of whether N.C.G.S. § 15A-1415(f) should be applied retroactively in capital cases where a defendant has had a motion for appropriate relief denied prior to 21 June 1996, the effective date of the statute. In *Green*, the capital defendant's motion for appropriate relief was

denied by the trial court prior to 21 June 1996. Nevertheless, the defendant wanted the discovery provisions applied retroactively to his case and to all other capital defendants who had motions for appropriate relief denied prior to 21 June 1996. We concluded that N.C.G.S. § 15A-1415(f) applies retroactively in capital cases to defendants whose post-conviction motions for appropriate relief were filed before 21 June 1996 if those motions had been allowed or were still pending on that date. *Green*, 129 N.C. at ——, —— S.E.2d at ——. We stated:

> For purposes of applying the discovery provisions of new subsection (f) [of N.C.G.S. § 15A-1415], we conclude that those provisions apply retroactively to post-conviction motions for appropriate relief in capital cases, but only when such motions were filed before 21 June 1996 and had been allowed or were still pending on that date. In this context, the term "pending" means that on 21 June 1996 a motion for appropriate relief had been filed but had not been denied by the trial court, or the motion for appropriate relief had been denied by the trial court but the defendant had filed a petition for writ of certiorari which had been allowed by, or was still before, this Court.

Id.

Here, the trial court summarily denied defendant's motion for appropriate relief on 21 May 1996. Defendant filed a motion to vacate this order, to which the State responded with a motion for summary denial. Although the trial court ultimately denied defendant's motion to vacate, it allowed defendant until 30 June 1996 to respond to the State's motion opposing his motion to vacate. On 21 June 1996, and during the time allotted for defendant to respond, N.C.G.S. § 15A-1415(f) became effective. When defendant filed his response to the State's motion, he also made a discovery request pursuant to N.C.G.S. § 15A-1415(f).

On these facts, we conclude that defendant's motion to vacate the order denying his motion for appropriate relief was essentially a motion to reconsider the denial of his motion for appropriate relief. By allowing defendant time to respond to the State's motion for summary denial of defendant's motion to vacate, the trial court resurrected defendant's motion for appropriate relief. The trial court's actions amounted to a reconsideration of its order dismissing defendant's motion for appropriate relief, thereby causing that motion for appropriate relief to be pending before the trial court until it was

again denied. As a result, final judgment on defendant's motion for appropriate relief was entered on 2 July 1996, after the effective date of N.C.G.S. § 15A-1415(f). Thus, defendant's motion for appropriate relief was pending before the trial court when N.C.G.S. § 15A-1415(f) became effective, and he was entitled to receive discovery under the statute.

For the foregoing reasons, the 31 July 1998 order of the Superior Court, Duplin County, denying defendant discovery pursuant to N.C.G.S. § 15A-1415(f) is reversed. The case is remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BEECHRIDGE DEVELOPMENT COMPANY, LLC v. LAURENCE E. DAHNERS, ELEANOR S. DAHNERS, TERRY R. KITSON, PAULA A. SHERMAN, DAVID B. CRAIG, TRUSTEE, BANCPLUS MORTGAGE CORPORATION, JANE F. BURRILL, JOHN S. BURRILL, TIM, INC., TRUSTEE, NATIONSBANK OF NORTH CAROLINA, NA, AND ORANGE WATER AND SEWER AUTHORITY

No. 101A99

(Filed 25 June 1999)

Easements— public easement—sanitary sewer line

A "public easement" on the recorded plat of defendant's property included use of the easement for a sanitary sewer line to serve plaintiff's adjacent property.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. ——, 511 S.E.2d 18 (1999), reversing a judgment signed 24 October 1997 by Battle, J., in Superior Court, Orange County. Heard in the Supreme Court 12 May 1999.

Northen Blue, LLP, by David M. Rooks, III, for plaintiff-appellant.

Beemer, Savery & Hadler, by Wayne R. Hadler and Jeffrey A. Jones; and Rightsell, Eggleston & Forrester, LLP, by Donald P. Eggleston, for defendant-appellees Laurence and Eleanor Dahners, Terry Kitson, Paula Sherman, and Jane and John Burrill.

PER CURIAM.

Plaintiff Beechridge Development Company acquired an undeveloped tract of property adjacent to defendants' Morgan Creek Hills property. Plaintiff intended to use a "public easement" found on the recorded plat to defendants' property for the installation of a sanitary sewer line to service plaintiff's tract. Using extrinsic evidence, the trial court found in favor of plaintiff, concluding that "Morgan Creek Hills . . . intended the recording of the Plat to be an offer of dedication of the Easement described on the Plat as a public easement for acceptance as a sanitary sewer easement." The Court of Appeals reversed the trial court's order, holding that the trial court erred by relying on extrinsic evidence when the plain language of defendants' recorded plat did not allow for a sanitary sewer line within the parameters of the term "public easement." *Beechridge Dev. Co. v. Dahners*, 132 N.C. App. 181, ——, 511 S.E.2d 18, 21 (1999). We reverse.

The term "public easement" is neither ambiguous nor silent as to the scope of an easement. "[A] public easement is one the right to the enjoyment of which is vested in the public generally or in an entire community; such as an easement of passage on the public streets and highways or of navigation on a stream." BLACK'S LAW DICTIONARY 510 (6th ed. 1990). This encompasses a wide variety of public uses, including a sanitary sewer line. *See* 11A Eugene McQuillen, THE LAW OF MUNICIPAL CORPORATIONS § 33.74, at 513 (3d ed. 1991). Accordingly, there is no need to resort to extrinsic evidence because this was a public easement, thus including a sanitary sewer line.

Therefore, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Orange County, for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

PIAZZA v. LITTLE

[350 N.C. 585 (1999)]

JOHN N. PIAZZA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF EDITH MAY PIAZZA v. MICHELLE C. LITTLE AND ANNIE LOU PERRY

No. 193PA98

(Filed 25 June 1999)

Insurance— automobile—excess liability policy—UIM coverage not required

An excess personal liability policy is not required by N.C.G.S. § 20-279.21(b)(4) to provide underinsured motorist (UIM) coverage where such coverage is expressly excluded by the terms of the policy.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 77, 497 S.E.2d 429 (1998), affirming an order of summary judgment in favor of plaintiff entered by Griffin, J., on 31 March 1997, in Superior Court, Pitt County. Heard in the Supreme Court 11 January 1999.

Ward and Smith, P.A., by Teresa DeLoatch Bryant and John M. Martin, for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by R. Scott Brown and Travis K. Morton, for unnamed defendant-appellant Automobile Insurance Company of Hartford, Connecticut.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

Ellis, Hooper, Warlick and Morgan, by John Drew Warlick, Jr., on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

The sole issue in this case is whether N.C.G.S. § 20-279.21(b)(4) requires an excess personal liability policy to provide underinsured motorist (UIM) coverage where such coverage is expressly excluded by the terms of the policy. Pursuant to the Court's decision in *Progressive Am. Ins. Co. v. Vasquez*, 350 N.C. 386, 515 S.E.2d 8 (1999), it does not.

Under the decision in *Progressive*, an excess liability policy such as the one at issue in this case is not a "motor vehicle liability policy"

under the terms of N.C.G.S. § 20-279.21(a) and therefore is not subject to the requirements of N.C.G.S. § 20-279.21(b)(3) or (b)(4). Because the terms of the excess liability policy do not provide UIM benefits, and in fact expressly exclude such coverage, plaintiff cannot prevail. *See Progressive Am. Ins. Co.*, 350 N.C. at 395, 515 S.E.2d at 13.

Accordingly, the decision of the Court of Appeals affirming the trial court's entry of summary judgment for plaintiff is reversed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Pitt County for entry of summary judgment for unnamed defendant Automobile Insurance Company of Hartford, Connecticut.

REVERSED AND REMANDED.

Justices FRYE and MARTIN dissent for the reasons stated in the dissenting opinion in *Progressive Am. Ins. Co. v. Vasquez*, 350 N.C. 386, 515 S.E.2d 8 (1999).

STATE OF NORTH CAROLINA v. SAMMIE LEE LOVE

No. 539A98

(Filed 25 June 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 350, 507 S.E.2d 577 (1998), finding no error in judgments entered 24 October 1996 by Bowen, J., in Superior Court, Robeson County. Heard in the Supreme Court 14 April 1999.

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

Sue A. Berry for defendant-appellant.

PER CURIAM.

AFFIRMED.

BROWN v. RENAISSANCE MEDIA, INC.

[350 N.C. 587 (1999)]

GEORGE W. BROWN AND CATHY G. BROWN, PLAINTIFFS v. RENAISSANCE MEDIA, INC., DEFENDANT v. GEORGE W. BROWN, JR., THIRD-PARTY DEFENDANT

No. 449A98

(Filed 25 June 1999)

On writ of certiorari, granted by the Supreme Court *ex mero motu* pursuant to N.C.G.S. § 7A-32(b) and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, of an unpublished, split decision of the Court of Appeals, 131 N.C. App. 152, 510 S.E.2d 418 (1998), affirming a judgment entered 17 July 1997 by Leonard, J., in District Court, Mecklenburg County. Heard in the Supreme Court 10 May 1999.

Aaron E. Michel for plaintiff-appellants and third-party defendant-appellant.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by K. Neal Davis and Kimberly R. Matthews, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DENNIS RAY CHERRY

No. 550PA98

(Filed 25 June 1999)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous, unpublished decision of the Court of Appeals, 131 N.C. App. 555, 512 S.E.2d 98 (1998), finding no error in judgments entered by Parker, J., on 1 December 1997 in Superior Court, Pitt County. Heard in the Supreme Court 12 May 1999.

Michael F. Easley, Attorney General, by Reuben F. Young, Assistant Attorney General, for the State.

Jeffery B. Foster for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

STAR FINANCIAL CORPORATION v. HOWARD NANCE COMPANY

No. 26A99

(Filed 25 June 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 674, 508 S.E.2d 534 (1998), affirming an order for summary judgment entered 3 December 1997 by Baker, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 10 May 1999.

John E. Hodge, Jr., for plaintiff-appellant.

Perry, Patrick, Farmer & Michaux, P.A., by Ray Michaux, Jr., and John H. Carmichael, for defendant-appellee.

PER CURIAM.

For the reasons stated in the majority opinion of the Court of Appeals, the decision of the Court of Appeals is affirmed. *See Scott v. Foppe*, 247 N.C. 67, 100 S.E.2d 238 (1957).

AFFIRMED.

MARGARET ATKINSON v. DAVID E. ATKINSON

No. 81A99

(Filed 25 June 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. 82, 510 S.E.2d 178 (1999), reversing an order signed 15 July 1997 by Smith (John W.), J., in District Court, New Hanover County, and remanding for further proceedings to effect an equitable distribution of the parties' marital property. Heard in the Supreme Court 12 May 1999.

Lea, Clyburn & Rhine, by J. Albert Clyburn and James W. Lea, III, for plaintiff-appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Greene, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the District Court, New Hanover County, for reinstatement of its order allowing defendant's motion to dismiss the equitable distribution claim.

REVERSED.

IN RE SWINSON

[350 N.C. 591 (1999)]

IN THE MATTER OF: PHILLIP R. SWINSON, A MINOR

No. 99A99

(Filed 25 June 1999)

Appeal by respondent-juvenile pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 132 N.C. App. 396, 516 S.E.2d 381(1999), affirming an order entered 28 January 1998 by Patterson, J., in District Court, Wilson County. Heard in the Supreme Court 12 May 1999.

Stanley G. Abrams for respondent-juvenile-appellant.

Michael F. Easley, Attorney General, by Harriet F. Worley, Assistant Attorney General, for State-appellee.

PER CURIAM.

AFFIRMED.

AMERICAN MFRS. MUT. INS. CO. v. HAGLER

No. 80P99

Case below: 132 N.C.App. 204

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 June 1999.

BISHOP v. BISHOP

No. 89P99

Case below: 132 N.C.App. 133

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 June 1999.

BRAME v. SHARPE

No. 216P99

Case below: 132 N.C.App. 822

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

BROOKS v. SOUTHERN NAT'L CORP.

No. 497P98

Case below: 131 N.C.App. 80

Motion by defendants to dismiss appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) allowed 24 June 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999. Justice Martin recused.

C.C. & J. ENTERS., INC. v. CITY OF ASHEVILLE

No. 184P99

Case below: 132 N.C.App. 550

Petition by respondent (City of Asheville) for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1999. Petition by intervenor (Jackson Park/Woolsey) for writ of supersedeas allowed 24 June 1999. Petition by intervenor (Jackson Park/Woolsey) for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1999.

CATO v. CROWN FIN. LTD.

No. 20P99

Case below: 131 N.C.App. 683

Petition by defendants (Arnold Walser and Shirley Walser) for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

CENTURA BANK v. EXECUTIVE LEATHER, INC.

No. 196P99

Case below: 132 N.C.App. 759

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

CONWAY v. CONWAY

No. 21P99

Case below: 131 N.C.App. 609

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 24 June 1999.

FORTUNE INS. CO. v. OWENS

No. 154PA99

Case below: 132 N.C.App. 489

Petition by defendants (Hart and Gilmore) for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1999.

GOODWIN v. SCHNEIDER NAT'L, INC.

No. 181P99

Case below: 132 N.C.App. 585

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 24 June 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

GRAY v. N.C. INS. UNDERWRITING ASS'N

No. 84PA99

Case below: 132 N.C.App. 63

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1999. Justice Martin recused.

IN RE APPEAL OF STERLING DIAGNOSTIC IMAGING, INC.

No. 128P99

Case below: 132 N.C.App. 393

Petition by Transylvania County for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

IN RE T.S.

No. 251P99

Case below: 133 N.C.App. 272

Motion by Attorney General for temporary stay allowed 8 June 1999.

JACKSON v. N.C. DEP'T OF HUMAN RES.

No. 510P98

Case below: 131 N.C.App. 179

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

LINEBACK v. WAKE COUNTY BD. OF COMM'RS

No. 166P99

Case below: 132 N.C.App. 584

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999. Motion by defendant for costs and attorneys' fees pursuant to G.S. 97-88 and Rule 34 of the N.C. R. App. P. denied 24 June 1999.

PACK v. RANDOLPH OIL CO.

No. 343P98

Case below: 130 N.C.App. 335
349 N.C. 361
349 N.C. 350

Motion by plaintiff for suspension of rules for reconsideration of petition to rehear petition for discretionary review dismissed 24 June 1999.

REIS v. HOOTS

No. 50P99

Case below: 131 N.C.App. 721

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

RIDENHOUR v. IBM CORP.

No. 187P99

Case below: 132 N.C.App. 563

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999. Justice Martin recused.

ROBINSON v. ENTWISTLE

No. 121P99

Case below: 132 N.C.App. 519

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. BLACKWELL

No. 233P99

Case below: 133 N.C.App. 31

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 June 1999.

STATE v. BLOUNT

No. 284P99

Case below: 133 N.C.App. 445

Motion by defendant for temporary stay denied 24 June 1999.

STATE v. BOOTHE

No. 214P99

Case below: 132 N.C.App. 823

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. BRAGG

No. 66P99

Case below: 128 N.C.App. 748

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 June 1999.

STATE v. BYRD

No. 110P99

Case below: 132 N.C.App. 220

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. FUNDERBURKE

No. 137P99

Case below: 132 N.C.App. 397

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. GARTLAN

No. 138P99

Case below: 132 N.C.App. 272

Motion by Attorney General to dismiss the appeal for lack of substantial constutional question allowed 24 June 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. HARRIS

No. 85PA99

Case below: 132 N.C.App. 134

Motion by Attorney General to dismiss appeal allowed 24 June 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1999 for the limited purpose of remanding to N.C. Court of Appeals for reconsideration in light of *Lilly v. Virginia*.

STATE v. HINNANT

No. 22A99

Case below: 131 N.C.App. 591

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 24 June 1999. Motion by Attorney General to dismiss the appeal based on a constitutional question denied 24 June 1999.

STATE v. HOWIE

No. 206P99

Case below: 133 N.C.App. 188

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. MUNSEY

No. 417A95-2

Case below: Wilkes County Superior Court

Motion by defendant to terminate appeal allowed 24 June 1999.

STATE v. PETTY

No. 156P99

Case below: 132 N.C.App. 453

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 24 June 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

STATE v. SINCLAIR

No. 220P99

Case below: 131 N.C.App. 703

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 June 1999.

STATE v. SUMMERS

No. 195PA99

Case below: 132 N.C.App. 636

Petition by Attorney General for writ of supersedeas allowed 24 June 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1999.

STATE v. WARD

No. 158A92-3

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari to review the decision of the Superior Court, Pitt County, allowed 9 June 1999 for the limited purpose of remanding this case to the Superior Court, Pitt County, for reconsideration of defendant's motion for discovery pursuant to G.S. 15A-1415(f), denied by the Superior Court on 29 September 1998, in light of this Court's decision in *State v. Green* (9 June 1999, No. 385A84-5).

STATE v. WHITE

No. 211P99

Case below: 133 N.C.App. 193

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 June 1999. Petition by defendant for writ of certiorari to review the order of the North Carolina Court of Appeals denied 24 June 1999.

STATE EX REL. EASLEY v. PURVIS FARMS

No. 194PA99

Case below: 132 N.C.App. 825

Petition by plaintiffs for writ of supersedeas allowed 20 May 1999. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 20 May 1999.

STATE FARM LIFE INS. CO. v. ALLISON

No. 13P98

Case below: 128 N.C.App. 74

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1999.

TALLEY v. TALLEY

No. 226P99

Case below: 133 N.C.App. 87

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999.

WELLS v. WELLS

No. 164P99

Case below: 132 N.C.App. 401

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1999. Justice Martin recused.

PETITIONS TO REHEAR

CONLEY v. EMERALD ISLE REALTY, INC.

No. 358PA98

Case below: 350 N.C.293

Petition by plaintiffs to rehear pursuant to Rule 31 denied 24 June 1999. Justice Martin recused.

PARISH v. HILL

No. 368PA98

Case below: 350 N.C. 231

Petition by plaintiffs to rehear pursuant to Rule 31 denied 24 June 1999.

RODWELL v. CHAMBLEE

No. 559A98

Case below: 350 N.C. 377

Petition by plaintiffs to rehear pursuant to Rule 31 denied 24 June 1999.

STATE FARM MUT. AUTO. INS. CO. v. FORTIN

No. 296PA98

Case below: 350 N.C. 264

Petition by plaintiff to rehear pursuant to Rule 31 denied 27 May 1999. Petition by plaintiff to vacate opinion denied 27 May 1999.

STATION ASSOC., INC. v. DARE COUNTY

No. 337PA98

Case below: 350 N.C. 367

Petition by plaintiffs to rehear pursuant to Rule 31 denied 24 June 1999.

ISENHOUR v. HUTTO

[350 N.C. 601 (1999)]

ANITA FAYE ISENHOUR, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ANTHONY DARRELL ISENHOUR, JR., DECEASED v. KIMBERLY ANN HUTTO, DONALD STEPHEN HUTTO, ROBBIE FAYE MORRISON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SCHOOL CROSSING GUARD, AND THE CITY OF CHARLOTTE, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 305PA98

(Filed 23 July 1999)

1. Cities and Towns— public duty doctrine—inapplicability to school crossing guard

The public duty doctrine did not shield a city and a school crossing guard, in her official capacity, from liability for alleged negligence of the crossing guard in the death of an elementary school student who was struck by an automobile after the guard directed him to cross the street since a school crossing guard is employed to provide a protective service to an identifiable group of children; the relationship between the crossing guard and the children is direct and personal; the dangers are immediate and foreseeable; and the city, by providing school crossing guards, had undertaken an affirmative, but limited, duty to protect certain children at certain times and in certain places.

2. Public Officers and Employees— school crossing guard—negligence—individual capacity—statement of claim

Plaintiffs' complaint sufficiently pled a claim against defendant school crossing guard in her individual capacity for negligently directing an elementary school student across the street where the complaint, as reflected within the caption, body, and claim for relief, indicates a suit against the crossing guard both individually and in her official capacity. Whether plaintiffs' allegations relate to acts performed outside the scope of defendant's official duties is not relevant to the determination of whether the defendant is being sued in an official or individual capacity.

3. Public Officers and Employees— school crossing guard—public employee—liability for negligence

Plaintiffs sufficiently alleged that the duties of defendant school crossing guard are ministerial in nature so that the crossing guard is a public employee, rather than a public official, and is thus liable in her individual capacity for ordinary negligence in the performance of her duties.

Chief Justice MITCHELL and Justice PARKER concur in the result only.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 596, 501 S.E.2d 78 (1998), affirming in part and reversing in part an order signed 8 April 1997 by Gardner, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 12 February 1999.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by Allen A. Bailey and Michael A. Bailey, for plaintiff-appellant and -appellee.

Dean & Gibson, L.L.P., by Rodney Dean and Barbara J. Dean; and Sara Smith Holderness for defendant-appellants and -appellees Morrison and City of Charlotte.

MARTIN, Justice.

Plaintiff, Anita Faye Isenhour, administratrix of the estate of her deceased son, Anthony Darrell Isenhour, Jr. (Anthony), initiated this action against defendants for the personal injuries and wrongful death sustained by Anthony when he was negligently struck by an automobile operated by defendant Kimberly Ann Hutto (Hutto).

Plaintiff made the following allegations in this action. On 8 October 1991, after school had recessed for the day, Anthony, age seven, walked to the northeast corner of The Plaza (intersection of Wilann Drive and Lakedell Drive) in Charlotte, North Carolina. At The Plaza, Anthony stopped and waited for directions to cross from the school crossing guard, defendant Robbie Faye Morrison (Morrison). After Morrison directed Anthony to walk across The Plaza, he was struck by an automobile operated by Hutto. At the time of the accident, Anthony was within the marked pedestrian crosswalk area. Anthony sustained severe head and bodily injuries and subsequently died on 11 June 1995 as a result of physical complications caused by the accident.

On 23 December 1993 plaintiff filed a complaint against defendants Kimberly Ann Hutto and Donald Stephen Hutto for negligently causing personal injuries to her son, Anthony. In the course of filing four amended complaints, plaintiff asserted a new claim for wrongful death and named additional defendants: Morrison, individually and in her official capacity, and the City of Charlotte (City). In their answer

defendants City and Morrison, in her official capacity, denied liability and asserted the defenses of governmental immunity, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. Morrison, in her individual capacity, moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted.

On 8 April 1997 the trial court denied defendants' Rule 12(b)(6) motion to dismiss the claims against the City and Morrison, in her official capacity, on the ground of the public duty doctrine. The trial court also denied the Rule 12(b)(6) motion to dismiss the claim asserted against Morrison in her individual capacity. The City and Morrison appealed to the Court of Appeals.

The Court of Appeals affirmed the trial court's denial of defendants' motion to dismiss based on the public duty doctrine, but reversed the trial court's denial of the motion to dismiss plaintiff's claims against Morrison in her individual capacity. *Isenhour v. Hutto*, 129 N.C. App. 596, 603, 501 S.E.2d 78, 83 (1998).

In analyzing the first issue, the Court of Appeals noted that under the public duty doctrine, there is no tort duty to protect individuals from harm by third parties when a state or municipal governmental entity is acting for the benefit of the general public. *Id.* at 597, 501 S.E.2d at 80 (citing *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991)); *see Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 717, *cert. denied*, — U.S. —, 142 L. Ed. 2d 449 (1998). In finding the public duty doctrine inapplicable, the Court of Appeals stated:

> Here, the relevant relationship was one between a crossing guard and an elementary school student. Unlike police and governmental agencies, who serve the public at large, a crossing guard's primary function is to ensure the safety of a specific individual—each child who comes to the crossing guard seeking to cross the street. Thus, the theoretical argument for the public duty doctrine has no applicability to the facts of the present case.
>
> . . . .
>
> . . . Here, the imposition of liability on crossing guards implicates no such threat of overwhelming liability, given the limited range of services provided by them and the relatively smaller segment of the population served.

Isenhour, 129 N.C. App. at 600-01, 501 S.E.2d at 81. Consequently, the Court of Appeals declined to apply the public duty doctrine to shield the City and Morrison, in her official capacity, from tort liability for Morrison's negligence in directing Anthony across the street. *Id.* at 602, 501 S.E.2d at 82.

In reversing the trial court's order denying Morrison's motion to dismiss in her individual capacity, the Court of Appeals concluded a crossing guard is a public official rather than a public employee. *Id.* at 603, 501 S.E.2d at 82-83. " '[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto.' However, a public employee may be held individually liable." *Id.* at 602, 501 S.E.2d at 82 (quoting *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952)) (citation omitted).

The Court of Appeals found Morrison's job duties analogous to the duties of a police officer. *Id.* at 603, 501 S.E.2d at 82-83. "As a police officer is a public official, . . . we believe a crossing guard should be so treated." *Id.* at 603, 501 S.E.2d at 83. Accordingly, the Court of Appeals held "the crossing guard was not susceptible to suit in her individual capacity for ordinary acts of negligence." *Id.*

On 5 November 1998 we allowed defendants' petition for discretionary review to determine whether the Court of Appeals properly applied the public duty doctrine to the instant facts and plaintiff's petition for discretionary review to determine whether the Court of Appeals properly concluded Morrison was not liable for negligence in her individual capacity.

When reviewing the denial of a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in plaintiff's complaint are treated as true. *Cage v. Colonial Bldg. Co., Inc. of Raleigh*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Forsyth Mem'l Hosp., Inc. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994) (quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)) (alteration in original). A motion to dismiss pursuant to Rule 12(b)(6) should not be granted " *'unless it appears to a certainty that plaintiff is entitled to no relief under*

any state of facts which could be proved in support of the claim.' " *Sutton v. Duke,* 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (quoting 2A James W. Moore, *Moore's Federal Practice* § 12.08 (2d ed. 1968)) (alteration in original).

[1] We first address the question of whether the public duty doctrine shields the City and Morrison, in her official capacity, from liability for the alleged negligent acts of Morrison in her capacity as a school crossing guard.

We recognized and applied the common law public duty doctrine in *Braswell v. Braswell,* 330 N.C. 363, 410 S.E.2d 897. There, Lillie Braswell (Lillie) informed the Pitt County sheriff that she suspected her husband was planning to murder her. *Id.* at 367, 410 S.E.2d at 900. The sheriff comforted Lillie and told her she would be protected. *Id.* at 370, 410 S.E.2d at 901. Less than a week later, Lillie was murdered by her husband. *Id.* at 369, 410 S.E.2d at 901. Her estate subsequently asserted a claim against the sheriff for negligently failing to protect the decedent. *Id.* at 366, 410 S.E.2d at 899. At trial, the trial court granted the sheriff's motion for a directed verdict. *Id.* at 367, 410 S.E.2d at 899.

This Court in *Braswell* stated:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Id. at 370-71, 410 S.E.2d at 901 (citation omitted). " 'For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits.' " *Id.* at 371, 410 S.E.2d at 901 (quoting *Riss v. City of New York,* 22 N.Y.2d 579, 582, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968)) (alteration in original).

In addition to recognizing the general common law rule, this Court recognized two well-established exceptions to the public duty doctrine:

> (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."

Id. at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 193-94, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)).

This Court found neither exception applicable to the facts present in *Braswell*. *Id.* at 372, 410 S.E.2d at 902. No evidence indicated the sheriff expressly or impliedly promised Lillie protection which would constitute a "special duty." *Id.* The Court noted that, arguably, the sheriff's promise to protect Lillie when she was driving to and from work may have been specific enough to be classified under the "special duty" exception. *Id.* Lillie was not, however, killed while driving to or from work, and thus her alleged reliance on the sheriff's promise could not be considered to have caused her death. *Id.* "In sum, the 'special duty' exception to the general rule against liability of law enforcement officers for criminal acts of others is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Id.*

We next addressed the public duty doctrine in *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711. In that case plaintiffs sued the North Carolina Department of Labor and its Occupational Safety and Health Division pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (1993) (amended 1994), for injuries and deaths resulting from a fire at the Imperial Foods Products plant in Hamlet, North Carolina. *Stone*, 347 N.C. at 476, 495 S.E.2d at 713. Plaintiffs alleged defendants had a duty under the Occupational Safety and Health Act of North Carolina (OSHANC), N.C.G.S. §§ 95-126 to -155 (1993) (amended 1997), to inspect the plant and, therefore, their alleged failure to inspect until after the fire constituted a breach of duty. *Stone*, 347 N.C. at 477, 495 S.E.2d at 713.

In *Stone* we concluded, "[t]he general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals." *Id.* at 482, 495 S.E.2d at 716. Accordingly, the governmental entity is not liable for negligence for

failure to carry out statutory duties. *Id.* In support of our holding, we reasoned that application of the public duty doctrine to the Department of Labor was a logical extension of the same policy considerations present in *Braswell*: "to prevent 'an overwhelming burden of liability' on governmental agencies with 'limited resources.' " *Id.* at 481, 495 S.E.2d at 716 (quoting *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901). Accordingly, this Court concluded the public duty doctrine shielded defendants from liability. *Id.* at 483, 495 S.E.2d at 717.

In *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), our most recent examination of the public duty doctrine, plaintiff was injured at an amusement park while riding a go-kart. *Id.* at 194-95, 499 S.E.2d at 748. Plaintiff sued the Department of Labor under the Tort Claims Act for passing go-karts during an inspection when the go-karts were not in compliance with the North Carolina Administrative Code. *Id.* at 195, 499 S.E.2d at 748. Defendant moved to dismiss on the basis of the public duty doctrine. *Id.* at 195, 499 S.E.2d at 749. Relying on *Stone*, this Court applied the public duty doctrine and determined that "nowhere in the Act did the legislature impose a duty upon defendant to each go-kart customer." *Id.* at 197, 499 S.E.2d at 750. This Court further noted the administrative rules promulgated by the Commissioner of Labor governing the inspection of go-karts similarly did not impose a duty to individual customers. *Id.* at 198, 499 S.E.2d at 751. Finally, this Court in *Hunt* concluded that neither recognized exception to the public duty doctrine applied. *Id.* at 199, 499 S.E.2d at 751. Accordingly, we held the public duty doctrine barred plaintiff's claim. *Id.*

As recognized in *Braswell*, *Stone*, and *Hunt*, the purpose of the public duty doctrine is to prevent " 'an overwhelming burden of liability' on governmental agencies with 'limited resources.' " *Stone*, 347 N.C. at 481, 495 S.E.2d at 716 (quoting *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901); *accord Hunt*, 348 N.C. at 199, 499 S.E.2d at 751 (quoting *Sinning v. Clark*, 119 N.C. App. 515, 519-20, 459 S.E.2d 71, 74, *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995)). Imposing liability for the alleged negligence of school crossing guards will not subject the City, or other governmental entities that provide crossing guards, to "an overwhelming burden of liability."

In any event, there is a meaningful distinction between application of the public duty doctrine to the actions of local law enforcement, as in *Braswell*, or of a state agency, as in *Stone* and *Hunt*, and the application of the doctrine to the actions of a school crossing

guard, at issue in the instant case. Unlike the provision of police protection to the general public or the statutory duty of a state agency to inspect various facilities for the benefit of the public, a school crossing guard is employed to provide a protective service to an identifiable group of children. Moreover, the relationship between the crossing guard and the children is direct and personal, and the dangers are immediate and foreseeable.

As the New York Supreme Court, Appellate Division, stated in a somewhat similar case,

> [t]he nature of the duty assumed [by the city] is . . . different from the protection afforded the general public against such hazards as criminal wrongdoing or violations of fire or building codes. This protective duty is carefully limited as to time (hours when the children will be traveling to and from school), place (designated school crossings), beneficiaries (school children) and purpose (safeguard the children at the school crossing and, if necessary, escort them safely across the street).

Florence v. Goldberg, 48 A.D.2d 917, 918-19, 369 N.Y.S.2d 794, 797 (1975).

The City, by providing school crossing guards, has undertaken an affirmative, but limited, duty to protect certain children, at certain times, in certain places. The rationale underlying the public duty doctrine is simply inapplicable to the allegations set forth in plaintiff's complaint. Because we conclude that the public duty doctrine does not operate to shield the City and Morrison, in her official capacity, from liability, we affirm the decision of the Court of Appeals on this issue.

[2] We next determine whether plaintiff has sufficiently pled a claim for relief against Morrison in her individual capacity.

First, we determine whether the complaint seeks recovery from Morrison in her official capacity or individual capacity, or both. "A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997).

> "The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief

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

Id. (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, LOC. GOV'T L. BULL. 67 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995, at 7).

Because public employees are individually liable for negligence in the performance of their duties, "[w]hether the allegations [in a complaint] relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity." *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888. This Court in *Meyer* examined plaintiff's complaint and determined plaintiff was suing defendants in both their official and individual capacities. *Id.*

In the present case, defendants contend the claim against Morrison arises solely in her official capacity because "[a]ll of the negligent acts and omissions which Robbie Faye Morrison is alleged to have committed concern the manner in which she performed her duties as a crossing guard." As we stated in *Meyer*, however, whether plaintiff's allegations relate to acts performed outside an employee's official duties is not relevant to the determination of whether a defendant is being sued in an official or individual capacity. *See id.* In addition, as in *Meyer*, the complaint here, as reflected within the caption, body, and claim for relief, indicates a suit against Morrison individually and in her official capacity. Accordingly, plaintiff sufficiently pled a claim for relief against Morrison in her individual capacity.

[3] Once we determine the aggrieved party has sufficiently pled a claim against defendant in his or her individual capacity, we must determine whether that defendant is a public official or a public employee. "It is settled in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Id.* at 112, 489 S.E.2d

at 888; *see Harwood v. Johnson*, 326 N.C. 231, 241, 388 S.E.2d 439, 445 (1990); *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). "An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. rev. denied*, 335 N.C. 559, 439 S.E.2d 151 (1993); *see Givens v. Sellars*, 273 N.C. 44, 49, 159 S.E.2d 530, 534-35 (1968); *Hefner*, 235 N.C. at 7, 68 S.E.2d at 787. Public officials receive immunity because "it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions" involved in exercising their discretion. *Miller v. Jones*, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945), *quoted in Meyer*, 347 N.C. at 112-13, 489 S.E.2d at 889.

Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. *See Meyer*, 347 N.C. at 113-14, 489 S.E.2d at 889; *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965); *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). "Discretionary acts are those requiring personal deliberation, decision and judgment." *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889; *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. Ministerial duties, on the other hand, are absolute and involve "merely [the] execution of a specific duty arising from fixed and designated facts." *Meyer*, 347 N.C. at 113-14, 489 S.E.2d at 889 (quoting *Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 332, 377 S.E.2d 102, 107 (1988)); *accord Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236; *see Reid*, 112 N.C. App. at 224, 435 S.E.2d at 119.

This Court has previously recognized that police officers are considered public officials rather than public employees. *See Hord*, 264 N.C. at 155, 141 S.E.2d at 245. In *Hord* we concluded that police officers were public officials primarily because: (1) a police officer is appointed pursuant to statutory authority, and (2) a police officer's authority in enforcing the criminal laws involves the discretionary exercise of some portion of sovereign power. *Id.*

We note that cities and towns are expressly authorized to employ police officers pursuant to article 13 of chapter 160A of the General Statutes, titled "Law Enforcement." *See* N.C.G.S. § 160A-281 (1994).

Under the provisions of article 13, police officers are required to take an oath of office, N.C.G.S. § 160A-284 (1998), and are granted all powers invested in law enforcement officers by statute and the common law, N.C.G.S. § 160A-285 (1994). Because "a [police officer] is charged with the duty to enforce the ordinances of the city or town in which he is appointed to serve, as well as the criminal laws of the state," he is a public officer in that municipality. *Hord*, 264 N.C. at 155, 141 S.E.2d at 245.

Unlike the specific grant of statutory authority given municipalities to employ police officers, defendants have not directed our attention to, and our research has not disclosed, any statute specifically authorizing municipalities to employ school crossing guards *per se*. Perhaps even more important, school crossing guards do not exercise the level of discretion statutorily vested in police officers, nor do they exercise a legally significant portion of sovereign power in the performance of their duties.

Plaintiff's fourth amended complaint alleges as follows:

> 5. At all times herein in question, . . . *Morrison was employed by the Defendant City, working as a school crossing guard*. . . .
>
> . . . .
>
> 12. On the date of the incident alleged herein, . . . *Morrison was assigned* by agents and employees of Defendant City to work at the intersection as a school crossing guard, *assisting children crossing The Plaza as they walked to and from Briarwood Elementary School* . . . .
>
> 13. On or about October 8, 1991, the Plaintiff's intestate, Anthony Darrell Isenhour, Jr., was a student at Briarwood Elementary School, which was located near the intersection referred to above. At approximately 2:30 p.m., after school had recessed for the day, *Plaintiff's intestate joined a group of children at the northeast corner of the intersection where they stopped and waited for directions from . . . Morrison to cross The Plaza.*
>
> 14. After the Plaintiff's intestate and other children stopped at the northeasterly corner of the intersection, . . . Morrison negligently directed the Plaintiff's intestate and the other children to walk across The Plaza . . . .

(Emphasis added.)

After careful review of the public official/public employee legal dichotomy, as applied to the allegations within plaintiff's complaint, we conclude plaintiff has sufficiently alleged that the duties of a crossing guard are ministerial in nature—they involve the " 'execution of a specific duty arising from fixed and designated facts.' " *Meyer*, 347 N.C. at 113-14, 489 S.E.2d at 889 (quoting *Jensen*, 297 S.C. at 332, 377 S.E.2d at 107). Plaintiff's allegations are therefore sufficient to overcome defendant's Rule 12(b)(6) motion to dismiss on the ground that Morrison is a public official immune to liability for ordinary negligence. We thus reverse the decision of the Court of Appeals on this issue.

Accordingly, we affirm the Court of Appeals' decision on the public duty doctrine and reverse its decision on plaintiff's claims against Morrison in her individual capacity.

AFFIRMED IN PART AND REVERSED IN PART.

Chief Justice MITCHELL and Justice PARKER concur in the result only.

WALTER LEE HEARNE, PETITIONER v. WAYNE SHERMAN, HEALTH DIRECTOR OF CHATHAM COUNTY, AND CHATHAM COUNTY, RESPONDENTS

No. 309A98

(Filed 23 July 1999)

Public Officers and Employees— employment termination case—evenly divided Court—decision affirmed without precedential value

An evenly divided Supreme Court affirmed without precendential value the unpublished decision of the Court of Appeals in a case involving termination of petitioner's employment as an animal control officer with a county health department that there was substantial evidence to support the conclusion of the final agency decision that petitioner voluntarily resigned and that the final agency decision by the county health director was reached in accordance with petitioner's due process rights.

Chief Justice MITCHELL did not participate in the decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 130 N.C. App. 340, 505 S.E.2d 923 (1998), reversing and remanding an order entered 20 March 1997 by Hobgood, J., in Superior Court, Chatham County. Heard in the Supreme Court 8 March 1999.

McSurely & Osment, by Alan McSurely and Ashley Osment, for petitioner-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr., for respondent-appellees.

LAKE, Justice.

This employment termination case comes to this Court as a result of a dissent in an unpublished decision in the Court of Appeals. The evidence in the record reflects that petitioner Walter Lee Hearne served as an "Animal Control Officer II" with the Chatham County Health Department until January 1995. Petitioner's employment ended when respondent Wayne Sherman, director of the Chatham County Health Department, sought petitioner's resignation as a result of adverse publicity arising out of allegations that petitioner euthanized a litter of puppies in an unauthorized manner.

The question presented for review is whether the final agency decision issued in this case was reached in accordance with petitioner's due process right to a fair determination. Since a final agency decision rendered pursuant to the procedures set forth in N.C.G.S. § 126-37 does not constitute a violation of a petitioner's due process rights, as we conclude was the case here, we affirm the Court of Appeals.

On 31 August 1995, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings alleging that respondent Sherman discharged him in January 1995 without just cause and without a hearing. However, in a letter to petitioner dated 2 August 1995, respondent Sherman wrote that it was the position of the Chatham County Health Department that petitioner voluntarily resigned from his job as Animal Control Officer II.

Administrative Law Judge (ALJ) Fred Morrison, Jr. conducted a hearing on petitioner's claim on 16-17 January 1996. In his recommended decision to the State Personnel Commission (SPC), the ALJ concluded that petitioner did not voluntarily resign his position as Animal Control Officer II and thus recommended petitioner's rein-

statement. On 5 August 1996, the SPC adopted the ALJ's findings of fact and conclusions of law, set out an additional finding of fact and additional conclusions of law, and recommended petitioner's reinstatement. On 31 October 1996, Chatham County Health Director Wayne Sherman, acting as the "local appointing authority" pursuant to N.C.G.S. § 126-37(b1), issued the final agency decision declining to adopt the SPC decision and concluded that petitioner had voluntarily resigned.

Petitioner filed a petition for judicial review to the Superior Court, Chatham County, pursuant to N.C.G.S. § 150B-43. In a 20 March 1997 order, the trial court found that the final agency's conclusion that petitioner voluntarily resigned was not supported by substantial evidence in the whole record, and reversed the final agency's decision. Accordingly, the trial court ordered petitioner's reinstatement. Respondents filed notice of appeal to the Court of Appeals, which held, in a split decision, that there was substantial evidence to support the conclusions of the final agency decision that petitioner voluntarily resigned. The Court of Appeals thus reversed and remanded the order to the trial court.

On 5 August 1998, petitioner filed a notice of appeal to this Court asserting substantial constitutional questions pursuant to N.C.G.S. § 7A-30(1), which in essence queried whether petitioner's due process rights were violated when the director of an agency renders the ultimate decision on an administrative appeal concerning his own employment decision. This Court entered an order on 3 December 1998 granting respondent's motion to dismiss petitioner's appeal of the constitutional questions. Our review of this case is therefore limited to the issue raised in the dissent below. Accordingly, we will not address the specific issue of whether a county health director is the proper person to serve as the "local appointing authority" under section 126-37(b1). The basis for the dissent in the decision below was that respondent Sherman issued a final agency decision wherein he evaluated factual issues involving his own testimony and credibility in violation of petitioner's rights to due process.

The decisive issue in the final agency determination was whether petitioner voluntarily resigned or was discharged from his position of employment. In determining whether an agency decision is supported by sufficient evidence, a reviewing court must apply the "whole record test." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977). This standard of review limits the reviewing court to the agency's findings of fact and does not allow the court to

" 'replace the [agency's] judgment as between two reasonably conflicting views.' " *Powell v. N.C. Dep't of Transp.*, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998) (quoting *Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996)) (alteration in original).

The determinative facts as to whether petitioner voluntarily resigned are not in dispute. During the administrative hearing, petitioner testified regarding his telephone conversation with respondent Sherman:

> And he told me then, he started talking about due to all the news media attention and stuff and all the publicity, bad publicity we're getting about the animal shelter, said, I'm asking you for your resignation. Said, I think it will be the best for the program if you would resign.
>
> . . . .
>
> And he said something else. And I asked him to repeat it again. And he said, well, said, I am asking you for your resignation. And I said, you got it.

Additionally, the record reveals that petitioner's wife listened in on that telephone conversation between petitioner and respondent Sherman. Mrs. Hearne testified:

> Mr. Sherman said, well, I just think it would be in the best interest of the animal shelter if you would resign, Lee.
>
> . . . .
>
> And Lee said—he was very verbal and said, well, this is not over unless you ask the other people for their resignations also. And Mr. Sherman didn't respond at that. And Lee said, well, you've got it. And Mr. Sherman said, well, you're not going to change your mind, now, are you?
>
> . . . .
>
> Lee, as I said, was very hurt and angry too. He said that, y'all come on out here and get this truck off of my property and all of the county stuff off of my property.

While there is language in the final agency decision relating to the credibility of Mr. Hearne and Mr. Sherman, the fact is the parties do not dispute the foregoing testimony of petitioner and his wife or the

material facts surrounding the termination of petitioner's employment. This testimony from petitioner and his wife is substantial evidence that petitioner, while certainly and understandably not happy about it, did in fact resign his position. Consequently, respondent Sherman was not put in the position of having to weigh his own credibility with regard to this fact. We therefore cannot conclude that either the procedure followed in this case or the evidence considered as a result thereof violated petitioner's right to due process.

Additionally, the Administrative Procedure Act provides a mechanism for a petitioner to seek to have a person rendering an agency decision recused:

> If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case.

N.C.G.S. § 150B-36(a) (1995). There is no evidence that petitioner exercised this statutory procedure to protect himself from any perceived bias on the part of or to challenge respondent Sherman. Finally, there is no provision in the Administrative Procedure Act requiring the final agency decision-maker to voluntarily recuse himself in a situation such as the one in the instant case.

The divergent judicial positions taken during the course of this case reflect a troubling and unfortunate set of circumstances involving fair and proper treatment and which seem to arise from the tenuous reaction of a public official in an environment of unfavorable publicity. In this light, our conclusion may seem harsh; however, because there was no procedural violation of the requirements set out in chapter 126 of the General Statutes and because we do not find that, under the particular circumstances of this case, respondent Sherman's participation as adjudicator violated petitioner's due process right to a fair administrative determination, we must affirm the decision of the Court of Appeals.

AFFIRMED.

Chief Justice MITCHELL did not participate in the decision of this case. The remaining members of the Court being equally divided, the decision of the Court of Appeals is affirmed without precedential value.

Justice FRYE dissenting.

In this case, petitioner was a permanent employee of Chatham County and was subject to the State Personnel Act (SPA) pursuant to N.C.G.S. § 126-5(a)(2). Petitioner claimed that he was discharged by respondent Chatham County Health Director without just cause and that he was entitled to a hearing to appeal his discharge. Respondent, on the other hand, claimed that petitioner voluntarily resigned from his employment and therefore was not discharged in violation of the just cause provision of the SPA. After a hearing, Administrative Law Judge (ALJ) Fred Morrison, Jr., concluded, and the State Personnel Commission (SPC) agreed, that petitioner did not voluntarily resign and was in fact discharged without just cause. Respondent Chatham County Health Director, as the "local appointing authority" responsible for making the final agency decision in this case, rejected the conclusions of the ALJ and the SPC. In doing so, respondent weighed the evidence and concluded that petitioner had voluntarily resigned. Respondent explained his conclusion by noting that either he or petitioner had lied about certain points, and he found that his own testimony on those points was credible.

Thus, the narrow question in this case may be stated as follows: Is an appellate court sitting in review of a final agency decision bound by findings of fact made by the agency's final decision-maker when that person bases the crucial finding on his own credibility? I conclude that the answer must be no.

As this Court stated in *Crump v. Board of Educ.*, 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990), "[a]n unbiased, impartial decision-maker is essential to due process." Paraphrasing the Court's words in *Crump*, I recognize that due process is a somewhat fluid concept, and determining what process is due when the head of an agency is making a final agency decision is different from evaluating the procedural protections required in a court of law. Determining what process is due requires an appellate court " 'to take into account an individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it.' " *Id.* (quoting *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 494, 49 L. Ed. 1, 10 (1976)).

From the beginning, this case has hinged on a factual dispute about the details surrounding petitioner's alleged resignation. Petitioner has lost his job and may lose his case, but he should not do so without having the crucial question decided by an unbiased, impartial decision-maker. Due process requires no less.

Justice PARKER joins in this dissenting opinion.

Justice MARTIN dissenting.

The record shows respondent rendered a final agency decision in a case in which he adjudicated contested issues of fact regarding his own testimony and credibility. The perception of partiality created by this procedure, as recognized by Judge Wynn in his dissenting opinion at the Court of Appeals, departs from constitutional principles of fairness and due process.

The majority opinion infringes upon a cornerstone principle of procedural due process. "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no [person] can be a judge in his own case and no [person] is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955).

In the present case, an administrative law judge (ALJ) concluded "[p]etitioner did not voluntarily resign" and "[r]espondent did not have just cause, procedurally or substantively, to terminate [p]etitioner's employment as an Animal Control Officer II." The State Personnel Commission (SPC) similarly concluded "[p]etitioner did not voluntarily resign" and "[r]espondent did not establish just cause for termination of the [p]etitioner's employment." After two impartial tribunals found in favor of petitioner, respondent, as Chatham County Health Director (Health Director) and a party to the action, rendered a final decision against petitioner holding "[p]etitioner resigned his position voluntarily and was not terminated by [r]espondent."

In refusing to adopt the findings of the two earlier tribunals, respondent relied upon his own personal knowledge and bias as a party to the action and in his capacity as Health Director. The perception of partiality exhibited by respondent's adverse decision against petitioner is visibly reflected in his final decision, which states:

> [I]t is evident that either Mr. Sherman or Mr. Hearne are [sic] lying about certain points. The Health Director finds Mr. Sherman's testimony on these points to be credible. Consequently, the Health Director declines to adopt the ALJ's recommended findings of fact on these points which are based on

[p]etitioner's testimony, or which are not based on Mr. Sherman's credible testimony.

The perception created by respondent's service as judicial arbiter in his own case does not promote confidence in our judicial system as, indeed, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 99 L. Ed. 11, 16 (1954).

Although I recognize that the instant appeal arises out of an administrative determination, " '[the United States Supreme Court] has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.' " *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161, 95 L. Ed. 817, 848 (1951) (Frankfurter, J., concurring) (quoting *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100, 47 L. Ed. 721, 725-26 (1903)). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. at 136, 99 L. Ed. at 946; *see* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-92 (1996). As we have succinctly stated, "[a]n unbiased, impartial decision-maker is essential to due process." *Crump v. Board of Educ.*, 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990).

The majority holds, in the instant case, that the determinative facts as to whether petitioner voluntarily resigned are not in dispute, and thus, respondent did not have to weigh his own credibility with regard to the facts. The ALJ and the SPC both made findings of fact, however, supporting the conclusion that petitioner did not voluntarily resign. Furthermore, on judicial review from the administrative determination, the trial court concluded "the finding of fact in [respondent's] decision, that petitioner voluntarily resigned, is not supported by substantial evidence in the whole record." Consequently, numerous material facts were in dispute regarding the details surrounding petitioner's alleged resignation.

I am troubled by the majority's selective recitation of certain portions of the record testimony to justify its conclusion that respondent did not have to weigh his own credibility. By doing so, the majority ignores the perception of partiality inherent in the termination procedure utilized by respondent. In addition, the majority's decision to reweigh the evidence ignores our long-standing rule that

appellate courts should not disregard findings of fact when they are supported by competent evidence, as here, even if the evidence would also support a contrary result. *See Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994). Therefore, the majority errs by disregarding the findings of the ALJ and the SPC that petitioner did not voluntarily resign.

Finally, I disagree with the majority's conclusion that petitioner should have moved to have respondent recuse himself pursuant to N.C.G.S. § 150B-36(a). First, since respondent served as Chatham County Health Director, he was necessarily the "local appointing authority" under N.C.G.S. § 126-37(b1). I note, and the majority does not disagree, that the Administrative Procedure Act does not provide for an alternative or substitute arbiter in the event of respondent's recusal. Therefore, any attempt by petitioner to request that respondent recuse himself would have in fact been "clearly useless" and, therefore, no procedural bar to the viability of petitioner's due process claim before this Court. *See UDC Chairs Chapter v. Board of Trustees*, 56 F.3d 1469, 1475 (D.C. Cir. 1995).

Second, the record reflects, as noted at oral argument, that respondent simply mailed his final decision to petitioner almost three months after the SPC adopted the ALJ's recommendation that petitioner be reinstated, thereby depriving petitioner of *any* opportunity to be heard prior to issuance of a final agency decision which wholly rejected the SPC's recommendation, and, perhaps even more important, depriving petitioner of any notice that respondent intended to serve as final arbiter over a contested case in which he had personal knowledge and bias as a party to the action.

Our constitutional guarantees of due process are paramount to the provisions of the Administrative Procedure Act, and, in any event, courts should "indulge every reasonable presumption against waiver" of a constitutional right. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 81 L. Ed. 1177, 1180 (1937); *see also* 2 Chester J. Antieau & William J. Rich, MODERN CONST. LAW § 35.03 (2d ed. 1997) ("Facts needed to establish an effective waiver [of due process rights], however, must be specifically proven.").

Put simply, after publication of the majority opinion, North Carolina's local government employees will retain little constitutional due process protection against fundamentally biased termination procedures. By adjudicating material factual issues in which respondent was personally involved and thereafter weighing the credibility of

his own testimony, respondent violated petitioner's constitutional due process rights.

Accordingly, I respectfully dissent.

IN THE MATTER OF THE WILL OF CALVIN H. BUCK

No. 428PA98

(Filed 23 July 1999)

Trials— motion for new trial for insufficient evidence—standard of review

In a caveat proceeding, the Court of Appeals correctly concluded that the trial court did not abuse its discretion in its order granting a new trial on the issue of undue influence. The trial court's decision to exercise its discretion to grant or deny a motion for a new trial for insufficient evidence under N.C.G.S. § 1A-1, Rule 59(a)(7) must be based on the greater weight of the evidence as observed first-hand by the trial court; the test for appellate review continues to be simply whether or not the record affirmatively demonstrates an abuse of discretion by the trial court in doing so. *Lassiter v. English*, 126 N.C. 489 is overruled to the extent that it is inconsistent with this decision.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 408, 503 S.E.2d 126 (1998), affirming in part, reversing in part, and remanding a judgment entered 18 February 1997 by Manning, J., in Superior Court, Gates County. Heard in the Supreme Court 10 May 1999.

Baker, Jenkins, Jones & Daly, P.A., by Bruce L. Daughtry and Roger A. Askew, for propounder-appellees Mallory, Kenneth, and Ronald Gene Buck.

George B. Currin, Herbert T. Mullen, Jr., and H. Spencer Barrow for caveator-appellant Sandra Buck Jordan.

MITCHELL, Chief Justice.

This appeal requires that we reconsider the standard to be used by an appellate court in reviewing the evidence before the trial court

at the time of its ruling on a motion for a new trial under Rule 59(a)(7) of the North Carolina Rules of Civil Procedure for insufficiency of the evidence to justify the verdict of a jury. N.C.G.S. § 1A-1, Rule 59(a)(7) (1990). Specifically, we must determine whether the appellate courts must apply a different standard for reviewing such evidence when the trial court grants a new trial than is to be applied when the trial court denies a new trial. We conclude that the evidentiary standard to be applied on appellate review is the same in each instance. Accordingly, we affirm the decision of the Court of Appeals, which applied the appropriate standard in this case.

Evidence presented at trial tended to show that Calvin H. Buck (testator) died on 23 December 1995 and was survived by his five children, Sandra Buck Jordan, Kenneth Buck, Mallory Buck, Ronald Gene Buck, and Joseph Buck. After Calvin Buck's death, his son Mallory presented for probate a paper writing dated 13 November 1995 (1995 Will), which was purported to be testator's last will and testament. The 1995 Will named Mallory as executor and divided testator's estate equally among three of his four sons, Mallory, Kenneth, and Ronald Gene. No provision was made in the 1995 Will for Sandra, who was the chief beneficiary of her father's estate under a will and codicil prepared in 1989 and 1990, respectively.

On 8 January 1996, Sandra filed a caveat to the 1995 Will, alleging that testator lacked testamentary capacity at the time the will was executed and that the will was procured by undue influence upon the testator by Kenneth, Mallory, and Ronald Gene. At the conclusion of a jury trial in the Superior Court, Gates County, the jury returned a verdict in favor of Sandra. The jury found that testator lacked sufficient mental capacity to execute the 1995 Will and that it had been procured by undue influence and was therefore invalid. Mallory, Kenneth and Ronald Gene Buck, propounders, moved for judgment notwithstanding the verdict and alternatively for a new trial. The trial court entered an order granting judgment notwithstanding the verdict, directing that the 1995 Will be admitted to probate, and conditionally allowing the motion for a new trial. Caveator appealed.

The Court of Appeals affirmed the trial court's entry of judgment notwithstanding the verdict as to the issue of testamentary capacity, reversed the trial court's entry of judgment notwithstanding the verdict as to the issue of undue influence, and affirmed the trial court's granting of propounders' alternative motion for a new trial on the issues of undue influence and *devisavit vel non*. The Court of Appeals denied caveator's petition for rehearing.

Caveator petitioned this Court for discretionary review, seeking review only of that part of the Court of Appeals' decision affirming the trial court's order conditionally granting a new trial on the issue of undue influence. On 4 February 1999, this Court allowed caveator's petition in order to review this single issue.

Caveator contends that the Court of Appeals erred by applying an incorrect standard for its appellate review of the trial court's order conditionally granting a new trial on the issue of undue influence. Pursuant to N.C.G.S. § 1A-1, Rule 50(b), a party who moves for judgment notwithstanding the verdict may also move, in the alternative, for a new trial. Rule 50(c)(1) provides:

> If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered.

N.C.G.S. § 1A-1, Rule 50(c)(1) (1990). When a party joins a motion for judgment notwithstanding the verdict with an alternative motion for a new trial, the trial court is required to rule on both. *Bryant v. Nationwide Mut. Fire Ins. Co*, 313 N.C. 362, 379, 329 S.E.2d 333, 343 (1985).

The trial court, acting in its discretion, granted propounders' alternative motion for a new trial as to the issue of undue influence, stating that "the jury's verdict was contrary to the weight of the credible evidence." This is the only portion of the trial court's order at issue before this Court on appeal.

At the outset, we note that the Court of Appeals expressed confusion concerning this Court's prior decisions regarding the proper standard for appellate review of trial court orders granting new trials for insufficiency of the evidence to justify the verdict. In *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973), and *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974), this Court reversed orders granting judgment notwithstanding the verdict and vacated orders which

conditionally granted new trials based upon the insufficiency of the evidence. In those cases, we indicated that a trial court's rulings on motions for a directed verdict at the close of the evidence and on motions for judgment notwithstanding the verdict after the jury had returned a verdict present only a question of law; that question is whether substantial evidence introduced at trial would support a verdict in favor of the nonmoving party. We did not mean to imply in either of those cases that a trial court's *discretionary* ruling granting or denying a motion for a new trial is to be reviewed on appeal as a question of law governed by whether substantial evidence introduced at trial supports the verdict returned by the jury. Neither *Dickinson* nor *Summey* should be read as supporting such a proposition.

We have often reiterated this Court's long-standing position that an order granting judgment notwithstanding the verdict, on the one hand, and an order granting a new trial for insufficiency of the evidence, on the other, present two different questions and require different standards of appellate review. In *Bryant v. Nationwide*, we stated that the questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law, while a motion for a new trial for insufficiency of the evidence pursuant to Rule 59(a)(7) is addressed to the discretion of the trial court. 313 N.C. at 379-81, 329 S.E.2d at 343-44. This position is consistent with our prior decisions over many years which have held uniformly that in the absence of an abuse of discretion, a trial court's ruling on a motion for a new trial due to the insufficiency of evidence is not reversible on appeal. *See, e.g., Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 696, 413 S.E.2d 268, 276 (1992); *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (plurality opinion).

We take this opportunity to reemphasize the proper standard of appellate review with regard to a trial court's grant of a new trial for insufficiency of the evidence. Rule 59(a)(7) authorizes the trial court to grant a new trial based on the "insufficiency of the evidence to justify the verdict." N.C.G.S. § 1A-1, Rule 59(a)(7). We have previously indicated that, in this context, the term "insufficiency of the evidence" means that the verdict "was against the greater weight of the evidence." *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979). The trial court has discretionary authority to appraise the evidence and to " 'order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony.' " *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611

(1977) (quoting *Roberts v. Hill*, 240 N.C. 373, 380, 82 S.E.2d 373, 380 (1954)). Like any other ruling left to the discretion of a trial court, the trial court's appraisal of the evidence and its ruling on whether a new trial is warranted due to the insufficiency of evidence is *not* to be reviewed on appeal as presenting a question of law. *Id.* at 635, 231 S.E.2d at 611. As we stated in *Worthington*:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either *granting or denying* a motion to set aside a verdict and order a new trial is *strictly limited* to the determination of whether the record affirmatively demonstrates an abuse of discretion by the [trial] judge.

305 N.C. at 482, 290 S.E.2d at 602 (emphasis added). This Court has long recognized this standard for appellate review of trial court orders granting new trials. *See, e.g., Dixon v. Young*, 255 N.C. 578, 122 S.E.2d 202 (1961); *Caulder v. Gresham*, 224 N.C. 402, 30 S.E.2d 312 (1944); *Bird v. Bradburn*, 131 N.C. 488, 42 S.E. 936 (1902); *Brink v. Black*, 74 N.C. 329 (1876). We recently reaffirmed the application of this standard of review to rulings on Rule 59 motions. " '[A]n appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (quoting *Campbell v. Pitt County Mem'l Hosp., Inc.*, 321 N.C. 260, 265, 362 S.E.2d 273, 275 (1987)) (emphasis added).

The trial court's discretion to grant a new trial arises from the inherent power of the court to prevent injustice. *Britt*, 291 N.C. at 634, 231 S.E.2d at 611. In *Britt*, Chief Justice Sharp explained that the trial court's discretionary authority to set aside a verdict was a traditional authority vested in the court which was not diminished by the adoption of the Rules of Civil Procedure. *Id.* at 635, 231 S.E.2d at 612. In fact, the General Assembly has "no power" to deprive the courts of this inherent authority. N.C. Const. art. IV, § 1. Rather, the procedure for exercising this discretion was merely codified in Rule 59, which lists grounds on which a trial court may grant a new trial. *Britt* at 635, 231 S.E.2d at 612.

We have long recognized the importance of deferring to the trial court's discretionary rulings regarding the necessity for a new trial:

> [T]he trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity of a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observations of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Worthington, 305 N.C. at 487, 290 S.E.2d at 605. It is impossible to place precise boundaries on the trial court's exercise of its discretion to grant a new trial. However, we emphasize that this power must be used with *great care and exceeding reluctance.* This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution.

In the present case, caveator contends that for purposes of appellate review a distinction must be made between a trial court's granting of a motion for a new trial on the grounds of insufficient evidence and a trial court's denial of a motion for a new trial made on those same grounds. She argues that a "*heightened standard of review and a greater degree of scrutiny* is required when an appellate court reviews a trial court's *grant* of a new trial, which actually reverses and overturns a unanimous jury verdict." (Emphasis added.) Caveator stresses the importance of protecting the sanctity of jury verdicts.

In affirming the trial court's order allowing the motion for a new trial on the issue of undue influence, the Court of Appeals stated:

> [W]e cannot say the trial court manifestly abused its discretion in its discretionary ruling that the jury's verdict was contrary to the *greater* weight of all the evidence in the case. Therefore, we will not disturb the order granting a new trial on the issues of undue influence and *devisavit vel non.*

In re Will of Buck, 130 N.C. App. 408, 417, 503 S.E.2d 126, 132 (1998) (emphasis added). Caveator says that the Court of Appeals erred by

not distinguishing between a trial court's grant and a trial court's denial of a Rule 59(a)(7) motion for a new trial due to the insufficiency of evidence. She argues that in reviewing the trial court's order granting a new trial, the Court of Appeals should have considered the jury's verdict in the context of whether such verdict was against the "great" weight of the evidence, not merely against the "greater" weight of the evidence.

The only North Carolina authority cited by caveator in direct support of her position is *Lassiter v. English*, a case in which our Court of Appeals made such a distinction, for purposes of appellate review, between the granting of a new trial and a denial of a new trial. 126 N.C. App. 489, 485 S.E.2d 840, *disc. rev. denied*, 347 N.C. 137, 492 S.E.2d 22 (1997). In *Lassiter*, the Court of Appeals stated:

> The trial court's determination on the grant or denial of an alternative new trial is reversible only for an abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). A "greater degree of scrutiny," however, must be given to the grant of a new trial on the ground that the evidence is insufficient to justify the verdict. 12 James W. Moore et al., *Moore's Federal Practice* § 59.26[1] (3d ed. 1997) [hereinafter *Moore's Federal Practice*]; N.C.G.S. 1A-1, Rule 59(a)(7) . . . . In order to sustain the granting of a new trial pursuant to Rule 59(a)(7) "the jury's verdict must be 'against the great—not merely the greater—weight of the evidence.' " *Moore's Federal Practice* § 59.26[1]; *see Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989). This standard assures "that the [trial] judge does not simply substitute his judgment for that of the jury, thus depriving the litigants of their right to trial by jury." *Conway v. Chemical Leaman Tank Lines*, 610 F.2d 360, 362 (5th Cir. 1980).

126 N.C. App. at 494, 485 S.E.2d at 843. Caveator concludes that by applying the "greater weight" standard of review, the Court of Appeals "allowed the trial court to unconstitutionally substitute its view of the evidence for that of the jury and did not adequately take into account the constitutional necessity of affording due deference to the finality and sanctity of the jury verdict and the litigant's constitutional right to trial by jury."

This Court has consistently held that "[t]he trial judge is 'vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the *greater* weight of the credible testimony.' " *Britt*, 291 N.C. at 634, 231 S.E.2d

at 611 (quoting *Roberts v. Hill*, 240 N.C. at 380, 82 S.E.2d at 380) (emphasis added). The Court of Appeals stated in *Lassiter*, however, that in order to sustain the granting of a new trial because of insufficient evidence, the jury's verdict must be against the great weight of the evidence, not the greater weight of the evidence. 126 N.C. App. at 494, 485 S.E.2d at 843. The "great weight" standard adopted by the Court of Appeals in *Lassiter* for appellate review of trial courts' discretionary orders granting new trials due to insufficiency of the evidence does not differ in any *practically* quantifiable way from the "greater weight" standard adopted by this Court in its prior decisions interpreting Rule 59(a)(7). Both standards attempt to limit the trial court's exercise of its discretion to set aside a jury verdict to those exceptional situations where the verdict is contrary to the evidence presented and will result in a miscarriage of justice.

Having carefully considered caveator's arguments and the legal authorities cited in support thereof, we are entirely unpersuaded. Accordingly, we decline to apply a different abuse of discretion standard to a trial court's grant versus a trial court's denial of a motion for a new trial for insufficiency of the evidence. In either instance, the trial court is required, in essence, to determine whether the verdict, because it is against the weight of the credible evidence, will result in an injustice if it is allowed to stand. Only the trial court has directly observed the evidence as it was presented and the attendant circumstances, as well as the demeanor and characteristics of the witnesses. *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. In determining whether to grant a new trial because the verdict is against the weight of the credible evidence, the primary focus of the trial court must be upon whether the verdict represents an injustice, not upon refined semantical distinctions between the "great" and "greater" weight of the evidence. Such semantical distinctions become even less useful for an appellate court which, unlike the trial court, does not have the opportunity to observe the trial firsthand and is at a distinct disadvantage in attempting to measure the weight and credibility of the evidence introduced at trial. We conclude that any distinction between the "great" and "greater" weight standards is like twenty-four carat gold, too refined for practical usefulness in this context.

There is no support in this Court's prior decisions for any such distinction. Therefore, we adhere to our previous recognition in *Worthington* of the viability of the simple abuse of discretion standard:

> First, our Court has had many opportunities, if it were so inclined, to formulate a "precise" test for determining when an abuse of discretion has occurred in the trial judge's grant or denial of a motion for a new trial. Second, our Court has not, however, found it logically necessary or wise to attempt to define what an abuse of discretion might be in the abstract concerning any ground upon which a new trial may be granted. For well over one hundred years, it has been a sufficiently workable standard of review to say merely that a manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing the heavy burden of proof.

Worthington, 305 N.C. at 484-85, 290 S.E.2d at 604 (footnote omitted). The trial court's decision to exercise its discretion to *grant or deny* a Rule 59(a)(7) motion for a new trial for insufficiency of the evidence must be based on the *greater* weight of the evidence as observed firsthand *only* by the trial court. The test for appellate review of a trial court's granting of a motion for a new trial due to insufficiency of the evidence continues to be simply whether the record affirmatively demonstrates an abuse of discretion by the trial court in doing so. *See Bryant*, 313 N.C. at 380, 329 S.E.2d at 343. To the extent that it is inconsistent with our decision here, the Court of Appeals' decision in *Lassiter* is overruled.

Having reaffirmed the uniform standard for appellate review of rulings on Rule 59(a)(7) motions for a new trial for insufficiency of the evidence, we now turn to the question of whether the trial court in this case abused its discretion by granting a new trial on the issue of undue influence. Caveator argues that under any standard of review, the record in this case affirmatively demonstrates a manifest abuse of discretion by the trial court. She contends that there was substantial evidence introduced which supported the jury's verdict that testator's 1995 Will was procured by undue influence. Caveator acknowledges that propounders' evidence may have supported a different theory as to why testator revoked his prior 1989 will, but she asserts that this evidence was "not so 'great' as to allow the trial judge to 'simply substitute his judgment for that of the jury.' " (Quoting *Lassiter*, 126 N.C. App. at 494, 485 S.E.2d at 843.) She contends that the conflicting evidence presented by the parties on the issue of undue influence presented a question of fact to be resolved by the jury, not the trial court. Caveator concludes that the trial court abused its discretion in setting aside the jury's verdict and granting a

new trial, and that the Court of Appeals erred in failing to reverse this order of the trial court.

The record in this case reveals that both parties presented substantial evidence in support of their theories as to why testator executed a new will in 1995. In its lengthy "Memorandum of Decision and Order," the trial court considered this conflicting evidence in detail and concluded that "the jury's verdict was contrary to the weight of the credible evidence." The Court of Appeals correctly applied the abuse of discretion standard of appellate review defined by this Court in *Bryant*. *Bryant*, 313 N.C. 362, 329 S.E.2d 333. Noting the trial court's "painstaking appraisal of the evidence," the Court of Appeals concluded that the trial court did not abuse its discretion in its order granting a new trial on the issue of undue influence. *Buck*, 130 N.C. App. at 417, 503 S.E.2d at 132. Having carefully considered the record in this case, we conclude that the Court of Appeals was correct.

AFFIRMED.

STATE OF NORTH CAROLINA v. PAUL DENNIS McCLENDON, JR.

No. 392A98

(Filed 23 July 1999)

1. Search and Seizure— traffic stop—probable cause—objective standard

For situations arising under the North Carolina Constitution, an objective rather than subjective standard must be applied to determine the reasonableness of police action related to probable cause. The reasoning of *Whren v. United States*, 517 U.S. 806, is compelling and is adopted. Whren conclusively establishes that the inquiry is no longer what a reasonable officer would do but what a reasonable officer could do and puts an end to issues involving whether the existence of probable cause for a traffic stop has been used as a pretext for stopping defendant for other reasons.

2. Search and Seizure— traffic stop—probable cause—pretext

Officers were justified in stopping defendant's vehicle in what became a narcotics prosecution where defendant's vehicle and another vehicle were exceeding the posted speed limit and defendant's vehicle was following too closely. Although defendant contended that the stated purpose of a speeding violation was a mere pretext for investigating him for possession of illegal drugs, the officer's subjective motive for the stop is immaterial.

3. Search and Seizure— traffic stop—detention beyond warning ticket—reasonable suspicion

In a prosecution for possession of marijuana, the detention of defendant from the time a warning ticket was issued until the time a canine unit arrived was reasonable under the totality of the circumstances in that defendant first said that his girlfriend owned the car but would not give her name; he eventually said that his girlfriend "Anna" owned the car; when the trooper inquired "Anna?" defendant said "I think so"; Anna was not the name listed on the title as the owner of the car; the address of the owner listed on the title and the address on defendant's license were the same; and defendant was extremely nervous. Language in *State v. Pearson*, 348 N.C. 272, regarding nervousness was not meant to imply that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot. Nervousness must be taken in light of the totality of circumstances and is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists. In this case, defendant exhibited more than ordinary nervousness.

4. Search and Seizure— traffic stop—detention beyond initial investigation—reasonable duration

In a marijuana prosecution, the detention of defendant for fifteen to twenty minutes between the issuance of a warning ticket and the arrival of a canine unit was reasonable. The officers acted quickly and diligently to obtain the canine unit and promptly put the drug detection dog to work upon its arrival.

Appeal of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 368, 502 S.E.2d 902 (1998), affirming a judgment entered 14 October 1996 by

Ross, J., in Superior Court, Guilford County, upon defendant's plea of guilty pursuant to a plea agreement in which defendant reserved his right to appeal the denial of a motion to suppress evidence. On 30 December 1998, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 14 April 1999.

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

Locke T. Clifford and Walter L. Jones for defendant-appellant.

Mebane Rash Whitman on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

MITCHELL, Chief Justice.

In June and July 1996, defendant was indicted for trafficking in marijuana by transporting more than fifty pounds but less than one hundred pounds, trafficking in marijuana by possession of more than fifty pounds but less than one hundred pounds, and conspiracy to traffic in a controlled substance by possession and transportation. Defendant moved to suppress evidence found as a result of a search of his vehicle. The trial court denied defendant's motion to suppress. Defendant subsequently pled guilty to all of the charges pursuant to a plea agreement in which he reserved the right to appeal the denial of his motion to suppress. All of the charges were consolidated for judgment, and the trial court sentenced defendant to a term of twenty-five to thirty-five months' imprisonment and imposed a fine of $15,000. The Court of Appeals, with one judge dissenting, affirmed the trial court. Defendant appealed to this Court as a matter of right based on the dissent below. On 30 December 1998, we also allowed his petition for discretionary review of additional issues.

The testimony before the trial court at the suppression hearing tended to show the following: On 21 February 1996, Sergeant T.L. Cardwell of the North Carolina Highway Patrol was on duty patrolling Interstate 85 in Greensboro. He noticed two cars traveling at a speed of seventy-two miles per hour, seven miles over the posted speed limit. One vehicle was a minivan. Following closely behind it was a station wagon driven by defendant. Sergeant Cardwell drove his car alongside the station wagon and made eye contact with defendant, who decreased his speed. Sergeant Cardwell did the same thing with the driver of the minivan, but that driver did not slow

down. Sergeant Cardwell then radioed for assistance, and Trooper Brian Lisenby responded. The officers stopped both vehicles. At the suppression hearing, Sergeant Cardwell gave three reasons for stopping the vehicles: (1) they were in violation of the posted speed limit; (2) defendant was following the minivan too closely; and (3) Sergeant Cardwell had formed the opinion that the lead vehicle was a decoy vehicle intended to distract police attention from the second vehicle, the station wagon driven by defendant.

Sergeant Cardwell questioned the driver of the minivan, Tony Contreras, who had a Texas driver's license and said that the minivan belonged to his brother. Contreras said he was meeting his brother at the Greensboro airport so that they could visit some area furniture stores in search of supplies for the furniture store they planned to open in Texas. Contreras could not name any of the stores that they were supposed to visit, nor did he have an explanation for why he drove to North Carolina while his brother took a flight. He denied traveling with defendant. Sergeant Cardwell issued a warning ticket charging Contreras with speeding and then searched the vehicle after Contreras signed a consent form.

At the same time, Trooper Lisenby was busy questioning defendant. Lisenby testified that defendant appeared nervous, did not make eye contact, and was breathing heavily. Defendant produced his Tennessee driver's license and the title to the station wagon, but he did not have the registration for the vehicle. Defendant said that his girlfriend owned the car, but he could not give Trooper Lisenby her name even though the address on defendant's driver's license and the address on the title to the station wagon were the same. Defendant also denied knowing or traveling with the driver of the minivan.

At this point, Trooper Lisenby told defendant to get into his patrol car, where the questioning continued. Defendant explained that he had come from Georgia and was on his way to Greensboro. Trooper Lisenby testified that as defendant answered the questions, his nervousness increased. Defendant was "fidgety," evasive with his answers, and appeared very uncomfortable. When questioned again about the name on the car's registration and his girlfriend's name, defendant mumbled something, which Trooper Lisenby thought sounded like "Anna." Although the name Anna did not appear on the title to the station wagon, a radio check by Lisenby revealed no problems with the registration of the station wagon or defendant's driver's license. The name on the title to the station wagon was Jema Ramirez.

Following the questioning, Trooper Lisenby radioed Sergeant Cardwell and gave him the information about defendant. Cardwell told Lisenby to issue defendant a warning ticket for speeding and following too closely. Trooper Lisenby did so, then asked defendant if he had weapons or narcotics in the vehicle. Defendant sighed deeply, chuckled nervously, looked down, and finally muttered "No." Trooper Lisenby asked defendant for permission to search his vehicle which defendant refused to give. Lisenby then left the patrol car and gave this information to Sergeant Cardwell, who got in the patrol car and continued to question defendant. Sergeant Cardwell testified that defendant was sweating and that his breathing was rapid. When asked by Cardwell, defendant again refused to give permission to search his vehicle.

Sergeant Cardwell called the High Point Police Department to secure a drug detecting dog. The dog was permitted to examine the exterior of the station wagon to detect any odor of controlled substances and "alerted" toward the rear of the vehicle. The dog was then placed inside the vehicle and alerted the officers to the rear cargo floor where the spare tire is usually stored. Sergeant Cardwell searched there and found marijuana. Defendant was advised of his rights and signed a *Miranda* rights form. From the time defendant was issued a warning citation until the time the canine unit arrived, approximately fifteen to twenty minutes had elapsed.

In affirming the trial court's denial of defendant's motion to suppress, the majority in the Court of Appeals concluded that Sergeant Cardwell had probable cause to stop defendant's vehicle and that the questioning of defendant by Trooper Lisenby did not exceed the permissible scope of the traffic stop. The Court of Appeals further concluded that, "based on the totality of the circumstances here, the detention of the defendant beyond the issuance of the warning ticket was justified and that no violation of defendant's constitutional rights occurred." *State v. McClendon*, 130 N.C. App. 368, 378, 502 S.E.2d 902, 908 (1998). The dissent in the Court of Appeals contended that because reasonable suspicion that criminal activity was afoot did not exist, the officers were not justified in detaining defendant for further questioning after he was given the warning citation. For the reasons that follow, we affirm the decision of the majority in the Court of Appeals.

[1] As a preliminary matter, we address the question of whether the rule set out in *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89

(1996), is also required by the North Carolina Constitution. In *Whren*, the United States Supreme Court held that the temporary detention of a motorist upon probable cause to believe that he has violated a traffic law is not inconsistent with the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist for the violation. *Id.* This decision established that police action related to probable cause should be judged in objective terms, not subjective terms. Provided objective circumstances justify the action taken, any "ulterior motive" of the officer is immaterial. As the Court of Appeals stated below, *Whren* conclusively established that the inquiry is no longer what a reasonable officer *would* do but what a reasonable officer *could* do, and in effect put an end to issues involving whether the existence of probable cause for a traffic stop has been used by officers as a pretext for stopping defendant for other reasons. *McClendon*, 130 N.C. App. at 374, 502 S.E.2d at 906.

Defendant first contends that Article I, Section 20 of the North Carolina Constitution affords broader protection to citizens than the Fourth Amendment, and therefore, the *Whren* rule should not be applied. As we said in *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984),

> the language of Article [I], Section 20 of the Constitution of North Carolina differs markedly from the language of the Fourth Amendment to the Constitution of the United States. . . .
>
> Whether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such issues are questions which can only be answered with finality by this Court.

Id. at 643, 319 S.E.2d at 260. Furthermore, we are "not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States." *Id.* at 642, 319 S.E.2d at 260.

However, we find the reasoning of the Supreme Court in *Whren* to be compelling, and we adopt it here. Moreover, this Court has previously recognized the principle that, in general, police action related to probable cause should be judged in objective terms, not subjective terms. *See State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641-42 (1982) ("The officer's subjective opinion is not material. . . . The search or seizure is valid when the objective facts known to the offi-

cer meet the standard required."). Therefore, for situations arising under our state Constitution, we hold that an objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause.

[2] Defendant contends that the stop of his vehicle for the stated purpose of a speeding violation was a mere pretext for investigating him for the possession of illegal drugs. Defendant argues that such a pretextual traffic stop by Sergeant Cardwell violated his rights under the North Carolina Constitution. However, the officer's subjective motive for the stop is immaterial. The facts found by the trial court from the evidence presented at the suppression hearing established conclusively that Sergeant Cardwell had probable cause to stop the station wagon driven by defendant, as well as the minivan driven by Contreras. Both vehicles were exceeding the posted speed limit, in violation of N.C.G.S. § 20-141, and defendant's vehicle was also following too closely, which is a violation of N.C.G.S. § 20-152. Because of the violations of these traffic laws, the officers had probable cause to stop the vehicles and to issue a warning ticket to each driver. *See* N.C.G.S. § 15A-302(b) (1997); N.C.G.S. § 20-183(b) (Supp. 1998). We therefore conclude that the officers in this case were justified in stopping defendant's vehicle.

[3] Having established that the initial stop of defendant's vehicle and the temporary detention of defendant were proper, we next address the question of whether the further detention of defendant from the time the warning ticket was issued until the time the canine unit arrived went beyond the scope of the stop and was unreasonable. As we have stated previously, Article I, Section 20 of our North Carolina Constitution, like the Fourth Amendment, protects against *unreasonable* searches and seizures. *Garner*, 331 N.C. at 506, 417 S.E.2d at 510. In order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot. *See Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990) ("[T]he 'totality of the circumstances—the whole picture[—]' . . . must be taken into account when evaluating whether there is reasonable suspicion.") (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d. 621, 629 (1981)); *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (whether a basis for reasonable suspicion exists is to be determined from the totality of the circumstances). After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions.

See Berkemer v. McCarty, 468 U.S. 420, 82 L. Ed. 2d 317 (1984); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989), *appeal dismissed and disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 809 (1990). Here, Trooper Lisenby lawfully stopped defendant and asked for his driver's license and registration. Defendant could not find the registration, and instead produced the title to the car. The title, however, was in the name of Jema Ramirez, instead of defendant's name. Trooper Lisenby was entitled to inquire further regarding the ownership of the car to determine whether it was stolen. It was defendant's responses to questions asked during such inquiry that aroused Lisenby's, and later Sergeant Cardwell's, suspicions that criminal activity was afoot.

Upon reviewing the evidence and the trial court's findings, we find several factors that gave rise to reasonable suspicion under the totality of the circumstances. First, when asked who owned the car, defendant said his girlfriend, but would not give Trooper Lisenby her name. It was only after defendant had been asked several times that he said his girlfriend "Anna" owned the car. When Trooper Lisenby inquired "Anna?" defendant said "I think so." However, "Anna" was not the name listed on the title as the owner of the car. Second, although defendant seemed unsure of who owned the car, the address of the owner listed on the title and the address on defendant's driver's license were the same, which would seem to indicate that they both lived in the same residence. Third, defendant was extremely nervous, sweating, breathing rapidly, sighing heavily, and chuckling nervously in response to questions. He also refused to make eye contact when answering questions. We conclude that these facts, when viewed in the totality of the circumstances, allowed the officers to form a reasonable suspicion that criminal activity was afoot. *See State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992) (nervousness was a factor considered in determining that grounds existed for forming a reasonable suspicion).

The dissent in the Court of Appeals found this Court's decision in *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998), controlling, stating that "evidence similar to that in the case at hand was insufficient to support a conclusion that the officers were justified in detaining the drivers." *McClendon*, 130 N.C. App. at 379, 502 S.E.2d at 909 (Wynn, J., dissenting). We recognize that *Pearson* could be so construed. Therefore, we revisit *Pearson* now in order to clarify its meaning and to illustrate how the totality of the circumstances in that case are distinguishable from those in the case *sub judice*.

In *Pearson*, there was no conflict concerning the validity of the search of the defendant's vehicle—the defendant gave his valid consent to that search. We declined, however, to extend this consent to include consent to a search of the defendant's person. We concluded that the officer did not have the requisite reasonable suspicion needed for the search of the defendant's person. *Pearson*, 348 N.C. at 276-77, 498 S.E.2d at 601.

In *Pearson*, the defendant was driving below the posted speed limit and drifting back and forth within his lane. The officer stopped the defendant in order to determine if he was impaired. When the officer walked up to the car, the defendant appeared nervous. Although the officer noticed a faint odor of alcohol, he determined that the defendant was just tired, not impaired. While in the officer's car, the defendant told the officer that he had gotten little sleep the night before, as he and his girlfriend had been visiting her parents, who lived near the Virginia border. When the officer questioned the defendant's girlfriend, however, she said they had been visiting the defendant's parents near New Jersey. Although there was no sign of any weapons or drugs in the defendant's car, the officer asked him to sign a consent form allowing a search of the car. The defendant did so, whereupon the officer searched the car and found nothing. The defendant was then told that standard procedure required that he be searched as well. That search of the defendant's person revealed small bags of marijuana hidden in his crotch area. This Court found that the conflicting stories of the defendant and his girlfriend and the apparent nervousness of the defendant were not enough to support a reasonable suspicion that criminal activity was afoot.

Defendant stresses the fact that in *Pearson*, we said that "[t]he nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper." *Id.* at 276, 498 S.E.2d at 601. Although the quoted language from *Pearson* is couched in rather absolute terms, we did not mean to imply there that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot. Nervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists. *See Butler*, 331 N.C. 227, 415 S.E.2d 719; *see also United States v. Perez*, 37 F.3d 510, 514 (9th Cir. 1994) (nervousness and sweating profusely were among the factors giving rise to reason-

able suspicion); *United States v. Nikzad*, 739 F.2d 1431, 1433 (9th Cir. 1984) (fact that defendant was nervous and failed to make eye contact gave rise to reasonable suspicion).

In *Pearson*, the nervousness of the defendant was not remarkable. Even when taken together with the inconsistencies in the statements of the defendant and his girlfriend, it did not support a reasonable suspicion. In the case before us, however, defendant exhibited more than ordinary nervousness; defendant was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer. This, taken in the context of the totality of the circumstances found to exist by the trial court, gave rise to a reasonable suspicion that criminal activity was afoot.

[4] Having determined that Sergeant Cardwell did have the requisite reasonable suspicion needed to detain defendant further, we turn to examine whether the duration of that detention was reasonable. As we noted previously, the time that elapsed between the issuance of the warning ticket and the arrival of the canine unit was only fifteen to twenty minutes. We conclude that this was not unreasonable under the circumstances. The officers acted quickly and diligently to obtain the canine unit, and upon its arrival, they promptly put the drug detection dog to work. *See United States v. Sharpe*, 470 U.S. 675, 688, 84 L. Ed. 2d 605, 617 (1985) ("We reject the contention that a 20-minute stop is unreasonable when the police have acted diligently . . . ."). The Court of Appeals was correct in affirming the trial court's denial of defendant's motion to suppress.

For the reasons stated herein, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. JAMES WILLIAM BARROW

No. 171A97

(Filed 23 July 1999)

1. **Criminal Law— capital trial—defendant's closing arguments—number**

The trial court erred in a prosecution for first-degree murder by not permitting defense counsel to make three closing arguments during the guilt phase. Defendant was being tried for multiple capital felonies, did not present evidence during the guilt-innocence phase, made a clear request, and obtained a ruling upon the request, thereby preserving the question for appellate review. There was prejudice per se.

2. **Trials— jury's request to review transcripts of testimony—failure to exercise discretion**

In a capital first-degree murder prosecution decided upon other grounds, the trial judge was required to exercise his discretion as to whether to have the court reporter read to the jury the testimony requested by the jury along with other evidence relating to the same factual issue. The court's statement that it "doesn't have the ability to now present to you the transcription of what was said during the course of the trial" suggests a failure to exercise discretion.

3. **Homicide— acting in concert—instructions**

In a capital first-degree murder prosecution reversed upon other grounds, the trial court at the new trial must charge the jurors that they are required to find that defendant himself possessed the requisite intent before rendering a verdict of guilty on the basis of defendant's acting in concert with respect to specific-intent crimes where the murders were committed after *State v. Blankenship*, 337 N.C. 543, and before *State v. Barnes*, 345 N.C. 184.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Stephens (Ronald L.), J., on 27 November 1996 in Superior Court, Johnston County, upon jury verdicts 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 27 August 1998. Heard in the Supreme Court 12 April 1999.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

FRYE, Justice.

On 13 February 1995, defendant was indicted upon three counts of first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. On 20 March 1995, the grand jury returned another indictment charging defendant with assault with a deadly weapon with intent to kill. Defendant was tried capitally at the 28 October 1996 Criminal Session of Superior Court, Johnston County. On 21 November 1996, the jury returned verdicts finding defendant guilty on all counts. In a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed sentences of death for the murder of Antwon Jenkins and for the murder of Michael Kent Jones. Defendant was sentenced to life imprisonment without parole for the murder of Lynn Wright to be served consecutive to the death sentences. The three assault charges were consolidated into a single judgment in which defendant was sentenced to imprisonment for a minimum term of 86 months and a maximum term of 113 months, to be served consecutive to the sentence of life without parole.

A detailed recitation of the evidence presented at trial is unnecessary in order to reach our decision in this case. The State's evidence tended to show that defendant and Davy Stephens[1] entered a house in Johnston County in the early morning hours of 21 January 1995, killing at least three men and wounding several others. Several persons who were present at the house gave conflicting testimony regarding the sequence and details, but the evidence was sufficient to support the verdicts rendered by the jury on all counts.

[1] In his first argument, defendant contends that the trial court committed prejudicial error *per se* by refusing to permit defendant's attorneys to make three closing arguments. Defendant rested his case without presenting evidence during the guilt-innocence phase of the

1. Davy Stephens was convicted of three counts of first-degree murder and sentenced to death. This Court found no error. *See State v. Stephens*, 347 N.C. 352, 493 S.E.2d 435 (1997), *cert. denied*, — U.S. —, 142 L. Ed. 2d 66 (1998).

trial. Defense counsel told the judge that they wanted to make three closing arguments: an opening argument by one defense attorney *before* the State's closing arguments and two final arguments, one by each of his attorneys, *after* the State's closing arguments.

The exchange between the trial court and defense counsel proceeded as follows:

> THE COURT: Any anticipation—and again, I'm not trying—and I'm not going to restrict anyone on the length of time that you will argue your case—any anticipation as to about how long those arguments will be in combination with each other?
>
> MR. STUBBS [prosecutor]: I think the State's two arguments would last anywhere from an hour to an hour and a half.
>
> MR. DENNING [defense counsel]: Your Honor, I don't think Defendant's arguments would last longer than an hour, hour and 10 or 15 minutes at most. What we would like to do, subject to the Court's approval, of course, would be to offer about a very brief three-, four-, five-minute opening statement, and then Mr. Murphy and I both having the right to close after the State's argument.
>
> THE COURT: You can open and close. I'll let you know tomorrow morning about that.
>
> MR. DENNING: Okay. That's fine.
>
> THE COURT: I mean, the procedure gives you—this is the first phase of this trial. The procedure gives you the right, in the Court's discretion, to open and close. I'm not sure the Court's going to allow you both to open and then have two arguments in closing.
>
> MR. DENNING: Okay. Certainly, I will state to the Court that we both would not open. But I—
>
> THE COURT: Yes, sir; I understand.
>
> MR. DENNING: I think you understand where I'm coming from.
>
> THE COURT: Yes, sir.
>
> MR. DENNING: Whatever you decide, we're certainly prepared to live with it.

The colloquy continued the next day as follows:

> MR. DENNING: Judge, as to the order of argument?

THE COURT: Yes, sir. I'll allow—in my discretion, I'll allow as under the rules of the Court is allowable. You can open and close. I'll allow an argument in opening and I'll allow an argument in closing. And the State—or you could waive opening and have two arguments in closing if you desire to do that. However you elect to proceed, the State will argue either, if you waive opening, first, and however many arguments they've determined that they want to make, or if you decide to open and close on behalf of the Defendant, the State will be sandwiched with however many arguments that they intend to use in between opening and closing.

I'd like to know, if I can, whether or not you intend to open and close and what fashion, so that when we come back from the break, the State will know whether or not they're arguing or whether you're arguing.

MR. MURPHY [defense counsel]: Your Honor, I intend to open for the Defendant. Denning will close.

N.C.G.S. § 7A-97 provides for the trial court's control of counsel's arguments to the jury:

> In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, *except in capital felonies, when there shall be no limit as to number.* The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; *in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side.* Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

N.C.G.S. § 7A-97 (1995) (emphasis added).

This Court has held that when a defendant presents no evidence during the guilt-innocence phase of a capital trial, he or she is entitled

to present both the opening and final arguments to the jury during the guilt-innocence closing arguments.[2] *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988); Gen. R. Pract. Super. and Dist. Ct. 10, 1999 Ann. R. N.C. 8. In fact, when a defendant does not present evidence and is thus entitled to both opening and final arguments to the jury, defense counsel, not exceeding three persons, may each address the jury as many times as they desire during closing arguments. *State v. Eury*, 317 N.C. 511, 516, 346 S.E.2d 447, 450 (1986). Though not at issue in this case, we note that in capital cases, the defendant always has a statutory right to present the final argument during sentencing phase closing arguments, without regard to whether he presented evidence during that phase. N.C.G.S. § 15A-2000(a)(4) (1997); *Mitchell*, 321 N.C. at 657, 365 S.E.2d at 558.

Here, defendant was being tried for multiple capital felonies and did not present evidence during the guilt-innocence phase. The State argues that in *State v. Williams*, 343 N.C. 345, 368, 471 S.E.2d 379, 392 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997), the Court distinguished *Mitchell* by declining to order a new trial where the defense did not specifically request that both defense attorneys argue after the State and where the defense never objected. Here, the State argues that defense counsel's request was equivocal and that no objection was made. To the contrary, defense counsel made a clear request. He said that defendant's attorneys would like to offer a brief opening statement, "and then Mr. Murphy and I both having the right to close after the State's arguments." Any subsequent deference to the trial court was made in an effort towards professional civility. Further, pursuant to North Carolina Appellate Rule 10(b)(1), defense counsel made a timely request and obtained a ruling upon the request, thereby properly preserving this question for appellate review. *See* N.C. R. App. P. 10(b)(1). Thus, as in *Mitchell*, defendant was entitled to present both the opening and final arguments to the jury during the guilt-innocence phase closing arguments.

"The right to a closing argument is a substantial right of which a defendant may not be deprived by the exercise of a judge's discretion." *Eury*, 317 N.C. at 517, 346 S.E.2d at 450. In *Mitchell*, we held that the refusal of the trial court to permit both counsel to address the jury during defendant's final arguments constitutes prejudicial

2. N.C.G.S. § 84-14 is the predecessor to N.C.G.S. § 7A-97. The change in codification was made under chapter 431, section 7 of the 1995 Session Laws without any modification to the statute's language. Therefore, even though the relevant cases were decided using section 84-14, they are still fully applicable to the instant case.

error *per se* entitling the defendant to a new trial as to the capital felony. *Mitchell*, 321 N.C. at 659, 365 S.E.2d at 559. Further, where a capital felony has been joined for trial with noncapital charges, the trial court's failure to allow both of defendant's counsel to make final arguments was prejudicial error as to the capital and noncapital charges. *Id.* Accordingly, in *Mitchell*, we granted the defendant a new trial as to the capital and noncapital charges. *Id.*; *see State v. Campbell*, 332 N.C. 116, 119-20, 418 S.E.2d 476, 478 (1992) (entitling defendant to a new trial as to capital and noncapital charges for the failure of the trial judge to allow both defense attorneys to make final arguments).

Likewise, in the instant case, the failure of the trial court to permit defense counsel to make three arguments during closing arguments of the guilt phase constituted prejudicial error *per se*. Defendant is thus entitled to a new trial as to the capital and noncapital charges.

Since defendant is entitled to a new trial on the first issue, it is unnecessary to address defendant's remaining arguments. However, we elect to address two additional issues since they relate to matters which may arise at a new trial.

[2] In his second argument, defendant contends that the trial court committed prejudicial error by failing to affirmatively exercise its discretion under N.C.G.S. § 15A-1233, thereby entitling defendant to a new trial. In the instant case, the jury sent a note to the trial judge requesting certain State's exhibits and the transcripts of the testimony of four witnesses: Kenneth Farmer, James White, June Bates, and SBI Agent Bishop. The trial court granted the request for the exhibits and, without objection from the parties, allowed the jury to take them into the jury room. The judge further responded to the jury that the court reporter had not yet transcribed the testimony, and the court did not have the ability to present the transcript to the jury.

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) (emphasis added).

The issue is whether the trial court exercised its discretion as required by N.C.G.S. § 15A-1233(a). The statute's requirement that the trial court exercise its discretion is a codification of the long-standing common law rule that the decision whether to grant or refuse a request by the jury for a restatement of the evidence lies within the discretion of the trial court. *See State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997); *State v. Ford*, 297 N.C. 28, 30, 252 S.E.2d 717, 718 (1979). It is within the court's discretion to determine whether, under the facts of a particular case, the transcript should be available for reexamination and rehearing by the jury. *See State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980).

"When a motion addressed to the discretion of the trial court is denied upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable." *Johnson*, 346 N.C. at 124, 484 S.E.2d at 375. " 'In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.' " *Id.* (quoting *Lang*, 301 N.C. at 510, 272 S.E.2d at 125).

In the instant case, the following exchange occurred between the trial court and the jury:

> THE COURT: Mr. Jordan, and you've sent a note out indicating certain requests by the jury, and I've had you come back in to answer those questions and requests. Your note reads, "One, may we obtain State's Exhibits two large diagrams?" You're asking to take those two diagrams into the jury deliberation room?
>
> THE FOREPERSON (JORDAN): Yes, sir.
>
> THE COURT: The Court's going to honor that request. The two large diagrams that were used during the course of the trial, you'll be able to take that back and use them in your deliberative process.
>
> Number two, it says, "May we obtain transcripts of Kenneth Farmer, James White, and June Bates?" *Ladies and gentlemen of*

the jury, although the Court Reporter obviously was taking down and continues to take down everything that's in fact been said during the trial, what she's taking down has not yet been transcribed. And the Court doesn't have the ability to now present to you the transcription of what was said during the course of the trial.

It was important, and it remains to be important that you listen carefully to the testimony, which I'm sure that you did, of each witness who testified. It will be your responsibility and obligation to use your independent recollection of what those witnesses testified to during the course of the trial in your evaluation of the evidence in the case. So we're not in the position to be able to comply with that request as far as any transcription of anything said by a witness during the trial, which would also apply to number three, "May we obtain transcripts from Bishop, SBI, for ballistics?" Again, his testimony was taken, but not transcribed, and so you'll have to take your recollection of his testimony and how it applies to the other evidence in the case.

(Emphasis added.)

Here, the trial court's statement that it "doesn't have the ability to now present to you the transcription of what was said during the course of the trial" suggests a failure to exercise discretion. This response could be interpreted as a statement that the trial court did not believe that it had discretion to consider the jury's request. *See id.* at 124-25, 484 S.E.2d at 376 (holding that the trial court's response to the jury's request—"I'll need to instruct you that we will not be able to replay or review the testimony for you"—indicated that the trial court believed it did not have discretion to consider the request); *see also State v. Ashe*, 314 N.C. 28, 36-37, 331 S.E.2d 652, 657-58 (1985) (holding that the trial court failed to exercise its discretion in merely stating that the request could not be granted because there was "no transcript at this point").

This Court has upheld the decision of the trial court where it exercised discretion in similar cases. *See State v. Fullwood*, 343 N.C. 725, 743, 472 S.E.2d 883, 892 (1996) (concluding that the trial court plainly exercised its discretion in denying the jury request to review testimony and "did not rely solely on the fact that the transcript was not readily available"), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997); *see also State v. Burgin*, 313 N.C. 404, 415, 329 S.E.2d 653, 660 (1985) (concluding that the trial court properly exercised its discre-

tion, by telling the jury that, in its discretion, it refused to order the stenographer to type the transcript). By contrast, in the instant case, the trial court stated that it did not have the *ability* to present the transcript to the jury, indicating a failure to exercise discretion.

While defendant had no right to copies of the transcript even if available, *see State v. Abraham*, 338 N.C. 315, 353, 451 S.E.2d 131, 151 (1994), it appears that the jury's interest was in reviewing the testimony of certain witnesses. This required the trial judge to exercise his discretion as to whether to have the court reporter read to the jury the testimony of these witnesses along with any "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).

[3] In his third argument, defendant contends that the trial court erred by refusing to instruct the jury on the charges of first-degree murder, as requested by defendant, that to prove defendant's guilt under the theory of acting in concert, the State was required to prove beyond a reasonable doubt that defendant personally had malice and the specific intent to kill formed after premeditation and deliberation.

In the instant case, the three murders were committed on 21 January 1995, after this Court's decision in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), and before this Court's decision in *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), which overruled *Blankenship*. Therefore, the acting-in-concert rule applied in *Blankenship* applies here. *State v. Rivera*, 350 N.C. 285, 292, 514 S.E.2d 720, 724 (1999).

Under *Blankenship*, "where multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators." *Blankenship*, 337 N.C. at 558, 447 S.E.2d at 736. A defendant may not be criminally responsible under the acting-in-concert theory for a crime such as premeditated and deliberate murder, which requires specific intent, unless the State shows beyond a reasonable doubt that he had the requisite *mens rea*. *Id.*

The acting-in-concert rule applied in *Blankenship* applies to the instant case. Thus, at defendant's new trial, the court must charge the jurors that they are required to find that defendant himself possessed

the requisite intent before they can properly render a verdict of guilty on the basis of defendant's acting in concert with respect to specific-intent crimes. *See Rivera*, 350 N.C. at 292, 514 S.E.2d at 724.

For the foregoing reasons, we conclude that defendant is entitled to a new trial on all counts.

NEW TRIAL.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 223, ELTON G. TUCKER, RESPONDENT

No. 54A99

(Filed 23 July 1999)

1. Judges— bench conference—refusal to accept guilty plea—not guilty verdict—absence of sworn testimony—not willful misconduct

A district court judge was not guilty of willful misconduct in office when he refused to accept a defendant's guilty plea to DWI in a commercial vehicle and entered a not guilty verdict after a bench conference with defendant and the arresting officer based on the officer's inability to confirm the weight of the vehicle or that it was in fact a commercial vehicle, without hearing any sworn testimony and without giving the State the opportunity to present evidence, where the prosecutor had called the DWI case for trial and was in the courtroom and within hearing of the bench at all times while the judge was acting on the case.

2. Judges— bench conference—refusal to accept guilty plea—not guilty verdict—absence of sworn testimony—conduct prejudicial to administration of justice—censure

A district court judge is censured for a violation of Canon 3A(4) of the N.C. Judicial Code which constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute for finding a defendant not guilty of DWI in a commercial vehicle after a bench conference with the arresting officer and defendant based on the officer's inability to confirm the weight of the vehicle or whether it was in fact a commercial vehicle where the case had been presented on a guilty plea, the normal custom in respondent judge's courtroom was for the pros-

ecutor not to be involved in the taking of guilty pleas, the prosecutor was not present during or involved in the discussion at the bench, and respondent did not hear any sworn testimony or give the State an opportunity to present evidence. The course respondent should have taken upon finding no factual basis for defendant's guilty plea was to reject the plea and return the case file to the prosecuting assistant district attorney so that she could determine whether to dismiss the case or move for a continuance in order to gather evidence concerning the alleged commercial vehicle.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 25 January 1999, that respondent, Judge Elton G. Tucker, a Judge of the General Court of Justice, District Court Division, Fifth Judicial District of the State of North Carolina, be censured for willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court 11 May 1999.

William N. Farrell, Jr., Special Counsel, for the Judicial Standards Commission.

Tharrington Smith, LLP, by Roger W. Smith and F. Hill Allen, for respondent-appellant.

ORDER OF CENSURE.

The record filed with us by the Judicial Standards Commission (Commission) and the transcript of the proceedings before it reveal the following: Judge Elton G. Tucker (respondent) presided at the 23 June 1997 Criminal Session of District Court, New Hanover County, where *State v. Stump*, New Hanover County docket number 97CR008694, was calendared. When the prosecuting assistant district attorney, Maria C. Warren, called the *Stump* case for trial, the unrepresented defendant advised Ms. Warren of his intention to plead guilty to charges of driving left of center and driving while impaired (DWI) in a commercial vehicle.

The normal practice in respondent's courtroom was that the prosecutor did not participate in the taking of guilty pleas. Ms. Warren handed respondent the *Stump* case file and returned to her other duties in the courtroom. Respondent spoke with the defendant and

the arresting officer, Brian S. Rommel, at the bench. The defendant affirmed his guilty plea, and respondent completed and had the defendant sign the necessary paperwork.

While making the sentencing determination, respondent noted the Intoxilyzer reading, which was .07, and questioned Officer Rommel. According to respondent, the .07 reading "threw up a red flag." Officer Rommel told respondent that the case involved "a commercial motor vehicle DWI, not a regular DWI."[1] Some discussion then occurred between Officer Rommel and respondent concerning the nature of the vehicle the defendant had been driving, which was the tractor part of a tractor-trailer rig that tows modular homes. Officer Rommel stated that the vehicle was not towing anything, and he was unable to tell respondent the weight of the vehicle.

Respondent asked Ms. Warren for chapter 20 of the North Carolina General Statutes, the motor vehicle code. Ms. Warren approached the bench, gave the requested book to respondent, and returned to her desk. After reviewing the applicable statutes, respondent advised Officer Rommel that he could not find that the vehicle operated by the defendant met the definition of a commercial vehicle, and therefore he could not accept the defendant's guilty plea for the charge of DWI in a commercial vehicle. Respondent accepted the defendant's plea of guilty to driving left of center but entered a not-guilty verdict for the DWI.

Respondent found the defendant not guilty of the DWI based on Officer Rommel's inability to confirm the weight of the truck or whether it was in fact a commercial vehicle, without hearing any sworn testimony and without giving the State an opportunity to present evidence. Testimony before the Commission was conflicting as to Ms. Warren's presence at the bench at the time respondent entered the not-guilty verdict. However, the Commission, after hearing all the evidence and observing the demeanor and determining the credibility of the witnesses, found as a fact that, with the exception of the time she approached the bench to deliver the book, Ms. Warren "was not present during and did not participate in" the discussion between respondent and Officer Rommel at the bench. It is clear from the evidence adduced by the Commission that Ms. Warren was at all relevant times present in the courtroom and readily available.

1. Under N.C.G.S. § 20-138.2, it is illegal to drive a commercial motor vehicle with a blood alcohol level of .04 or more or while under the influence of an impairing substance. Under N.C.G.S. § 20-138.1, it is illegal to operate a motor vehicle while under the influence of an impairing substance or with a blood alcohol level of .08 or more.

On 9 April 1998, respondent was served with a complaint alleging that he "disposed of the *Stump* case *ex parte* without the State's knowledge, without giving the State an opportunity to try or otherwise be heard in the case, and less than 30 days after being served" with another complaint alleging that respondent had found defendants not guilty *ex parte* in two DWI cases. After a hearing on 11 December 1998, the Commission found, in pertinent part, that

> [u]pon rejecting the [defendant's guilty] plea, the respondent simply found the defendant not guilty of that charge without hearing any sworn testimony from anyone. The respondent never alerted Warren that there was a problem with the case nor informed her of his rejecting the plea. The respondent disposed of the *Stump* case *ex parte* without the State's knowledge and without giving the State an opportunity to present evidence or otherwise be heard. This the respondent did despite Warren's presence in the courtroom and ready availability. In addition, the respondent disposed of the *Stump* case within 30 days of being served with the COMPLAINT in Inquiry Concerning a Judge No. 207, which alleged in part that the respondent had disposed of two (2) cases *ex parte*. Finally, the respondent's disposition of the *Stump* case occurred notwithstanding his acceptance of a REPRIMAND from the Commission on March 21, 1986, in Inquiry Concerning a Judge, No. 91, which put him on notice that the Commission found his "accepting a plea of guilty to exceeding safe speed and entering judgment thereon without consulting the prosecuting assistant district attorney, and . . . directing the entry of not guilty pleas and verdicts to the original charges in [*State v. Ratcliff*, New Hanover County file number 83 CR 18126,] without hearing any evidence . . . violated Canon 3A(4) of the North Carolina Code of Judicial Conduct, and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

(Alterations in original).

The Commission concluded that these actions by respondent constituted: conduct in violation of Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct; conduct prejudicial to the administration of justice that brings the judicial office into disrepute; and willful misconduct in office. The Commission recommended that this Court censure respondent.

[1] While we are troubled by the fact that respondent previously had been warned by the Commission, by private reprimand, about conduct similar to that in question in this case and by the fact that respondent's conduct was the subject of review by this Court just one year ago, nevertheless we conclude that his actions that are in question here do not amount to willful misconduct. The Commission found that respondent "disposed of the *Stump* case *ex parte* without the State's knowledge and without giving the State an opportunity to present evidence or otherwise be heard." However, as counsel for respondent has noted, this case did not involve an *ex parte* transaction in the usual sense. The prosecutor, Ms. Warren, had called the *Stump* case for trial and was in the courtroom and within hearing of the bench at all times while respondent was acting on it. Respondent's actions here were not covert or hidden, as the entire proceeding at the bench was visible and audible throughout the courtroom. The State was clearly on notice that the case was being considered because Ms. Warren had called it for trial. We do not believe that in this respect respondent's actions constituted willful misconduct in office as characterized by the Commission.

[2] However, we do agree with the Commission that respondent's actions constituted a violation of Canon 3A(4) of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Respondent's actions, while not *ex parte* in the ordinary sense, effectively excluded the State and prevented the State from presenting evidence or otherwise being heard. By finding the defendant not guilty without hearing any sworn testimony, when the case had been presented on a guilty plea, when the normal custom in respondent's courtroom was for the prosecutor not to be involved in the taking of guilty pleas, and when in fact the prosecutor was not present during or involved in the discussion at the bench, respondent did not accord the State its full right to participate and be heard.

The course respondent should have taken upon finding no factual basis for defendant's guilty plea was to reject the plea and return the case file to Ms. Warren. Then Ms. Warren, as the prosecuting assistant district attorney and the State's representative, could have determined whether to dismiss the case or move for a continuance in order to gather evidence concerning the alleged commercial vehicle. As this Court stated in a previous admonition to respondent, "[e]ach judge and attorney in the courts of our State has a duty to uphold the legal process. Neither complacency nor the search for efficiency

should obscure that responsibility." *In re Tucker*, 348 N.C. 677, 681, 501 S.E.2d 67, 70 (1998).

Now, therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that Judge Elton G. Tucker be, and he is hereby, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Done by order of the Court in Conference, this the 22nd day of July, 1999.

WAINWRIGHT, J.
For the Court

MARGARET K. JONES v. ASHEVILLE RADIOLOGICAL GROUP, P.A., NATHAN WILLIAMS, M.D., TIMOTHY GALLAGHER, M.D., MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, AND LUCI A. LAYTON

No. 242A98

(Filed 23 July 1999)

Appeal by defendants 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. 449, 500 S.E.2d 740 (1998), affirming in part and reversing and remanding in part judgments entered by Ferrell, J., on 25 February 1997 and 3 March 1997 in Superior Court, Buncombe County. Heard in the Supreme Court 12 January 1999.

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

Dameron & Burgin, by Charles E. Burgin and Sharon L. Parker, for defendant-appellants Asheville Radiological Group, P.A., and Timothy Gallagher, M.D.

Kennedy Covington Lobdell & Hickman, L.L.P., by James P. Cooney, III, for defendant-appellant Nathan Williams, M.D.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

We remand this case to the Court of Appeals to modify its opinion in *Jones v. Asheville Radiological Group*, 129 N.C. App. 449, 500 S.E.2d 740 (1998). First, the majority holding is found within an opinion authored by Judge Greene titled "concurrence and dissent." Because of the potential confusion to the bench and bar, this opinion format is unacceptable and must be modified on remand. Second, the Court of Appeals reversed in part the judgment of the trial court but, in so doing, failed to identify precisely which, if any, of plaintiff's claims should have survived defendants' motion for summary judgment in the trial court.

Accordingly, we remand the decision of the Court of Appeals to that court for issuance of an opinion consistent with this opinion.

REMANDED WITH INSTRUCTIONS.

STATE OF NORTH CAROLINA v. DERRICK ALLEN; IN RE ANDREW CURLISS

No. 88PA98

(Filed 23 July 1999)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered in open court by Hudson, J., on 6 March 1998 in Superior Court, Durham County. Heard in the Supreme Court 29 May 1998.

Everett, Gaskins, Hancock & Stevens, L.L.P., by Hugh Stevens and C. Amanda Martin, for petitioner-appellant Andrew Curliss.

Michael F. Easley, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for respondent-appellee State.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, on behalf of The Associated Press; North Carolina Association of Broadcasters, Inc.; and North Carolina Press Association, Inc., amici curiae.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

IN RE SARAH LYNN OWENS

No.122PA98

(Filed 23 July 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, 128 N.C. App. 577, 496 S.E.2d 592 (1998), affirming an order of contempt entered in open court by Farmer, J., on 7 February 1997 in Superior Court, Wake County. Heard in the Supreme Court 30 September 1998.

Smith Helms Mulliss & Moore, L.L.P., by Jonathan E. Buchan, T. Jonathan Adams, and James G. Exum, Jr., for appellant Sarah Owens.

Michael F. Easley, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, on behalf of The Associated Press; The New York Times Company; North Carolina Association of Broadcasters, Inc.; and North Carolina Press Association, Inc., amici curiae.

PER CURIAM.

The decision of the Court of Appeals is affirmed for the reasons stated therein. *But see* Act of July 9, 1999, ch. 267, 1999 N.C. Sess. Laws —— (codifying "journalists' testimonial privilege" as N.C.G.S. § 8-53.9, effective 1 October 1999).

AFFIRMED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. LEROY McNEIL

No. 37A87-4

(Filed 20 August 1999)

1. Sentencing— capital—aggravating circumstances—course of conduct—prior plea agreement

There was no error in a first-degree murder capital sentencing hearing where defendant contended that a plea agreement in a prior trial for the same offenses resulted in the State being precluded from submitting evidence of another murder in support of the course of conduct aggravating circumstance, in violation of *State v. Case*, 330 N.C. 161. The denial of the State's motion to join the additional murder in the prior trial effectively barred the State from introducing any evidence of that murder and that ruling became the law of the case. The unavailability of the evidence relating to the third murder (Kearney) was not the result of a voluntary plea agreement executed between defendant and the State as in Case and the principles enunciated in Case are not applicable. In any event, by opposing the joinder of Kearney's murder, defendant obtained a benefit which he may not now transform into a claim of error.

2. Jury— selection—capital sentencing—instructions—failure to request

During jury selection for a capital first-degree murder sentencing proceeding, defendant waived his contention that refusing to instruct prospective jurors to disregard parole-related considerations was error by not requesting the Conner instruction at any point during the questioning of the prospective jurors. Defendant's argument that his tender of modified jury instructions prior to voir dire was sufficient to constitute a request for the Conner instruction regarding two particular prospective jurors was rejected. Plain error analysis does not apply to situations in which the trial court has failed to give an unrequested instruction regarding jury voir dire.

3. Jury— selection—parole eligibility—ability to follow instructions

There was no error during jury selection for a capital sentencing proceeding for first-degree murder where defendant contended that the court erred by not allowing defendant to question prospective jurors as to whether they could follow the trial court's instructions regarding parole eligibility. Upon reviewing the record, the Court concluded that defendant was allowed to ask prospective jurors whether they could follow the court's instruction.

4. Evidence— capital sentencing proceeding—witness's prior convictions

There was no prejudicial error during a capital sentencing proceeding for first-degree murder where defendant contended that the Confrontation Clause had been violated by the Court's refusal to allow cross-examination of a State's witness concerning unserved warrants which defendant contended had given the police leverage over the witness during questioning. The court afforded defendant wide latitude to expose the witness's alleged bias and motive by allowing cross-examination regarding all prior convictions, regardless of age; instructed the jury that the witness was testifying under an agreement with the prosecutor for a charge reduction and that the witness was an accomplice considered to have an interest in the outcome of the case; and further cross-examination to show bias or motive would have been repetitive and cumulative. Unlike the cases relied upon by defendant, the issue in this case arose in the context of a sentencing hearing rather than a trial to determine guilt or innocence.

5. Appeal and Error— preservation of issues—denial of motion in limine

Defendant in a capital sentencing proceeding waived an assignment of error to testimony regarding autopsy findings where defendant's previous motion in limine had been denied and defendant did not object at the time the State questioned the witness. The denial of defendant's motion in limine is insufficient to preserve for appeal the question of the admissibility of the challenged evidence.

6. Evidence— capital sentencing—prior murder—hearsay—other evidence—no prejudice

There was no prejudicial error in a capital sentencing proceeding for a first-degree murder in the admission of testimony from a retired police officer that defendant had drowned his wife. Defendant opened the door by raising the issue, and, even assuming that the testimony was barred by the Confrontation Clause, the parties had stipulated that defendant had pled guilty to voluntary manslaughter for his wife's death, defendant had received an active prison term for the offense, and a certified copy of the plea and judgment were introduced. Competent evidence was before the jury which supported the submission of the prior violent felony aggravating circumstance.

7. Sentencing— capital—mitigating circumstance—no significant history of prior criminal activity

The trial court did not err in a capital sentencing proceeding for a first-degree murder by not submitting the statutory mitigating circumstance of no significant history of prior criminal activity where the State's evidence revealed a 1959 burglary conviction for which defendant was sentenced to six months probation, defendant later violated his probation, served time in Savannah, Georgia for larceny of a television, was arrested in 1975 for hit and run and property damage, and pled guilty in 1977 to voluntary manslaughter for throwing his wife over a bridge into a lake. None of the cases cited by defendant in which it was held appropriate to submit the circumstance involved a prior criminal history which included a violent felony involving death. N.C.G.S. § 15A-2000(f)(1).

8. Criminal Law— prosecutor's argument—capital sentencing—sympathy for victims

The prosecutor's argument in a capital sentencing proceeding was not so grossly improper as to require the trial court to intervene ex mero motu where defendant contended that the prosecutor placed undue emphasis upon the personal qualities and future prospects of the victims and sought to improperly invoke sympathy for the victims. The prosecutor's argument about the promising nature of the victim's lives served to inform the jury about the specific harm caused by defendant's crime.

9. Criminal Law— prosecutor's argument—capital sentencing—prior violent felony

The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu to prevent the prosecutor from referring to another murder where defendant contended that the argument urged the jury to return a death sentence based on the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), which the court had refused to submit to the jury. The additional death was relevant to the prior violent felony aggravating circumstance, N.C.G.S. § 15A-2000(e)(3).

10. Criminal Law— prosecutor's argument—capital sentencing—general deterrence

There was no grossly improper error requiring intervention ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor attempted to defend the death penalty on general deterrence grounds.

11. Criminal Law— prosecutor's argument—capital sentencing—community sentiment

There was no error requiring intervention ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor improperly informed the jury that community sentiment urged the death penalty and that the jury is effectively an arm of the State. It is not improper to remind jurors that they are the voice and conscience of the community.

12. Criminal Law— prosecutor's argument—capital sentencing—moral culpability

There was no gross error demanding intervention ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor repeatedly urged the jury to reject proposed mitigating circumstances based on defendant's failure to demonstrate that he lacked moral culpability, thereby improperly implying that the jury could ignore credible mitigating evidence. The prosecutor's definition and statements concerning defendant's moral culpability were substantially similar to those found in the North Carolina Pattern Jury Instructions and upheld in other cases.

13. Criminal Law— prosecutor's argument—capital sentencing—lack of due process for victims

There was no gross error requiring intervention ex mero motu in a capital sentencing proceeding where the prosecutor argued that defendant took victims' lives without due process. It has been repeatedly held that it is not improper to argue that defendant acted as judge, jury, and executioner to single-handedly decide the victim's fate.

14. Criminal Law— prosecutor's argument—capital sentencing—facts in evidence

There was no gross error requiring intervention ex mero motu in a capital sentencing proceeding for first-degree murder where defendant contended that the prosecutor either materially misstated the evidence or based his argument on facts not in evidence. The argument at issue concerned fingerprints and the record revealed that defendant had stipulated to his guilty plea in a prior voluntary manslaughter. It can be reasonably inferred that defendant was fingerprinted after his arrest for this crime and that law enforcement used defendant's fingerprints from their files in the investigation of these deaths; in any event, the trial court properly instructed the jurors that they were the sole judge of the evidence and should be guided by their own recollection of the evidence rather than counsel's arguments.

15. Sentencing— capital—aggravating circumstances—voluntary manslaughter as prior violent felony—instructions

There was no error in a capital sentencing proceeding for first-degree murder where the trial court instructed the jury with respect to the prior violent felony aggravating circumstance that voluntary manslaughter is by definition a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3).

16. Sentencing— capital—aggravating circumstances—prior violent felony—instructions

There was no plain error in a capital sentencing proceeding where defendant contended that the court improperly charged the jury in connection with the prior violent felony aggravating circumstance that defendant had engaged in some acts of violence against his wife at or prior to her death (not the subject of this sentencing proceeding). The record shows within the meaning and intent of N.C.G.S. § 15A-2000(e)(3) that defendant used

violence or the threat of violence to throw his wife over a bridge into a lake while she was still alive.

17. Sentencing— capital—aggravating circumstances—especially heinous, atrocious or cruel—instructions

The trial court did not err in a capital sentencing proceeding by giving almost verbatim the North Carolina Pattern Jury Instruction on the especially heinous, atrocious or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9). Although defendant contended that the instructions impermissibly allowed the jury to find the existence of this aggravating circumstance based upon the combined actions of defendant and an accomplice, defendant admitted that he planned to kill one victim so that there would be no witnesses, further admitted shooting that victim, and pled guilty to her murder. *Enmund v. Florida*, 458 U.S. 782, has no application to the facts at hand.

18. Sentencing— capital—aggravating circumstances—especially heinous, atrocious or cruel—sufficiency of evidence

There was sufficient evidence in a capital sentencing proceeding to warrant submission of the especially heinous, atrocious, or cruel aggravating circumstance despite defendant's contention that the instructions allowed the jury to find the circumstance based on an accomplice's behavior. The detailed evidence clearly showed that defendant murdered a victim and was an active participant in severely beating and strangling her prior to her death.

19. Trials— instructions—request following charge

A defendant in a capital sentencing procedure waived an objection to the court's exclusion of evidence of organic brain damage from its instructions on the mental or emotional disturbance mitigating circumstance by failing to make a timely request to include evidence of organic brain damage when specifically asked by the court at the charge conference. Once the jury has been charged, a defendant is not permitted to propose new evidentiary matter if he previously had the opportunity to raise any such argument at the charge conference. Rule 21 of the General Rules of Practice for Superior and District Courts.

20. Sentencing— capital—death sentence—not arbitrary

The evidence in a capital sentencing proceeding in which the jury returned a death penalty fully supported the aggravating cir-

cumstances found by the jury and there was no indication that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

21. Sentencing— capital—proportionality

A death sentence was not substantially similar to any of the cases in which a death penalty was found disproportionate and had the characteristics of first-degree murders for which the death penalty has previously been upheld as proportionate. The defendant in this case admitted murdering two victims, pleading guilty to their premeditated and deliberate first-degree murder. He planned to rob and kill one victim, deceived her to get her alone in a vacant house and then brutally tortured and murdered her; he planned to rob and kill the second victim two days later, luring her to go drinking, driving her to an isolated area, shooting her in the head and leaving her body on the side of the road, and then going to her apartment and stealing belongings; and the jury found four statutory aggravating circumstances in the first murder and three in the second. A death sentence has never been found disproportionate where defendant was convicted of murdering more than one victim, three of the four aggravating circumstances found in the first murder have been found sufficient standing alone to sustain a death sentence, two of the three aggravating circumstances found in the second murder have been found sufficient to sustain a death sentence standing alone, and a death sentence has never been found disproportionate in a witness elimination case.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Farmer, J., on 14 November 1996 in Superior Court, Wake County upon defendant's plea of guilty to two counts of first-degree murder. Heard in the Supreme Court 13 April 1999.

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

Sam J. Ervin, IV, for defendant-appellant.

MARTIN, Justice.

On 9 May 1983 defendant Leroy McNeil (defendant) was indicted for the first-degree murders of Deborah Jean Fore (Fore), Elizabeth Faye Stallings (Stallings), and Irene Dina Kearney (Kearney). At the

26 March 1984 Criminal Session of Superior Court, Wake County, Judge Coy E. Brewer granted the State's motion to join the Fore and Stallings murders but denied the State's motion to join the Kearney murder. On 9 May 1984 the jury convicted defendant of the first-degree murders of Fore and Stallings on the basis of malice, premeditation and deliberation, and the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death in each case, and, on 14 May 1984, the trial court entered judgments in accordance with those recommendations. Thereafter, the State voluntarily dismissed the murder charge against defendant for the Kearney murder.

On appeal, this Court found no error in defendant's first-degree murder convictions and death sentences. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989). On 26 March 1990 the United States Supreme Court granted defendant's petition for a writ of certiorari and remanded defendant's case to this Court for reconsideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *McNeil v. North Carolina*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990). On remand, this Court vacated defendant's death sentence and remanded to the trial court for resentencing. *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991).

Prior to his resentencing, defendant filed a motion for appropriate relief claiming trial counsel admitted his guilt to the jury without defendant's consent in violation of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). On 26 August 1993 Judge Jack A. Thompson allowed defendant's motion and awarded him a new trial.

On 28 October 1996 defendant entered a plea of guilty to the first-degree murders of Fore and Stallings. On 14 November 1996 the jury again recommended a sentence of death in each case. On 14 November 1996 the trial court entered judgments in accordance with the jury's recommendations.

The State's evidence at the second trial, introduced during the sentencing hearing, tended to show the following. On Friday, 8 April 1983, defendant and Penny McNeil (Penny) discussed committing a robbery to obtain money. While discussing their robbery plans, defendant told Penny that if they did not kill the witnesses they might be able to identify defendant and Penny. Defendant and Penny

decided that "what ever take place on that will just have to take place."

While driving through Raleigh that afternoon, defendant and Penny saw Stallings and asked her if she wanted a ride. Stallings accepted. Defendant and Penny drove Stallings to pick up food stamps at the United States Post Office on New Bern Avenue. When Stallings was in the post office, defendant told Penny to move to the back seat so he could "check [Stallings] out and see if she had any money."

When Stallings returned to the car, defendant drove to a store to retrieve a change purse Penny had left in a phone booth. While they were in the store, defendant told Penny he was going to rob Stallings.

After leaving the store, defendant asked Stallings "did she smoke Reefer," and "where she could get some." Defendant and Penny drove Stallings to a vacant house next door to defendant's residence. Defendant and Penny tricked Stallings into believing the vacant house was a place to purchase drugs. Defendant, Penny, and Stallings entered the vacant house. At some point, Penny removed a pocketknife from defendant's car and brought it into the vacant house.

After entering the house, defendant "acted like he was going to . . . kiss the young lady" and "forced her into the back bedroom," where "he grabbed her around the neck," pulled out his knife, and demanded her money and food stamps. Stallings gave defendant and Penny her food stamps and begged them not to hurt her. Defendant forced Stallings to pull up her top to see if she had any money, which she did not. Penny noticed that Stallings had been cut and was bleeding from her chest. Defendant began strangling Stallings and told Penny he was trying "to get her weak" but that he was not going to kill her. Penny testified that "[i]t looked to me like he was trying to kill her, because her eyes were rolling back and her tongue was coming out of her mouth."

Defendant told Penny to go next door and get his gun. When Penny returned with defendant's M1.22 rifle, Stallings "was laid out in the floor" and appeared to be dead. Defendant told Penny to leave the room, and, after doing so, defendant shot Stallings. Defendant then removed Stallings' clothes to make it appear as if she had been raped. Defendant and Penny left Stallings' body in a closet of the vacant

home. Defendant sold Stallings' food stamps for $109.00 and used the money to purchase alcoholic beverages.

Dr. Gordon LeGrand, the pathologist at Wake Medical Center who performed the autopsy on Stallings' body, testified that Stallings died as a result of a bullet wound to her head.

On Saturday, 9 April 1983, the next day, defendant and Penny spent most of the day drinking. They continued drinking until Sunday, 10 April 1983, when they realized their rent was due and they had "rode around and drinked up the money." Defendant and Penny discussed various people they might rob and the prospect of Penny engaging in prostitution to get the rent money. Defendant told Penny that Fore might have money, but since Fore knew defendant, he would have to kill Fore after the robbery in order not to leave any witnesses.

Defendant called Fore on the phone and talked with her about going out for a beer. Fore refused defendant's offer but defendant told Fore he would come to her apartment anyway. Defendant and Penny went to Fore's apartment, and Fore again refused to go out with defendant but agreed to let him drive her to a local store. Instead of driving to the store, defendant drove to a club located on Rock Quarry Road where Penny was going to pretend to look for her boyfriend. The club was closed so defendant proceeded back toward Rock Quarry Road and stopped the car in an isolated area. Defendant took a .22-caliber-long barrel pistol from under the seat and put it in his belt and stepped out of the car. Fore got out of the car and told defendant, "you could have had me to the store and back home and now we got a flat tire." While Penny sat in the car, defendant shot Fore in the head, took her keys and a dollar bill, and left her body on the side of the road.

Defendant and Penny traveled to Fore's apartment, used Fore's key to get inside, and stole her pocketbook, a jewelry box, and a television set. After stealing Fore's pocketbook, defendant attempted to use her bank card. After several unsuccessful tries, the automated teller machine retained the bank card. Fore's pocketbook was later dropped in a well behind defendant's residence and the pistol and rifle used in the two murders were sold for $90.00.

Dr. Laurin Kaasa, the pathologist at Wake Medical Center who performed the autopsy on Fore's body, stated that Fore died as a result of a gunshot wound to her head.

During the sentencing proceeding, defendant introduced several witnesses who testified that defendant was born into extreme poverty and was subject to severe physical and mental cruelty by his grandfather and that defendant grew up in an environment where the most basic needs were not adequately met. Defendant also introduced testimony of three correctional officers, all of whom testified that defendant was an excellent worker with a positive attitude. Defendant further introduced the testimony of Dr. Robert Theodore Michael Phillips, a psychiatrist. Dr. Phillips testified that defendant had become grossly desensitized to human interaction and showed signs of organic brain dysfunction, alcoholism, and a personality disorder not otherwise specified.

Additional facts will be provided as needed to discuss specific issues pertaining to defendant's assignments of error.

PLEA AGREEMENT

[1] By assignment of error, defendant contends that his plea agreement improperly precluded the State from submitting evidence of the Kearney murder in support of the (e)(11) statutory aggravating circumstance. The plea agreement states "that upon defendant's pleas of guilty the State will not seek to charge defendant with any additional conduct now known to the State" and "the State will not seek to introduce any evidence in this case relating to the Irene Kearney [murder]."

In seeking to have all three cases joined for trial, the State argued that after murdering Stallings and Fore on 8 and 10 April 1983, respectively, defendant and Penny met Kearney at a liquor house, "lure[d] her to their house," "lured [her] behind the house," and killed her on 15 April 1983. Defendant contends that the State's evidence shows defendant murdered Kearney using similar *modus operandi* and during the same time frame as the Stallings and Fore murders. Defendant asserts this evidence is relevant to the (e)(11) statutory aggravating circumstance: "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). By failing to submit evidence of Kearney's murder in support of the (e)(11) statutory aggravating circumstance, defendant argues the trial court violated *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991).

In *Case* the State agreed it would only offer evidence of the (e)(9) statutory aggravating circumstance—the murder was especially heinous, atrocious, or cruel—as part of a plea bargain in which defendant agreed to plead guilty to first-degree murder. N.C.G.S. § 15A-2000(e)(9); *Case*, 330 N.C. at 163, 410 S.E.2d at 58. The evidence, however, would have supported submission of the (e)(5) statutory aggravating circumstance—defendant committed the murder while engaged in the commission of a kidnapping—and the (e)(6) statutory aggravating circumstance—defendant committed the murder for pecuniary gain. N.C.G.S. § 15A-2000(e)(5), (6); *Case*, 330 N.C. at 163, 410 S.E.2d at 58.

This Court concluded that "[i]t was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence." *Case*, 330 N.C. at 163, 410 S.E.2d at 58. We reasoned that:

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

Id.

Defendant properly asserts that the State lacks the authority to agree not to submit statutory aggravating circumstances which could be supported by evidence. *Id.*; *see State v. Atkins*, 349 N.C. 62, 76, 505 S.E.2d 97, 106 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3732 (1999); *State v. Adams*, 347 N.C. 48, 57, 490 S.E.2d 220, 224 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998); *State v. Johnson*, 331 N.C. 660, 665, 417 S.E.2d 483, 486 (1992). In the present case, however, the State did not have evidence available supporting a statutory aggravating circumstance related to Kearney's murder because the trial court severed the case.

On 25 January 1984 the State filed a motion to join all three murder cases for trial. Defendant filed a motion opposing joinder of the cases because there was "no transactional connection or continuing program of action with regard to the three murders." After providing opportunity for both parties to be heard, Judge Brewer granted the

State's motion to join the Stallings and Fore murders, but denied the State's motion to join the Kearney murder. Judge Brewer's ruling effectively barred the State from introducing any evidence of Kearney's murder during defendant's 1984 trial for the Stallings and Fore murders.

At defendant's second trial, defendant, by and through his counsel, conceded that matters resolved by Judge Brewer were "law of the case." Defendant stated:

> [W]e stood before Your Honor [Judge Farmer] the first day that this trial began and I had a list of motions on behalf of the defendant to present to the Court, and the State said, Your Honor, we believe these matters are resolved by law of the case, a Superior Court Judge has previously considered these matters and this is the law of the case, which I think he's right about that.

Because a previous court ruling barred the joinder of Kearney's murder, no evidence of Kearney's murder was introduced by the State at defendant's second sentencing hearing. The unavailability of evidence relating to Kearney's murder was not the result of a voluntary plea agreement executed between defendant and the State, as in *Case*. Rather, it was the result of the trial court's prior judicial order barring the joinder of Kearney's murder. Consequently, the principles enunciated in *Case* are not applicable to the instant proceeding.

In any event, by opposing the joinder of Kearney's murder, defendant obtained a benefit which now, on appellate review, he claims was unlawful and requires a new trial. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (1997). Defendant may not transform the trial court's earlier favorable ruling into a claim the trial court erred by accepting a plea agreement which only assured the State would comply with the trial court's earlier ruling severing Kearney's murder case. This assignment of error is without merit.

JURY SELECTION

[2] In his next assignment of error, defendant contends the trial court erred by refusing to instruct prospective jurors to disregard parole-related considerations in determining defendant's sentence. We disagree.

When instructing the jury about parole eligibility, this Court has previously held that the trial court's instructions should provide, in substance,

> that the question of eligibility for parole is not a proper matter for the jury to consider and that it should be eliminated entirely from their consideration and dismissed from their minds; that in considering whether they should recommend life imprisonment, it is their duty to determine the question as though life imprisonment means exactly what the statute says: 'imprisonment for life in the State's prison.'

State v. Conner, 241 N.C. 468, 471-72, 85 S.E.2d 584, 587 (1955).

In the present case, the record reveals that prior to the beginning of *voir dire*, defendant submitted two requests for modified jury instructions to be given "[i]n the event that during selection of the jury one of the jurors should express in the presence of other jurors" some difficulty with the belief that a life sentence means a life sentence. The trial court denied defendant's request, stating, "I plan to give the standard answer if they raise the question of parole, which comes out of Supreme Court case [law]."

During *voir dire* of the first panel of twelve jurors, defendant engaged prospective juror Britt in the following dialogue:

> Q: Ms. Britt, let me come back to you and ask you, is there anything about a sentence of life in prison that particularly gives you concern? I don't think I had an opportunity yesterday to ask you that specific question. Is there anything about a life sentence that troubles you?
>
> A: No, as long as it is a life sentence and, without the opportunity of parole.
>
> Q: Yes, ma'am. Talk to me about that, if you will?
>
> MR. MURPHY [prosecutor]: Objection, Your Honor.
>
> COURT: Well, sustained to the form of the question.
>
> Q: You indicated that there is one feature of a life sentence that troubles you. Can you tell me what it is about that that troubles you?
>
> MR. MURPHY: Objection, Your Honor.
>
> COURT: Well, overruled.

Q: You can answer the question, Ms. Britt?

A: It would bother me if someone were given a life sentence and then two or three years later was allowed out again.

Q: Yes, ma'am. Is there any other feature about a life sentence that would trouble you or is that the only one?

A: That's mainly it, or I would say the only one.

Following further questioning of prospective juror Britt, the trial court held two bench conferences. Following the second bench conference, defendant continued questioning prospective jurors and participated in the following dialogue with prospective juror Turner:

Q: Is there anything about a life sentence that is troublesome to you as you now sit in the courtroom, thinking about it, that you need to tell me?

A: Well, I have concerns, like Ms. Britt, wouldn't want a life sentence to be, you know, wouldn't want somebody to be paroled in two or three years that's connected to a life sentence, sentenced to a life sentence.

Q: Yes, ma'am. You would want it to be real life?

A: Yes, sir.

At the conclusion of the proceedings on that day, the trial court allowed defendant to reconstruct the earlier bench conferences held during prospective juror Britt's questioning. Defendant requested the opportunity to ask prospective juror Britt, "If in this case, if [the] Court instructs you that a life sentence means the defendant will spend the rest of his life in prison, will you have any difficulty following that instruction?" The trial court told defendant that if this question was asked and the State objected, the objection would be sustained. Alternatively, defendant requested the opportunity to read the tendered jury instructions to the prospective jurors. Defendant further requested permission to ask the jurors if they could follow the law with respect to parole eligibility. Defendant's requests were denied.

Later, during defendant's *voir dire* of prospective juror Johnson, the following conversation occurred:

Q: Do you have any feelings about a life sentence that you want to tell me?

A: Yes, I do.

Q: Tell me about that?

A: One of the biggest things I have about a life sentence is the literal interpretation of life. The second thing is parole, which goes right along with the first thing. If we're talking a true life, what lifetime are we talking about? And those—so I have a problem with that.

Q: Yes, sir. Excuse me just a moment.

After a bench conference and a short recess, the trial court discussed the instructions to be given to prospective jurors regarding parole eligibility. Defendant stated, "unless the Court will tell this jury that, something to the effect, they're to consider a life sentence means life, we can't then ask if the two jurors [Britt and Taylor] that specifically raised this issue whether they'll have any difficulty following that instruction." The trial court responded by stating that it did not believe an inquiry as to whether "life meant life" amounted to a request for parole instructions in accordance with *Conner*. The trial court further stated that it could instruct a prospective juror as to what life imprisonment means. Nonetheless, if a prospective juror asked about parole, the trial court would respond by reciting the *Conner* instruction. In addition, the trial court stated that because prospective jurors Britt and Taylor did not inquire as to whether defendant might be paroled, there was no need to give the *Conner* instruction. The trial court also stated that, generally, when a prospective juror raises a parole eligibility issue, "most of the attorneys turn to the Court and say, we'll let the Court answer that, but nobody has asked me to do that." In response, defendant requested that the trial court give the *Conner* instruction to prospective juror Johnson. Additionally, defendant again requested that the trial court read the tendered jury instructions to the prospective jurors. The trial court denied defendant's request to read the tendered instructions but agreed to read the *Conner* instruction.

When the prospective jurors returned and *voir dire* continued, the trial court gave the *Conner* instruction as follows:

COURT: Members of the jury, I believe that one or two, perhaps two of the jurors have already made an inquiry of counsel

which they can not answer to the jury, and that is concerning life imprisonment, what that means. Somebody may have raised the question of parole, one of the jurors after that.

Our Supreme Court here in North Carolina has anticipated that some jurors may raise that question or make that inquiry of the Court. And when that question comes up, and if it's in your minds at this point, the Court would like to say to you that the question of any eligibility for parole is not a proper matter for you to consider in recommending punishment in this case, and it should be eliminated entirely from your consideration and dismissed from your minds. In considering whether to recommend death or life imprisonment in this case, you should determine the question as though life imprisonment means exactly what the statute says, imprisonment for life. You may continue with your questions.

Defendant then asked the prospective jurors whether they could follow the *Conner* instruction and received affirmative responses.

At the conclusion of the jury selection process, the issue arose again during questioning by defendant:

Q: Have any of my questions to other prospective jurors brought to mind any point that any of you would like to make before we finish this questioning, that is, is there anything troubling you, concerning you that you believe that we should go into before we stop?

A: (Juror Number 3) I have one question. In the State of North Carolina when you say life imprisonment, what exactly does that entail? In some states that means life without parole. Could you please expand on that as a sentencing option?

Q. Mr. Mangin, I'm going to ask the Court to answer that question for you.

The trial court answered prospective juror Mangin's question by reciting the same *Conner* instruction. The prospective juror responded, "That answers my question." Following this exchange, defendant did not again attempt to question prospective jurors concerning their ability to follow the *Conner* instruction.

In the case at hand, defendant argues the submission of the tendered jury instructions prior to *voir dire* constituted a request for

the *Conner* instruction during questioning of prospective jurors Britt and Turner.

A defendant's eligibility for parole is not a proper matter for consideration by a jury during sentencing. *State v. White*, 343 N.C. 378, 389, 471 S.E.2d 593, 599, *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996); *State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. Jones*, 296 N.C. 495, 502-03, 251 S.E.2d 425, 429 (1979). "[A] jury may be instructed about the question of parole and meaning of life imprisonment, if such question arises during jury deliberation. However, we have not held that a jury should be instructed upon these issues absent such an inquiry." *State v. Skipper*, 337 N.C. 1, 43, 446 S.E.2d 252, 275 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995) (citing *State v. Robinson*, 336 N.C. 78, 123-24, 443 S.E.2d 306, 329 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995)). "[A]lthough we have approved the inclusion of the language 'life means life' in instructions to the jury in response to inquiries by the jurors about the meaning of a life sentence during their sentencing deliberations, *we have not required it.*" *State v. Burr*, 341 N.C. 263, 288, 461 S.E.2d 602, 615 (1995) (emphasis added), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *see State v. Campbell*, 340 N.C. 612, 632, 460 S.E.2d 144, 154-55 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996).

In *Atkins*, 349 N.C. 62, 505 S.E.2d 97, a case factually similar to the one at hand, defendant argued that the trial court committed plain error by failing to instruct the jury not to consider parole in its decision in accordance with *Conner*. *Id.* at 81, 505 S.E.2d at 109. "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." *Id.* On appeal, defendant argued that the discussion between the prospective juror and the trial court in the presence of the other jurors triggered a duty for the trial court to give a "life means life" instruction. *Id.*

Finding defendant's assignment of error without merit, this Court concluded:

> 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.

Id. at 81, 505 S.E.2d at 109-10.

The facts in *Atkins* are analogous to the situation presented before this Court. Defendant did not request that the trial court give the *Conner* instruction at any point during the questioning of prospective jurors Britt or Turner. In fact, only during the *voir dire* of prospective juror Johnson did defendant finally request the *Conner* instruction. The trial court granted defendant's request and noted that this was the first time defendant had requested the *Conner* instruction. We do not agree with defendant's argument that his tender of modified jury instructions prior to *voir dire* was sufficient to constitute a request for the *Conner* instruction during questioning of prospective jurors Britt and Turner. Accordingly, defendant's claim related to prospective jurors Britt and Turner has been waived. *See* N.C. R. App. P. 10(b)(2). Additionally, plain error analysis does not apply "to situations in which the trial court has failed to give an instruction during jury *voir dire* which has not been requested." *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109-10.

[3] Defendant further argues that the trial court erred by failing to allow defendant to ask prospective jurors whether they could follow the trial court's instructions regarding parole eligibility. Once the trial court instructs the jury in accordance with *Conner*, "[t]he defendant has a right to inquire as to whether a prospective juror will follow the court's instruction." *State v. Jones*, 336 N.C. 229, 240, 443 S.E.2d 48, 52, *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994).

Upon review of the record, we conclude that defendant was allowed to ask prospective jurors whether they could follow the trial court's instruction regarding parole eligibility. After the trial court first gave the *Conner* instruction, defendant was afforded the opportunity to ask the prospective jurors whether they could follow the instruction:

> Q. Can you—did you understand the Court's instruction and can you follow that instruction if you're chosen to serve as a juror in this case?
>
> A. [Juror Johnson] I comprehend the Court's instruction.

Defendant asked the other prospective jurors who were present the same question, and all responded affirmatively. In addition, at the

conclusion of *voir dire*, the trial court again gave the *Conner* instruction after prospective juror Mangin asked a question regarding parole eligibility. At this time, defendant had the opportunity but failed to ask any of the prospective jurors whether they could follow the trial court's instructions.

By allowing defendant to inquire as to whether the prospective jurors could follow the court's instructions, the trial court properly followed *Jones*, 336 N.C. 229, 443 S.E.2d 48. Defendant's assignment of error is rejected.

CAPITAL SENTENCING

[4] By another assignment of error, defendant contends the trial court committed prejudicial error by refusing to allow defendant to cross-examine Penny concerning any unserved warrants against her for felonious assault.

Prior to the evidentiary portion of defendant's sentencing hearing, the State filed a motion *in limine* seeking "to prohibit the defendant from asking the State's witness Penn[y] McNeil about any criminal convictions which are more than ten years old" and to prohibit defendant "from asking about any specific instances of conduct of the witness Penn[y] McNeil as any prior specific instances of conduct have not been shown to be probative of truthfulness or untruthfulness." Defendant responded that he intended "to offer evidence of and go into the witness Penny McNeil's prior history of convictions and actions that appear on her criminal record, some of which did not result in convictions," for the purpose of showing bias and motive. Defendant further replied that Penny's knowledge of any unserved warrants gave her a motive to cooperate with the police and to minimize the extent of her own involvement in the Stallings and Fore murders. The trial court ruled that defendant could discuss all of Penny's prior convictions, regardless of their age, but would take under advisement the issue of questioning Penny about specific instances of conduct not probative of truthfulness or untruthfulness.

During defendant's cross-examination of Penny, the trial court sustained the State's objection to a question asking Penny if "at the time this happened, there was an outstanding warrant for your arrest?"

Defendant argues that Penny, at the time she was questioned by police, was aware of the existence of at least one, and possibly two, outstanding warrants for felonious assault with a deadly weapon

inflicting serious bodily injury. Defendant also contends the police were aware of Penny's unserved warrants, and thus, had great leverage over Penny during questioning. Consequently, by not allowing defendant to inquire about Penny's outstanding warrants, defendant claims the trial court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

The State contends that defendant's proposed cross-examination was repetitive and cumulative of other cross-examination reflecting on Penny's alleged bias, and, in addition, that any such error was harmless beyond a reasonable doubt.

The Confrontation Clause guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (per curiam).

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683 (1986). Accordingly, cross-examination guaranteed by the Confrontation Clause is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation." *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 353 (1974).

During the sentencing hearing, the trial court afforded defendant wide latitude to expose Penny's alleged bias and motive by allowing cross-examination regarding all of Penny's prior convictions, regardless of age. On cross-examination, defendant questioned Penny about her prior criminal history of convictions, including assault with a deadly weapon on Gloria Davis, assault and battery on Polly Liles, assault with a deadly weapon in 1977, assault on Sharon Randolph in

1979, assault on David Bridges in 1980, and damage to property in 1978. Testimony was further elicited by the State that Penny had entered into a plea agreement which allowed her to avoid the death penalty and receive a sentence of life plus ten years in exchange for her truthful testimony. Penny and the prosecutor both stated for the record that the plea agreement signed by Penny was the only agreement any prosecutorial agency ever made with her. Penny further testified that, even though she did not recall the four to five different stories she told the police, she admitted she lied to the police when she was originally questioned, she was indeed present at Stallings murder, and she did have a knife in her hand during the murder.

Moreover, the trial court instructed the jury that evidence had been introduced which tended to show: (1) Penny "was testifying under an agreement with the prosecutor for a charge reduction and a recommendation for a sentence concession in exchange for her [truthful] testimony"; (2) Penny was an accomplice and "[a]n accomplice is considered by the law to have an interest in the outcome of the case"; and (3) "defendant in this case contends that Penny McNeil made false contradictory or conflicting statements."

Consequently, further cross-examination relating to Penny's unserved assault warrants to show alleged bias or motive would be repetitive and cumulative of the evidence already presented. *See State v. Howie*, 310 N.C. 613, 616, 313 S.E.2d 554, 556 (1984) (excluded evidence of witness' indictment of an unrelated robbery was cumulative because witness' "potential bias was fully explored"). Therefore, we cannot say the trial court abused its discretion in excluding the evidence.

Even assuming, *arguendo*, that the trial court erred in excluding evidence of Penny's unserved assault warrants, we hold any such error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *see Delaware v. Van Arsdall*, 475 U.S. at 684, 89 L. Ed. 2d at 686 (Confrontation Clause violation subject to harmless error analysis); *State v. Hoffman*, 349 N.C. 167, 181, 505 S.E.2d 80, 89 (1998) (same), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 522 (1999).

In arguing that the trial court was in violation of the Confrontation Clause, defendant relies principally upon *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, and *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997).

In *Davis* the principal witness against defendant was on probation after having been adjudicated a delinquent for burglarizing two cabins. *Davis*, 415 U.S. at 310-11, 39 L. Ed. 2d at 350. The trial court did not allow defendant to cross-examine the witness about his probationary status, and the Court in *Davis* held this violated defendant's Sixth Amendment right "to be confronted by the witnesses against him." *Id.* at 315, 39 L. Ed. 2d at 353.

In *Prevatte* the State's principal witness was under indictment in another county on nine charges of forgery and uttering forged checks. *Prevatte*, 346 N.C. at 163, 484 S.E.2d at 378. The trial court denied defendant's requests to cross-examine the witness about these charges and whether the witness had been promised anything in return for testifying against defendant. *Id.* Relying on *Davis*, this Court held that the refusal of the trial court to allow cross-examination of the State's principal witness was constitutional error warranting a new trial. *Id.* at 163-64, 484 S.E.2d at 378-79.

The State contends the facts in the instant case are more analogous to our recent holding in *Hoffman*, 349 N.C. 167, 505 S.E.2d 80. In *Hoffman* the trial court did not allow defendant to cross-examine Donald Pearson, a State's witness, about charges pending against him for breaking and entering. *Id.* at 179, 505 S.E.2d at 87-88. On appeal, defendant argued this was a violation of his rights under the Sixth Amendment Confrontation Clause. *Id.* at 179, 505 S.E.2d at 88.

The Court in *Hoffman* held that the trial court's error in failing to allow defendant to cross-examine Pearson was harmless beyond a reasonable doubt. *Id.* at 181, 505 S.E.2d at 89. Distinguishing the facts in *Hoffman* from those of *Davis* and *Prevatte*, this Court reasoned that Hoffman was not denied the right of "effective" cross-examination under the Sixth Amendment. *Id.* at 180-81, 505 S.E.2d at 88-89. Pearson's testimony was not central to the defendant's guilt, and thus Pearson was classified not as a principal witness, but as a corroborating witness. *Id.* at 180, 505 S.E.2d at 88. "[E]ven without inquiry into any pending charges, Pearson was thoroughly impeached on cross-examination" about his prior convictions and conduct. *Id.* at 180, 505 S.E.2d at 88-89. "Pearson was also cross-examined about several prior inconsistent statements." *Id.* at 181, 505 S.E.2d at 89. Finally, there was substantial additional evidence and testimony presented by the State demonstrating defendant's guilt aside from Pearson's testimony. *Id.*

We conclude the facts in the present case are more analogous to *Hoffman* than to *Davis* and *Prevatte*. In *Davis* and *Prevatte*, the principal witnesses' testimony was critical in determining defendants' guilt. In the present case, defendant entered guilty pleas to both counts of first-degree murder on the first day of trial. Consequently, the context in which this issue arises is a sentencing hearing, rather than a trial to determine guilt or innocence.

In addition, as in *Hoffman*, defendant here thoroughly impeached Penny regarding her prior inconsistent statements and prior convictions. Penny admitted on direct and on cross-examination that she initially lied to the police during questioning. Furthermore, defendant thoroughly questioned Penny about her prior criminal convictions, regardless of their age. Accordingly, we are inclined to believe that the trial court's exclusion of defendant's proposed cross-examination was well within the "broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation." *Davis*, 415 U.S. at 316, 39 L. Ed. 2d at 353. In any event, it is clear that any error in denying defendant's request to question Penny about her unresolved warrants was harmless beyond a reasonable doubt. *Hoffman*, 349 N.C. at 181, 505 S.E.2d at 89. This assignment of error fails.

[5] In defendant's next assignment of error, he argues the trial court erred by allowing the State's pathologist, Dr. Gordon LeGrand, to testify that fecal matter was found inside Stallings' vaginal area after her death.

During the sentencing proceeding, the State called Dr. LeGrand as an expert witness to describe Stallings' autopsy findings to the jury. Prior to Dr. LeGrand's testimony, defendant made a motion *in limine* to suppress any evidence related to fecal matter found inside Stallings' vagina. Defendant argued that this evidence was irrelevant to statutory aggravating circumstance (e)(9) and that any relevance was outweighed by its prejudicial effect on the jury. The trial court denied defendant's motion and held that "the State could bring out evidence of fecal material matter, that it was present, that a jury might consider that as it relates to any trauma or force or struggle or stress or anything else that she under if—as far as it being at the time of the killing."

Dr. LeGrand testified that fecal matter was found in Stallings' vagina about a "half inch or so beyond the actual vaginal entrance." He opined that the presence of fecal matter in Stallings' vagina was caused by a sudden, traumatic event such as the beating she

received by defendant or the gunshot wound to her head resulting in her death.

By failing to object at the time the State questioned Dr. LeGrand regarding the fecal matter, defendant waived this assignment of error. "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." N.C. R. App. P. 10(b)(1). The trial court's denial of defendant's motion *in limine* is insufficient to preserve for appeal the question of the admissibility of the challenged evidence. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam). We note that defendant failed to assign plain error to the trial court's admission of the challenged evidence. Accordingly, defendant's argument is not properly before this Court. *See* N.C. R. App. P. 10(c)(4); *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

[6] In another assignment of error, defendant argues that the trial court erred by admitting hearsay testimony of Cecil Collins, a retired member of the Charlotte-Mecklenburg Police Department, who testified that defendant's wife, Cynthia McNeil (Cynthia), died as a result of defendant drowning her.

The State presented Collins' testimony to establish the existence of the (e)(3) statutory aggravating circumstance: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person . . . ." N.C.G.S. § 15A-2000(e)(3). Collins testified that Cynthia's body was recovered from Lake Wylie on 13 July 1976 and, after making several untruthful statements, that defendant admitted to the police that he threw his wife's body over Buster Waters Bridge into Lake Wylie.

On cross-examination, defendant asked Collins:

> Q. And the only thing anybody could ever determine with respect to the cause of death would be consistent with, with a drug overdose, isn't that true?
>
> A. I can't answer that. I don't have the knowledge of that. I do know what was on the autopsy for, you know, cause of death, and beyond that after 20 years, I can't—I haven't seen it, so I don't recall.

On redirect by the State, the following colloquy occurred:

Q: Cause of death on the autopsy was drowning, wasn't it?

A: Yes, sir, it was.

By questioning Collins about the cause of Cynthia's death, defendant "opened the door" for the State to ask Collins similar or related questions. "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*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Albert*, 303 N.C. at 177, 277 S.E.2d at 441. Thus, by raising the issue of the cause of Cynthia's death on cross-examination, defendant "opened the door" for the State to elicit hearsay statements from Collins concerning the cause of her death in rebuttal.

Nevertheless, defendant argues that Collins' testimony was inadmissible hearsay under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I, Sections 18, 19, 23, 24, and 27 of the North Carolina Constitution because Collins did not perform the autopsy and is reciting information developed by someone else.

Even assuming that Collins' response in rebuttal to the line of questioning defendant initiated was barred by the Confrontation Clause, we conclude the trial court's admission of the challenged testimony was harmless beyond a reasonable doubt. Prior to Collins' testimony, the parties stipulated that defendant had pled guilty to voluntary manslaughter for Cynthia's death and had received an active prison term for the offense. The State also introduced a certified copy of the criminal judgment and a copy of defendant's guilty plea for voluntary manslaughter. Consequently, competent evidence of Cynthia's death was before the jury in the form of Collins' testimony, certified copies of defendant's voluntary manslaughter conviction, and defendant's guilty plea. This evidence adequately supports the trial court's submission of the (e)(3) statutory aggravating circumstance. *See State v. Richmond*, 347 N.C. 412, 437, 495 S.E.2d 677, 691 (where this court held that "error, if any, in the admission of [testimony of the

father of the victim regarding the cause of the victim's death] was harmless beyond a reasonable doubt because clearly competent evidence of defendant's first-degree murder conviction for this offense was admitted in the form of a certified copy of his criminal judgment"), *cert. denied*, --- U.S. ---, 142 L. Ed. 2d 88 (1998). Accordingly, any error in admitting the challenged testimony was harmless beyond a reasonable doubt.

[7] By defendant's next assignment of error, he contends the trial court should have submitted the (f)(1) statutory mitigating circumstance: "The defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1).

"The trial court is required to submit to the jury any statutory mitigating circumstance supported by the evidence regardless of whether the defendant objects to it or requests it." *State v. Bonnett*, 348 N.C. 417, 443, 502 S.E.2d 563, 580 (1998), *cert. denied*, --- U.S. ---, 142 L. Ed. 2d 907 (1999). Prior to submitting the (f)(1) statutory mitigating circumstance, "the trial court is required to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). Defendant's prior criminal activity is considered "significant" under N.C.G.S. § 15A-2000(f)(1) if it is "likely to have influence or effect upon the determination by the jury of its recommended sentence." *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

Defendant argues that *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106, the opinion issued by this Court after defendant's first trial, provides support for this assignment of error. In *McNeil* we noted, "we are unable to say beyond a reasonable doubt that no juror could reasonably have found that a defendant's commission of a single very serious noncapital crime years before was *not* a significant *history* of prior criminal activity." *Id.* at 395, 395 S.E.2d at 110-11. Nonetheless, during defendant's second sentencing hearing, the State, in addition to offering evidence of defendant's voluntary manslaughter conviction, also presented evidence of numerous other serious offenses committed by defendant which were not introduced during the first trial.

At the most recent sentencing proceeding, the State introduced evidence revealing defendant's 1959 conviction for house burglary where defendant was sentenced to six months probation in Washington, D.C. Defendant later violated this probation. Defendant

served time in Savannah, Georgia, for larceny of a television. In 1975 defendant was arrested for hit-and-run and property damage. As discussed earlier, in 1977 defendant pled guilty to voluntary manslaughter for throwing his wife, Cynthia, over a bridge into Lake Wylie. This evidence of defendant's prior criminal activity is more extensive and significant than the evidence presented at defendant's first trial.

In support of his argument, defendant cites several cases where, under similar circumstances, he alleges this Court held it was appropriate to submit the (f)(1) statutory mitigating circumstance. *See Wilson*, 322 N.C. at 143, 367 S.E.2d at 604 (prior history included second-degree kidnaping conviction, theft, and storing illegal drugs); *State v. Lloyd*, 321 N.C. 301, 312, 364 S.E.2d 316, 324 (prior history included convictions of "assault with intent to rob not being armed," "breaking and entering a business place with intent to commit larceny," and alcohol-related misdemeanors), *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988); *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 824 (1985) (prior history included felonious breaking and entering, felonious larceny, armed robbery, and felonious assault), *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). None of the cases defendant cites, however, involve a prior criminal history which includes a violent felony involving death, as is present in the instant case.

Consequently, the trial court properly found that no reasonable juror could have concluded that defendant's criminal history was insignificant under N.C.G.S. § 15A-2000(f)(1). Accordingly, this assignment of error is meritless.

In defendant's next assignment of error, he argues the trial court failed to intervene *ex mero motu* to preclude the prosecutor from making numerous improper statements to the jury during closing arguments. We disagree.

During the sentencing hearing, defendant failed to object to any portion of the prosecutor's closing argument. When a party fails to object during closing arguments, "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." *Atkins*, 349 N.C. at 84, 505 S.E.2d at 111. Therefore, the appropriate standard of review for defendant's arguments is one of "gross impropriety." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

"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. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3716 (1999). "Whether counsel abuses this 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." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976).

[8] Defendant first argues that the prosecutor placed undue emphasis upon the personal qualities and future prospects of Stallings and Fore and sought to improperly invoke sympathy for the victims. The pertinent part of the prosecutor's closing argument included:

> If you want to feel sympathy, you want to have some emotion in this case, if it's based on the evidence, that's okay. If it's rooted in the evidence, that's okay.
>
> . . . .
>
> . . . If you could ask Faye Stallings at this time would you want to work at a clothes house, I'll bet she'd say, yeah, I'll do that compared to where she is right now. Give Deborah Fore that chance, no question, living in a maximum facility, small, small cell, is that a bad life? It's not a good life. But is it enough punishment in this case based on what you've heard? No, it's not. It's absolutely flat out not enough, and there's no question about that.
>
> Faye—do you think Faye and Deborah would trade for that? Of course they would. Do you think they would trade for the 13 years that they've been buried somewhere? Of course they would. Is life imprisonment enough? No, it is not.

In *State v. Larry*, 345 N.C. 497, 481 S.E.2d 907, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 234 (1997), this Court addressed a claim that the prosecutor's argument was improperly designed to appeal to the jury's sympathy for the victim. *Id.* at 529, 481 S.E.2d at 926. In rejecting defendant's claim, this Court stated:

> [i]n *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735-36 (1991), the United States Supreme Court upheld the use of victim-impact statements during closing arguments

> unless the victim-impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair.
>
> *State v. Bishop*, 343 N.C. [518,] 554, 472 S.E.2d [842,] 861 [(1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997)]. In *State v. Bishop*, we held that the prosecutor's arguments about the victim and what she could have accomplished served to inform the jury about the specific harm caused by the crime and did not render the trial fundamentally unfair.

Larry, 345 N.C. at 529-30, 481 S.E.2d at 926.

In the instant case, the prosecutor's argument about the promising nature of Stallings' and Fore's lives served to inform the jury about the specific harm caused by defendant's crime. *See State v. Gregory*, 340 N.C. 365, 427, 459 S.E.2d 638, 674 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Consequently, the prosecutor's argument was not so "grossly improper" as to require the trial court to intervene *ex mero motu*.

[9] Defendant next argues that the prosecutor's references to Cynthia's death as the third person killed urged the jury to return a death sentence based on the (e)(11) statutory aggravating circumstance, which the trial court refused to submit to the jury. N.C.G.S. § 15A-2000(e)(11) ("The murder for which the defendant stands convicted was part of a course of conduct . . . .").

Cynthia's death, however, was relevant to the (e)(3) statutory aggravating circumstance, and therefore, relevant to the decision of the jury. Accordingly, the prosecutor's statements relating to Cynthia's death did not constitute gross impropriety requiring intervention *ex mero motu* by the trial court. *See State v. Holden*, 321 N.C. 125, 156, 362 S.E.2d 513, 532 (1987) (prosecutor's statement, "How many more women are we going to have to see this man rape before we say enough is enough?" was not held to be so "grossly improper" as to require the trial court to intervene *ex mero motu*), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

[10] Defendant further argues that the prosecutor's closing argument attempted to defend the imposition of the death penalty on general deterrence grounds. In his closing argument, the prosecutor stated:

> The death penalty is a strong extreme measure, no question about it. It is proper in a civilized society. It is not society com-

> mitting murder, it is the contrary. It is society protecting life. It is society making a statement that life is the proper thing. We're going to, we're going to enforce the laws and if you kill three people, that's enough. That is beyond enough. That's way beyond enough, and in this case, ladies and gentlemen, a decision of life imprisonment for the defendant is just not proper.

Defendant is correct in noting it is improper for the prosecutor to argue the "general deterrent" effect of capital punishment to the jury. *Bishop*, 343 N.C. at 555, 472 S.E.2d at 862; *State v. Hill*, 311 N.C. 465, 475, 319 S.E.2d 163, 169-170 (1984); *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). This Court, however, has approved prosecutorial arguments urging the jury to sentence a particular defendant to death to specifically deter that defendant from engaging in future murders. *See, e.g., State v. Locklear*, 349 N.C. 118, 164, 505 S.E.2d 277, 304 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 559 (1999).

Nonetheless, even assuming the prosecutor's statements were improper, they were not so "grossly improper" as to warrant action by the trial court *ex mero motu*. *Hill*, 311 N.C. at 475, 319 S.E.2d at 170 (prosecutor's argument referring to the "deterrent effect" of the death penalty did not warrant *ex mero motu* action by the court); *Kirkley*, 308 N.C. at 215, 302 S.E.2d at 155 (improper "general deterrent" argument by prosecutor was not grossly improper). Defendant's argument is without merit.

[11] Defendant also contends the prosecutor improperly informed the jury that community sentiment urged the death penalty and that the jury is effectively an arm of the State in the prosecution of defendant. The prosecutor argued:

> Law enforcement has done all they can. We have done all we can. There comes a time in society, and this is the only real civic duty we have anymore, is serving on a jury. That you've got to stand up, you got to throw out your chest, you got to take on the oath and you've got to say, by gosh, I ain't standing for this anymore, this is not right, and it's not.

The State must not ask the jury " 'to lend an ear to the community rather than a voice.' " *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985) (quoting *Prado v. State*, 626 S.W.2d 775, 776 (Tex. Crim. App. 1982)). It is not, however, improper to remind the jurors that

"they are the voice and conscience of the community." *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

We have held on several prior occasions that similar arguments advising jurors that law enforcement and the State can do no more are not prejudicial. *See State v. Barrett*, 343 N.C. 164, 180-81, 469 S.E.2d 888, 897 ("The buck stops here, ladies and gentlemen, and you cannot pass it along. It's in your laps. The police can't do anymore, the Judge can do no more. It's up to you to decide."), *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996); *State v. Artis*, 325 N.C. 278, 329, 384 S.E.2d 470, 499 (1989) ("The officers can do no more. The State can do no more. The Judge can do no more. Now, it's entirely up to you. The eyes of Robeson County are on you. You speak for Robeson County . . . ."), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *Brown*, 320 N.C. at 203, 358 S.E.2d at 18 ("The officers can't do any more. The State can't do any more. You speak for all the people of the State of North Carolina . . . .").

Accordingly, the prosecutor's comments were not "grossly improper," and thus, the trial court did not abuse its discretion in not intervening *ex mero motu*.

[12] Defendant next claims the prosecutor repeatedly urged the jury to reject proposed mitigating circumstances based upon defendant's failure to demonstrate he lacked moral culpability for the Stallings and Fore murders. Defendant contends that the prosecutor's argument improperly implied that the jury could ignore credible mitigating evidence concerning defendant's age, character, education, environment, habits, mentality, and prior record.

In the present case, the prosecutor's definition and statements concerning defendant's moral culpability are substantially similar to those found in the North Carolina pattern jury instructions. *See* N.C.P.I.—Crim. 150.10 (1996) (amended 1997). In any event, this Court has upheld virtually identical prosecutorial arguments in *State v. Bishop*, 343 N.C. 518, 552, 472 S.E.2d 842, 860 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997), and *State v. McLaughlin*, 341 N.C. 426, 443-44, 462 S.E.2d 1, 10 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). Defendant's argument fails.

[13] Defendant further argues that the prosecutor improperly suggested to the jury that defendant took the victims' lives without due process. The prosecutor argued, "Where was due process? LeRoy

McNeil, he's her judge, jury, execut[ioner] all wrapped in one. Where is Faye Stallings' due process? Who was her advocate?" This Court has repeatedly held it is not improper to argue that defendant, as judge, jury, and executioner, single-handedly decided the victim's fate. *Hoffman*, 349 N.C. at 189, 505 S.E.2d at 93; *State v. Smith*, 347 N.C. 453, 466-67, 496 S.E.2d 357, 365, *cert. denied*, — U.S. —, 142 L. Ed. 2d 91 (1998); *Walls*, 342 N.C. at 64, 463 S.E.2d at 772. Defendant's argument is without merit.

[14] Defendant also contends that the prosecutor either materially misstated the evidence or based his arguments on facts not in evidence. Specifically, defendant contends the following arguments were improper: (1) that defendant did not rebut any evidence offered regarding Cynthia's death; and (2) that [defendant] "almost got away with [Fore's murder] but for good police work, but for the fact that they had fingerprints on file from the 1976 killing and were able to match them when they ran these prints found at the Stallings' murder scene and compared them and made that match."

"A jury argument is proper as long as it is consistent with the record and not based on conjecture or personal opinion." *Robinson*, 336 N.C. at 129, 443 S.E.2d at 331-32. "Counsel is permitted to argue from the evidence which has been presented, as well as reasonable inferences that can be drawn therefrom." *State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

In the present case, the record reveals the State introduced, and defendant stipulated to, defendant's guilty plea of voluntary manslaughter for Cynthia's death in 1977. It can be reasonably inferred that defendant was fingerprinted after his arrest for this crime. It can also be reasonably inferred that law enforcement used defendant's fingerprints from their files in the investigation of the deaths of Stallings and Fore. Consequently, the prosecutor's comments were not grossly improper.

In any event, we note that the trial court properly instructed the jurors that they were the sole judge of the evidence and should be guided by their own recollection of the evidence, not counsel's arguments. *See State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 520 (1998). Jurors are presumed to follow the trial court's instructions. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Accordingly, the trial court did not err in failing to intervene *ex mero motu*.

[15] By defendant's next assignment of error, he argues that the trial court erroneously instructed the jury with respect to the (e)(3) statutory aggravating circumstance by reading the first bracketed sentence of N.C.P.I.—Crim. 150.10, which states, "voluntary manslaughter is by definition a felony involving the use or threat of violence to the person." Defendant contends the offense of voluntary manslaughter does not fall within this definition and the evidence does not show that Cynthia's death involved an inherently violent act.

To instruct the jury on the (e)(3) statutory aggravating circumstance, "the felony for which the defendant has been convicted must be one involving threat or use of violence to the person. It cannot, under this provision, be a crime against property." *State v. Goodman*, 298 N.C. 1, 23, 257 S.E.2d 569, 584 (1979). Voluntary manslaughter is defined as "the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation." *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981). "Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor." *State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986). Consequently, within the meaning and intent of N.C.G.S. § 15A-2000(e)(3), voluntary manslaughter is a felony involving the use or threat of violence to the person. Therefore, the trial court's instructions to the jury were proper.

[16] In a related assignment of error, defendant contends that the trial court improperly suggested, in charging the jury on the (e)(3) statutory aggravating circumstance, that defendant engaged in some acts of violence against Cynthia at or prior to her death. Defendant argues the trial court erred by instructing the jury as follows:

> If you find from the evidence beyond a reasonable doubt that the defendant had been convicted of voluntary manslaughter and that the defendant used violence to the, or threatened violence to the person in order to accomplish his criminal act, and that the defendant killed the victim after he had thrown her off of a bridge, you would find [the (e)(3)] aggravating circumstance and would so indicate by having your foreperson write "yes" in the space after this aggravating circumstance on the Issue and Recommendation form.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, you will not find [the (e)(3)] aggravating

> circumstance and will so indicate by having your foreperson write "no" in that space.

Defendant claims the trial court gave improper instructions concerning the circumstances under which the jury could find the (e)(3) statutory aggravating circumstance.

We note that defendant waived this argument by failing to properly object during the charge conference.

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2).

During the charge conference, defendant objected only to the trial court's reading of the first bracketed sentence of N.C.P.I.—Crim. 150.10. Defendant's objection was not directed to the circumstances under which the jury could find the (e)(3) statutory aggravating circumstance. Accordingly, defendant has waived appellate review of this assignment of error. N.C. R. App. P. 10(b)(2).

Nonetheless, defendant has assigned plain error to this alleged instructional error. *See* 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) (citing *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 132 (1998).

The record shows, within the meaning and intent of the (e)(3) statutory aggravating circumstance, that defendant used violence or the threat of violence to throw Cynthia over a bridge into a lake while she was still alive. In accordance with the evidence presented, the trial court gave jury instructions that were substantially similar to those recommended in N.C.P.I.—Crim. 150.10. "Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its delibera-

tion . . . ." N.C.G.S. § 15A-2000(b). We conclude that the trial court's instructions did not constitute plain error and, accordingly, reject defendant's assignment of error.

[17] In his next assignment of error, defendant contends the trial court erred in its jury instruction concerning the (e)(9) statutory aggravating circumstance: "The capital felony was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). Specifically, defendant argues that the trial court's instructions impermissibly allowed the jury to find the existence of the (e)(9) statutory aggravating circumstance for Stallings' murder based upon the combined actions of defendant and Penny.

Defendant relies on *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), to assert that the statutory aggravating circumstances must focus on defendant's culpability and cannot include accomplice behavior. Defendant's reliance is misplaced. In discussing the holding of *Enmund* in *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996), this Court observed:

> [The United States Supreme Court in *Enmund*] held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Thus, an Enmund issue only arises when the State proceeds on a felony murder theory.*

Id. at 87, 463 S.E.2d at 226 (citation omitted) (emphasis added).

In *Enmund* there was no direct evidence showing that defendant either planned to murder the victim or was physically present when the killing occurred. *Enmund*, 458 U.S. at 786, 73 L. Ed. 2d 1144-45. In the present case, defendant admitted that he planned to kill Stallings so there would be no witnesses. Defendant further admitted shooting Stallings and in fact pled guilty to her murder. Accordingly, *Enmund* has no application to the facts at hand.

The trial court's instructions to the jury concerning the (e)(9) statutory aggravating circumstance were almost verbatim from the North Carolina pattern jury instructions. N.C.P.I.—Crim. 150.10. The trial court instructed:

> Fourth. Was this murder especially heinous, atrocious or cruel? This aggravating circumstance is limited to acts done during the commission of the murder, but not after the death. In this context "heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageous, wicked and vile. And "cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. However, it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined to you. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a [conscienceless] or pitiless crime which was unnecessarily [torturous] to the victim.

This Court has upheld virtually identical jury instructions to those set out above in *State v. Syriani*, 333 N.C. 350, 390-91, 428 S.E.2d 118, 140-41, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), and *State v. Lemons*, 348 N.C. 335, 370-71, 501 S.E.2d 309, 330-31 (1998), *sentence vacated on other grounds*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3771 (1999). "Because these jury instructions incorporate narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved, we reaffirm that these instructions provide constitutionally sufficient guidance to the jury." *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141.

[18] Nevertheless, defendant argues that these instructions impermissibly allowed the jury to find the (e)(9) statutory aggravating circumstance based on Penny's, not defendant's, behavior. "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. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998) (quoting *Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3716 (1999). "[C]ontradictions and discrepancies are for the jury to resolve; and all evidence admitted that is favorable to the State is to be considered." *Robinson*, 342 N.C. at 86, 463 S.E.2d at 225.

Whether the trial court properly submitted the (e)(9) statutory aggravating circumstance depends upon the particular facts of a

given 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). Defendant's capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. *State v. Stanley*, 310 N.C. 332, 336, 312 S.E.2d 393, 396 (1984). "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. Rouse*, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994) (quoting *Goodman*, 298 N.C. at 25, 257 S.E.2d at 585), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). "The defendant's acts must be characterized by '*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*' in a first degree murder case." *Stanley*, 310 N.C. at 336, 312 S.E.2d at 396 (quoting *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983)).

The evidence presented in this case, when considered in the light most favorable to the State, was sufficient to warrant the submission of the "especially heinous, atrocious, or cruel" statutory aggravating circumstance. The record reveals defendant tricked Stallings into a back bedroom of a vacant house by pretending to offer her drugs; defendant grabbed her around her neck, pulled out his knife, and asked for her money and food stamps; defendant had previously agreed to kill Stallings so there would be no witnesses; Stallings asked defendant and Penny if they were going to hurt her and then cried and begged for them not to do so; Stallings cooperated and gave them her food stamps; Stallings was cut on the chest and forced to lift her top to see if she had any money in her bra; defendant strangled Stallings until her eyes rolled back and her tongue came out of her mouth; and defendant shot Stallings in the head with an M1.22 rifle. The autopsy revealed that Stallings was severely beaten prior to her death and that she had a stab wound to her chest; a deep cut across the distal phalanx which extended to the bone described as a painful wound; a large premortem contusion above her left eye, with a corresponding linear abrasion below the eye caused by a narrow, blunt object; and a premortem blunt-trauma contusion of her liver. Defendant's fingerprints were found on a stick the pathologist testified could have caused the victim's contusions. Hair impressions consistent with Stallings' hair type were found on the other end of the stick. Defendant's bloody palm prints were found above the victim's body. There was blood on the bottom of Stallings' feet and barefoot impressions in the room.

The State's evidence clearly showed defendant murdered Stallings and was an active participant in severely beating and strangling her prior to her death. We therefore hold the evidence was sufficient to warrant the submission of the (e)(9) statutory aggravating circumstance in this case. *See McCollum*, 334 N.C. at 222, 433 S.E.2d at 151 (defendant's presence and active participation in the rape and murder of the victim justified submission of the (e)(9) statutory aggravating circumstance). This assignment of error is devoid of merit.

[19] In his next assignment of error, defendant contends the trial court improperly excluded evidence of his organic brain damage when instructing the jury on the (f)(2) statutory mitigating circumstance—"The capital felony was committed while the defendant was under the influence of mental or emotional disturbance"—and the (f)(6) statutory mitigating circumstance—"The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(2), (6).

At the charge conference, defendant requested submission of the (f)(2) and (f)(6) statutory mitigating circumstances. After agreeing to submit both of the statutory mitigating circumstances, the trial court asked defense counsel:

> COURT: Under number two, the contentions of the defendant as to that mitigating circumstances [sic], that the defendant suffered from alcoholism, as well as chronic alcoholism and personality disorder?
>
> MR. KINGSBERRY: Yeah, personality disorder and I can't—not otherwise specified.

Thereafter, the trial court instructed the jury in connection with the (f)(2) statutory mitigating circumstance as follows:

> You will find this mitigating circumstance if you find that the defendant suffered from chronic alcoholism or personality disorder not otherwise specified, and that as a result, the defendant was under the influence of mental or emotional disturbance when he killed the victim.

Similarly, the trial court instructed the jury regarding the (f)(6) statutory mitigating circumstance as follows:

> You would find this mitigating circumstance if you find that the defendant was a chronic alcoholic or suffered from personality disorder not otherwise specified and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

After the trial court instructed the jury, and the jury had retired to begin its deliberations at the direction of the trial court, defendant raised the issue that organic brain damage should have been included as a third possibility under the (f)(2) and (f)(6) statutory mitigating circumstances. In response, the trial court stated, "I believe we had a discussion on that as to what was, those items were and I thought we did arrived [sic] at the evidence being chronic alcoholic and personality disorder."

The State argues that defendant waived this objection by failing to make a timely request to include evidence of organic brain damage when specifically asked by the trial court at the charge conference. We agree.

Rule 21 of the General Rules of Practice for the Superior and District Courts provides in pertinent part:

> At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

Gen. R. Pract. Super. and Dist. Ct. 21, 1999 Ann. R. N.C. 16. Once the jury has been charged, however, defendant may only ask the trial court to correct or withdraw an erroneous instruction or to inform the jury on a point of law which should have been covered in the original instructions. *Id.*

Defendant's request following the trial court's charge did not fall within the provisions of Rule 21. Defendant asked the trial court to give new instructions to the jury regarding evidence of defendant's alleged organic brain damage. The record shows defendant did not ask for any such instruction during the charge conference. Once the jury has been charged, a defendant is not permitted under Rule 21 to propose a new evidentiary matter if he previously had the opportunity to raise any such argument at the charge conference. Accordingly, defendant has waived this assignment of error.

Moreover, as defendant did not assign plain error to challenge the alleged instructional error, the waiver rule precludes plain error review. *See* N.C. R. App. P. 10(c)(4); *Frye*, 341 N.C. at 496, 461 S.E.2d at 677.

PRESERVATION

Defendant raises twenty additional issues which he concedes have been decided contrary to his position previously before this Court. Defendant makes these arguments for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving these arguments for any possible further judicial review in this case. Specifically, defendant argues: (1) the trial court erred in denying defendant's motion to suppress his statement to investigating officers on 23 April 1983; (2) the trial court erred by imposing the death penalty upon defendant; (3) the trial court erred by denying defendant's motion to dismiss the cases against him on speedy-trial grounds; (4) the trial court erred by refusing to suppress all of the State's physical evidence against defendant; (5), (6), and (7) the trial court erred by refusing to allow defendant to question prospective jurors concerning their ability to consider sentencing defendant to life imprisonment, their ability to consider specific mitigating circumstances, and any misconceptions concerning the parole eligibility of persons sentenced to life imprisonment; (8) the trial court erred by denying defendant's motion for individual *voir dire* of prospective jurors; (9) the trial court erred by allowing the State's challenges for cause; (10) the trial court erred by allowing the State's peremptory challenge for prospective jurors who expressed reservations about imposition of capital punishment; (11) the trial court erred by refusing to allow defendant to argue the jury could consider the State's plea agreement with Penny as a mitigating circumstance; (12) defendant's trial counsel failed to give adequate representation by conceding the existence of statutory aggravating circumstances in his opening statement; (13), (14), (15), and (16) the trial court erred by submitting the (e)(3), (4), (5), and (9) statutory aggravating circumstances; (17) the trial court erred by failing to properly instruct the jury on the (e)(4) statutory aggravating circumstance; (18) the trial court erred by instructing the jury that before they could find the existence of a nonstatutory mitigating circumstance, they must first find that the circumstance has mitigating value; (19) the trial court erred in defining the term "mitigating circumstance"; and (20) the trial court erred by misstating the law in the jury charge.

We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Accordingly, defendant's assignments of error are without merit.

We note, however, that several of the issues that defendant has denominated as preservation issues cannot be 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 they have merit. When counsel determines that an issue of this nature does not have merit, counsel should "omit it entirely from his or her argument on appeal." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994). Nevertheless, we have thoroughly reviewed the transcript and record as to these assignments of error and have determined they are meritless.

PROPORTIONALITY REVIEW

[20] Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we are required to review and determine: (1) whether the record supports the jury's finding of any aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; 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); *State v. LeGrande*, 346 N.C. 718, 727, 487 S.E.2d 727, 731 (1997); *State v. Rich*, 346 N.C. 50, 66, 484 S.E.2d 394, 404 (1997).

In the present case, defendant pled guilty to the first-degree murders of Stallings and Fore. The jury found four aggravating circumstances in the Stallings murder: (1) defendant had been previously convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (3) the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); and (4) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury found three aggravating circumstances in the Fore murder: (1) defendant had been previously convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (3) the murder was committed while

defendant was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5).

Of the twelve mitigating circumstances submitted for the Stallings murder, one or more jurors found the following: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) defendant was born into a home environment of fear, violence, and abuse; (3) defendant was exposed to alcohol consumption and dependency at an early age; (4) during the thirteen years since these events occurred defendant has changed from the person he was in 1983, as seen in part by his demeanor toward prison staff and fellow inmates; (5) defendant volunteers for extra work, without pay, and accepts any task, no matter how menial; and (6) other circumstances found by the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of the twelve mitigating circumstances submitted for the Fore murder, one or more jurors found the same six mitigating circumstances described above, as well as a seventh mitigating circumstance, that defendant never knew his father and was abandoned by his mother.

After thoroughly examining the records, transcripts, and briefs in this case, we conclude the evidence fully supports the aggravating circumstances found by the jury. Further, there is no indication that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn then to our final statutory duty of proportionality review.

[21] In conducting our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. 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." *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. 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*, 522 U.S. 900, 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 of the aforementioned cases in which this Court has found the death penalty disproportionate. The instant case is distinguishable in the following ways: (1) defendant admitted murdering two victims; (2) defendant pled guilty to the premeditated and deliberate first-degree murder of both victims; (3) defendant planned to rob and kill Stallings, deceived her to get her alone in a vacant house, then brutally tortured and murdered her; (4) two days later, defendant planned to rob and kill Fore, lured her to go drinking, drove her to an isolated area, then shot her in the head and left her body on the side of the road; (5) after shooting Fore, defendant went to her apartment and stole several of her belongings; (6) the jury found four statutory aggravating circumstances against defendant in the Stallings murder; and (7) the jury found three statutory aggravating circumstances against defendant in the Fore murder. Accordingly, the facts and circumstances distinguish the instant case from those in which this Court held the death penalty disproportionate.

We also compare the present case with cases in which this Court has found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality, it is unnecessary to discuss or cite all of these cases for comparison. *State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, — U.S. —, 142 L. Ed. 2d 315 (1998); *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164; *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983).

As discussed earlier, defendant pled guilty to two first-degree murders. This Court has never found a death sentence disproportionate where defendant was convicted of murdering more than one victim. *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. Heatwole*, 344 N.C. 1, 30, 473 S.E.2d 310, 325 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997); *McLaughlin*, 341 N.C. at 466, 462 S.E.2d at 23; *see also Brown*, 320 N.C. at 210, 358 S.E.2d at 22 (plea of guilty is the equivalent of conviction).

Further, of the four statutory aggravating circumstances found by the jury in the Stallings murder, three, standing alone, have been found sufficient to sustain a death sentence: (1) the (e)(3) statutory aggravating circumstance, *see Brown*, 320 N.C. at 219, 358 S.E.2d at 27; (2) the (e)(5) statutory aggravating circumstance, *see State v. Zuniga*, 320 N.C. 233, 274-76, 357 S.E.2d 898, 923-24, *cert. denied*, 484

U.S. 959, 98 L. Ed. 2d 384 (1987); and (3) the (e)(9) statutory aggravating circumstance, *see Syriani*, 333 N.C. at 400-06, 428 S.E.2d at 144-49. In the Fore murder, of the three statutory aggravating circumstances found, two, standing alone, have been found sufficient to sustain a death sentence: (1) the (e)(3) statutory aggravating circumstance, *see Brown*, 320 N.C. at 219, 358 S.E.2d at 27; and (2) the (e)(5) statutory aggravating circumstance, *see Zuniga*, 320 N.C. at 274-76, 357 S.E.2d at 923-24.

The remaining aggravating circumstance in both murders was the (e)(4) statutory aggravating circumstance (witness elimination). "[This Court has] never found a death sentence to be disproportionate in a witness-elimination case. The reason is clear: '[m]urder can be motivated by emotions such as greed, jealousy, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion.' " *State v. McCarver*, 341 N.C. 364, 407, 462 S.E.2d 25, 49 (1995) (quoting *State v. Oliver*, 309 N.C. 326, 375, 307 S.E.2d 304, 335 (1983)), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996).

After comparing this case to "similar cases" as to the crime and 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 say defendant's death sentence is excessive or disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIAM MORGANHERRING

No. 340A95

(Filed 20 August 1999)

1. Constitutional Law, Federal— effective assistance of counsel—murder and sexual offense charges—guilty plea to sexual offense and withdrawal of insanity notice

Defendant in a prosecution for first-degree murder and sexual offenses did not demonstrate ineffective assistance of counsel where he withdrew his notice and plea of not guilty by reason of insanity on the first day of trial and announced his intention to plead guilty to the two counts of sexual offense; defendant signed

a Harbison statement in which he authorized and instructed his attorneys to admit that he committed the physical acts alleged in the bills of indictment and to base his defense solely on the absence of mental elements of the crime and to seek to reduce the degree of the offenses; he was examined by the court; and he contended on appeal that he did not realize that a defense of diminished capacity would not affect his being found guilty of first-degree felony murder and that it was improbable that a jury would acquit him of first-degree murder after he admitted his guilt to the concurrent sexual offenses once he abandoned his insanity defense. The evidence as a whole entirely supports the trial court's conclusion that defendant was fully aware of the direct consequences of his plea including the fact that he would in all likelihood be convicted of at least felony murder, that defendant had competent counsel who believed that a defendant who put forth a non-credible defense at the guilt phase would not receive a sympathetic hearing from the jury in the punishment phase, and that defendant had a full opportunity to assess the advantages and disadvantages of pleading guilty to the two counts of second-degree sexual offense. In view of defendant's detailed, tape-recorded confession and other evidence in the case, defendant had no realistic defense to the sexual offense charges and hence no defense to felony murder; furthermore, defendant was subject to application of the felony murder rule by virtue of his robbery of one victim and was also convicted of first-degree murder of both victims on the basis of premeditation and deliberation.

2. Jury— first-degree murder—jurors' understanding of life imprisonment

The trial court correctly denied defendant's pretrial motion to question jurors about their understanding of life imprisonment where defense counsel admitted at the pretrial hearing that the statute allowing in capital cases an instruction that a sentence of life imprisonment means life without parole took effect after the crimes in the instant case.

3. Jury— parole eligibility—particular juror with family experience—no plain error in seating

There was no plain error in a capital prosecution for first-degree murder in the seating of a prospective juror who stated during voir dire that a man who had shot her uncle was sentenced to life, got out on parole, killed someone else, and after going

back to court killed a jailer, but when asked also stated that she could set that experience aside. Defendant neither challenged the juror for cause nor exercised one of his remaining peremptory challenges, did not request any instruction or admonition regarding parole following her selection as a juror, and there is no evidence which in any way suggests or implies that any juror erroneously considered the issue of parole eligibility.

4. Confessions and Incriminating Statements— effect of cocaine binge—prior to arrest—statement admissible

The trial court did not err in a first-degree murder prosecution by admitting defendant's confession where defendant contended that he did not knowingly waive his Fifth and Sixth Amendment rights as a result of a cocaine binge prior to his arrest. There is no evidence in the record that defendant's confession was not voluntary and no evidence to indicate that he was intoxicated or otherwise impaired at the time he made the statements.

5. Discovery— written report of expert—not prepared—voir dire prior to testimony

The trial court did not err in a first-degree murder prosecution by ordering that the State could conduct a voir dire of defendant's mental health expert prior to his testimony if the expert failed to provide the State with a report of his findings prior to testifying. Although defendant argued that his expert had not prepared a written report, the court did not order the production of a document that did not exist but ordered that the State would be able to conduct a voir dire if a written report was not produced. Moreover, N.C.G.S. § 15A-905 has been construed as providing for reciprocity when defendant has obtained discovery under N.C.G.S. § 15A-903.

6. Constitutional Law— right to counsel—presence at court-ordered psychiatric examination

The trial court did not err in a first-degree murder prosecution by denying defendant's request to have counsel present at a court-ordered psychiatric examination. Two psychiatrists and one psychologist examined defendant at his insistence; while the State raised the possibility of an examination by a State-selected psychiatrist, no court-ordered psychiatric examination occurred because defendant abandoned the insanity defense.

7. Jury— selection—capital punishment

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excusing for cause a juror who stated that she felt her personal beliefs might affect her consideration of the death penalty.

8. Evidence— photographs—homicide victims before and after death

The trial court did not err in a first-degree murder prosecution by admitting into evidence photographs of the victims before and after their deaths. It is apparent that the court gave due consideration to the objection and arguments of counsel and made findings that the photographs were relevant, were not repetitive, and were no more gruesome than would be the case in other murders of the same nature. Additionally, the court found that the probative value of the photographs outweighed the danger of any prejudice to defendant.

9. Evidence— expert—cross-examination—psychiatrist—familiarity with sources

The trial court did not err in a capital prosecution for first-degree murder in the cross-examination questions the State was allowed to ask the defendant's expert in addictive medicine. Although defendant asserted that the prosecutor improperly injected her own knowledge as to the importance of the treatises relied upon by the witness, the degree of the witness's familiarity with the sources upon which he based his opinion is certainly relevant to the weight and credibility the jury should give the testimony.

10. Evidence— expert—cross-examination—defendant's statements

The trial court did not err in a capital prosecution for first-degree murder by allowing the State to challenge the validity of a defense expert's opinion by reminding the jury that defendant had a choice with respect to what he told the expert. Since a mental health expert would have to weigh, assess, and analyze his conversations with a client such as defendant in forming his opinion and then either accept or reject in whole or in part the information received, it was proper for the State to examine the reliability or truth of defendant's statements and the degree of reliance placed upon them by the expert in forming his opinions.

11. Evidence— expert—cross-examination—defendant's memory

The trial court did not err in a capital prosecution for first-degree murder in allowing the prosecutor's cross-examination of defendant's expert where defendant contended that the prosecutor improperly stated her opinion that defendant's confession indicated that defendant had a good memory and a cognitive thought pattern. The prosecutor's questions were well within the bounds of a proper cross-examination; defendant's expert had stated that defendant's mental state was so afflicted that he could not coherently remember what occurred during the murders and it was proper for the State to attack this conclusion.

12. Evidence— capital sentencing—written transcript of plea to other crimes

There was no error in a capital sentencing proceeding where defendant contended that the jury was prevented from considering a guilty plea to sexual offense charges as a nonstatutory mitigating circumstance by the court's denial of his motion to admit the written transcript of the plea. The court had instructed the jury that defendant had changed his plea to guilty on the two charges of second-degree sexual offense and submitted the nonstatutory mitigating circumstance that defendant accepted responsibility for the sex offenses. The denial of the motion to admit the written plea did not preclude the jury from considering the guilty pleas as a mitigating circumstance.

13. Homicide— first-degree murder—premeditation and deliberation—sufficiency of evidence

The trial court did not err by submitting to the jury charges of first-degree murder on the basis of premeditation and deliberation where defendant contended that there was insufficient evidence for the jury to find that defendant had the capacity to form a specific intent to kill, but defendant first choked Ms. Pena, then repeatedly slashed and stabbed her; he had the ability immediately after her murder to choose various items from her apartment to sell to purchase cocaine; defendant saw Ms. Lee within a relatively short period and decided to "get her"; he was capable of creating an excuse to trick Mrs. Lee into Ms. Pena's apartment; defendant then began choking her, stopping long enough to force her to perform oral sex; and then defendant choked her again until he killed her.

14. Criminal Law— automatism—failure to instruct—no error

The trial court did not err in a capital prosecution for first-degree murder by failing to instruct the jury on the defense of automatism where the evidence clearly supported the instruction given on voluntary intoxication and the defenses of voluntary intoxication and automatism are fundamentally inconsistent. Additionally, defendant failed to present evidence which would support an instruction on automatism.

15. Homicide— felony murder—robbery—continuous transaction

The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant could be found guilty of felony murder if his intent to rob was formed after the murder where the evidence did not tend to establish that robbery was defendant's primary motivation for the killing, but defendant's account of the murder and his actions following the murder indicate that the murder and robbery were part of a continuous transaction.

16. Evidence— prison reports elicited on cross-examination—no plain error

There was no plain error in a capital sentencing proceeding where the testimony of defendant's mental health expert on direct examination focused on defendant's inability to control his emotional impulses in and out of prison and confirmed that the source of defendant's temper and aggression was a combination of cocaine and alcohol, and the State on cross-examination read defendant's prison writeups concerning details of his disciplinary reports, medical requests, and special religious requests. It was permissible for the State to ask questions regarding defendant's behavior and temperament in a setting when he was not consuming drugs.

17. Sentencing— capital sentencing—prison disciplinary reports—admissible

There was no error in a capital sentencing proceeding where defendant objected to the State asking his mental health expert a question regarding defendant's prison disciplinary reports. The rules of evidence do not apply in sentencing proceedings and any evidence which the court deems relevant to sentence may be introduced. A question as to whether defendant needed to be dis-

ciplined while in prison is relevant to the issue of defendant's temper and, since this evidence tends to rebut defendant's theory that he was aggressive only when consuming cocaine and alcohol, it was also relevant to the State's argument.

18. Sentencing— capital sentencing—death sentence—not arbitrary

The record in a capital sentencing proceeding fully supported the aggravating circumstances found by the jury, and there was no indication that the sentences of death in this case were imposed under the influence of passion, prejudice or any other arbitrary factor.

19. Sentencing— capital sentencing—death sentence—not disproportionate

A sentence of death in a first-degree murder prosecution was not disproportionate where the case was not substantially similar to any case in which the court has found the death penalty disproportionate and was more similar to cases in which the sentence was found proportionate. A sentence of death has never been found disproportionate where the court found defendant guilty of murdering more than one victim, the finding of premeditation and deliberation indicates a more cold-bloodied and calculated crime, the death penalty has not been found disproportionate in any case where the jury has found three aggravating circumstances, and the death penalty has not been found disproportionate in any case in which the prior violent felony aggravating circumstance was included.

Justices MARTIN and WAINWRIGHT 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 judgments imposing sentences of death entered by Hight, J., at the 10 July 1995 Criminal Session of Superior Court, Wake County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 25 February 1997. Heard in the Supreme Court 13 October 1997. On 6 November 1997, the Supreme Court remanded the case to Superior Court, Wake County, for an evidentiary hearing, and the case was recertified to the Supreme Court on 29 January 1999.

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

William F.W. Massengale and Marilyn G. Ozer for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 21 February 1994 for two counts of first-degree murder, one count of crime against nature, and two counts of second-degree sexual offense. Prior to trial, the prosecutor indicated she was not going to proceed on the charge of crime against nature and entered a dismissal on 2 August 1995. Defendant was tried capitally at the 10 July 1995 Criminal Session of Superior Court, Wake County. On 14 July 1995, defendant pled guilty to the two charges of second-degree sexual offense and entered a transcript of the plea. The jury subsequently found defendant guilty of both counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding, the jury recommended sentences of death as to each murder conviction. On 22 July 1995, the trial court sentenced defendant to two separate sentences of death, one for each of the two convictions for first-degree murder, and to two consecutive forty-year sentences, one for each of the two convictions for second-degree sexual offense.

At trial, the State's evidence tended to show that in November 1993 defendant moved from New Jersey to Raleigh, North Carolina, to move in with his half-sister, Stacy Holmes. Defendant lived with his half-sister for almost one month, until she asked him to move out because of his alcohol and cocaine abuse and because defendant was very headstrong and "wouldn't negotiate or listen to other people's opinions." Defendant met his first victim, Ramona Pena, at a bus stop and began living with her after leaving his sister's home. Ms. Pena was disabled by multiple sclerosis. The two lived as roommates, with defendant contributing to the cost of rent and groceries.

During this period, defendant was employed briefly for a temporary service company and then began working for Hockaday Heating and Air. Defendant purchased his work tools through installment deductions from his paychecks. On 20 January 1994, defendant picked up his paycheck and discovered that $87.06 had been deducted to pay off the balance defendant owed on his work tools. As a result, defendant became angry; left work; and spent most of his paycheck on beer, cocaine and a prostitute.

Upon returning to Ms. Pena's apartment, defendant went into the bathroom to finish the cocaine he had purchased. He then sat in the living room with Ms. Pena. Ms. Pena got up and began walking down the hall, and defendant followed her and grabbed her. Defendant began choking her in the hall and then dragged Ms. Pena into the bedroom and continued to choke her. At this point, defendant could not remember the exact sequence of events; however, evidence tended to show that Ms. Pena's hands were tied behind her back, she was stabbed six times in the back, and she suffered lacerations on both sides of her neck as well as her left wrist. An autopsy revealed that Ms. Pena died from the lacerations and stab wounds and that death may have taken from thirty minutes to an hour. After the murder, defendant gathered various items of Ms. Pena's from the apartment, including her checkbook and two credit cards. On 21 January 1994, defendant sold Ms. Pena's property and forged and cashed one of her personal checks to purchase more cocaine. Defendant remained in the apartment most of the next day making phone calls, only leaving to purchase beer and pizza.

On 23 January 1994, defendant saw the second victim, Dyann Lee, walking across the apartment-complex parking lot. Defendant approached Ms. Lee and told her Ms. Pena wanted to talk with her. Ms. Lee followed defendant into Ms. Pena's apartment. After she entered the apartment, Ms. Lee walked down the hall into Ms. Pena's bedroom. Defendant came up behind her and grabbed her in a "choke hold." Defendant released Ms. Lee, forced her to perform oral sex and then choked her again until she became unconscious. After Ms. Lee lost consciousness, defendant sodomized her. An autopsy revealed that Ms. Lee died from asphyxiation. After killing Ms. Lee, defendant stole and then sold both a gold chain Ms. Lee had been wearing and a leather coat of Ms. Pena's to purchase more cocaine.

During the late night hours of 23 January 1994 or the early morning hours of 24 January 1994, defendant made a confessional phone call to a Ms. Barbara Frame, who urged him to turn himself in. Defendant attempted to flag down a passing police car, but his attempt failed. He then called the police. On 24 January 1994, between the hours of 3:00 and 3:30 a.m., James Spears of the Wake County 911 center took a call from defendant, who requested that a police officer pick him up so that defendant could turn himself in for a double murder. When police arrived, defendant walked to the police car and confessed to both murders. On the way to the police station, defendant made voluntary statements concerning his regret for

killing Ms. Pena and Ms. Lee. Defendant also stated the murders were a result of his temper. When officers arrived at the murder scene, they found the two bodies in the back bedroom, as defendant had described. After sifting through garbage in the dumpster, police found a bag that contained personal items and a steak knife from Ms. Pena's apartment.

During questioning, defendant told police:

> I was sitting there and she [Ms. Pena] got up to go down the hall and I walked down the hall and I just grabbed her. Started choking her, drug her on into the bedroom and I choked her and choked her and she still seemed like she didn't want to just go out. I don't know if I cut her wrists first or cut her throat. I don't remember the order and the sequence of how, but I know I did it, okay.

Later, when questioned about Ms. Lee and his encounter with her on Sunday afternoon, 23 January 1994, defendant stated:

> I saw her walking across over there and looked at her. And I remember what the guy was saying about she being, you know, kind of like, you know, loose and everything, you know. And, uh, something just said get her.

Linwood Harper, a downstairs neighbor, testified that he saw defendant following Ms. Lee up the stairs to Ms. Pena's apartment on 23 January 1994. Harper saw defendant again a few hours later when defendant knocked on his door asking for either a ride or a small loan. Another neighbor of Ms. Pena's, Paqita Taylor, testified that defendant came to her apartment on 23 January 1994, inquiring about how to turn on the stove in Ms. Pena's apartment. Defendant told Ms. Taylor that Ms. Pena was sleeping and that he did not want to wake her.

At trial, defendant presented evidence tending to show that he suffers from "idiosyncratic alcohol intoxication," a condition which causes him to react to even small amounts of alcohol with a total loss of impulse control. Defendant presented evidence at both the guilt and sentencing phases tending to show that he had an extremely abusive and unstable childhood. Testimony also indicated that defendant's family has an extensive history of psychiatric problems. Two experts in clinical forensic psychology and clinical forensic psychiatry testified that defendant has a mixed personality disorder with

antisocial, narcissistic and emotionally unstable features, as well as alcohol and cocaine dependence.

[1] In his first assignment of error, pertaining to his motion for appropriate relief, defendant alleges ineffective assistance of counsel. Defendant, through counsel, submitted a written notice of intent to plead not guilty by reason of insanity pursuant to N.C.G.S. § 15A-959. However, on the first day of the trial, 10 July 1995, defendant withdrew his notice and plea of not guilty by reason of insanity, and instead simply pled not guilty to the murder charges. At this time, defendant also announced his intention to plead guilty to the two counts of sexual offense against Dyann Lee. This change in the theory of defense was memorialized in a *Harbison* statement, which was signed by defendant before two witnesses. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). This document was captioned "Defendant's Consent to Theory of Defense and Admission of All Acts Alleged in Indictments" and stated:

> COMES NOW the undersigned defendant in the above-captioned case who alleges and says that he has authorized and instructed his defense attorneys Randolph Riley and Dan Boyce to admit that he committed the physical acts alleged in the bills of indictment therein and to base his defense solely on the absence of mental elements of the crime including premeditation and deliberation and of the specific intent to kill and on his insanity at the time of the commission of the homicides and to seek thereby to reduce the degree of the offenses from murder in the first degree to second-degree murder or manslaughter or to have him acquitted on the basis of insanity.

Defense counsel explained to the trial court that this document was prepared prior to the withdrawal of the insanity notice and that they did not intend to go forward with the insanity defense. The trial court then closely examined defendant directly regarding his understanding of this statement of the defense theory and his voluntary agreement with it. The trial court specifically focused on the withdrawal of the insanity defense, the admission to the physical acts alleged in the indictments and the lack of mental elements of the crimes as the sole basis of defense. The trial court and defendant engaged in the following colloquy:

> THE COURT: . . . [This statement] says that you have authorized and you have instructed your lawyers to admit that you

committed the physical acts alleged in the bills of indictment, that is to first degree murder of, or of Dyann Lee, Ramona Pena and second degree sexual offenses of Dyann Lee, the two charges there, is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: And that you intend to base your defense solely on the absence of the mental elements of the crime including premeditation and deliberation and the specific intent to kill, is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: And that you are not at this time raising insanity as a defense, is that correct?

[DEFENDANT]: Yes, sir, that's correct.

THE COURT: Now, and you've made this decision based upon talking with your lawyers, is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: And you understand this decision and you are satisfied with it?

[DEFENDANT]: Yes, sir, I am and I do.

THE COURT: And you understand you don't have to do that?

[DEFENDANT]: Yes, sir.

THE COURT: And that any choice that you make about doing that is your choice, and it is the choice only to be made after consulting with your lawyers?

[DEFENDANT]: Yes, sir.

THE COURT: And so this is your choice to do it and nobody is forcing you to do it in anyway?

[DEFENDANT]: No, sir, nobody is forcing me.

THE COURT: And this is what you want to do personally?

[DEFENDANT]: Yes, sir.

Defendant now contends, through his present counsel, that notwithstanding his execution of the *Harbison* statement and the foregoing exchange with the trial court, and specifically his state-

ments of understanding regarding a defense of absence of premeditation and deliberation and intent to kill, he did not realize that a defense of diminished capacity would not affect his being found guilty of first-degree felony murder, and thus he received ineffective assistance of counsel. Defendant argues that it was not fully explained to him or that he did not understand that once he abandoned his insanity defense, under the felony murder rule it was improbable that a jury would acquit him of first-degree murder after he admitted his guilt to the concurrent sexual offenses, since such admission would technically make him guilty of first-degree felony murder. Defendant asserts that, during trial, he believed that despite his plea and admission of all acts alleged in the indictments, he could still be acquitted of first-degree murder. He contends now, through his present counsel, that he did not then understand that the defenses of diminished capacity and involuntary intoxication cannot apply to the felony murder charges because intent in sexual offenses is inferred. *See State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

After reviewing defendant's motion for appropriate relief raising this issue, this Court determined that the record on appeal contained insufficient evidence to enable this Court to determine the issue. Therefore, on 6 November 1997, this Court entered an order remanding defendant's motion to Superior Court, Wake County, for an evidentiary hearing. The order stated that the evidentiary hearing would specifically address the following matters:

> (1) the withdrawal of defendant's plea of not guilty to the murder charges by reason of insanity, (2) the submission of a stipulation by defendant admitting commission of the physical acts alleged in the bills of indictment and basing defense on absence of mental elements of the crime, (3) the tender of guilty pleas to the sex offenses, (4) the circumstances surrounding these submissions to the trial court, and (5) the defendant's understanding and voluntary tender thereof.

State v. Morganherring, 347 N.C. 393, 494 S.E.2d 399 (1997). Additionally, this Court's order directed the trial court to make findings of fact and conclusions of law as to defendant's allegations in his motion for appropriate relief. Following this hearing, the trial court, on 12 June 1998, entered its order, with extensive findings of fact and conclusions of law that defendant had not received ineffective assistance of counsel, again denying defendant's motion for appropriate relief. This order, together with a transcript of the hearing and the

exhibits and documents introduced into evidence, was filed in this Court on 29 January 1999 and is considered an addendum to the record on appeal in this case.

It is now incumbent upon this Court upon review to inquire whether the trial court's "findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). When there is "an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion." *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984). Findings of fact "made by the trial court pursuant to hearings on motions for appropriate relief" are binding on appeal if they are supported by competent evidence. *Stevens*, 305 N.C. at 720, 291 S.E.2d at 591.

In its numerous findings of fact, the trial court determined that defense counsel felt that in order to maintain any credibility with the jury with regard to the murder charges, counsel had to minimize the evidence regarding the sexual offenses and turn the jury's attention away from those crimes, as they were "the most repellent aspect of his second murder." The trial court found "that Mr. Riley and Mr. Boyce reasonably concluded that they had to focus the jury's attention instead on evidence tending to show that the murders were not committed with cold-blooded premeditation and deliberation." These findings by the trial court are fully supported by the testimony of defense counsel. Mr. Riley testified that he decided to base the defense on the defendant's traumatic childhood, his history of substance abuse and his abuse of cocaine and alcohol at the time of the murders. Mr. Riley testified:

> My co-counsel and I hoped thereby to focus the jury's attention on what we saw as the causes of [defendant's] rage, as well as on his impulsiveness, and lack of premeditation and deliberation. With this strategy in mind, we prepared, for the trial judge and for the record, a memorialization of "Defendant's Consent to Theory of Defense and Admission of All Acts Alleged in Indictments." . . . The defendant agreed with and accepted this strategy.

With respect to the rationale behind the decision not to proceed with the insanity defense, Mr. Riley testified that sometime between

6 July and 10 July 1995, he and his co-counsel determined, after consultation with the involved psychiatric experts, that they would not be able to credibly employ an insanity defense. Defendant was examined by three psychiatric experts: Dr. Bob Rollins, Dr. Roy Mathew, and Dr. Brad Fisher. Based upon the results of these examinations, Mr. Riley stated that defense counsel abandoned "the insanity [defense] because . . . we didn't have enough credible evidence to support it in a way that would not be embarrassing in front of the jury."

With regard to the pleas entered on the sexual offenses, Mr. Riley testified that he did explain this strategy to defendant. During recross-examination in response to "whether there would be from the evidence any substantial defense that the defendant could assert as to those sex offenses," Mr. Riley stated: "I don't know how to answer that except to say that it was my conclusion that a conviction was inevitable to a high degree of certainty." Further, in support of the trial strategy, Mr. Riley testified:

> [T]o have interposed pleas of not guilty and persisted in putting the State to its proof on those charges would, in my opinion, have appeared to be inconsistent in the minds of the jurors with the approach that we wanted them to, to understand the defendant was making to these charges of admitting everything that was overwhelmingly provable and only basing his defense on those things which, as to which there might be some question, some reasonable way of disputing the contentions of the State.

With respect to defense counsel's discussions with defendant about the felony murder rule and defendant's understanding of the legal technicalities thereof, the evidence resulting from the hearing on remand and the *Harbison* theory of defense document itself reflect a sparsity of detail. Felony murder as such is not specifically mentioned in this document. As for the lack of any direct reference to felony murder in the theory of defense document, Mr. Riley testified:

> [Y]ou need to understand that there essentially wasn't any defense to felony murder. So there was less, less occasion to discuss it.
>
> Once it was defined and explained to him, I mean, it didn't go away and the evidence didn't change, so there was more of a need

to explain to him what we intended to do with respect to the evidence that we had on his state of mind.

. . . .

Q. And why when you wrote the theory of defense did you not simply put in an effort to avoid the death penalty the defendant authorized his attorney if that is what he was doing?

A. Draftsmanship less than comprehensive is all I can say.

In this regard, co-counsel, Mr. Boyce, testified that there were "numerous conversations" with defendant. Mr. Boyce testified:

The whole focus of defense was always on mental capacity. He made some pretty significant statements to the police about his involvement in the crimes and we knew we could not really overcome them. So we were desperate to save [defendant's] life.

At times [defendant] wanted to live. At times he indicated to us that he would prefer to go ahead and die.

Ultimately, he allowed us to present a defense which could have preserved his life.

We at all times thought the jury would find [him] guilty of the sex crimes. We also thought they would find him guilty of some degree of murder.

My recollection is we went to the Death Penalty Resource Center, had discussions about how to handle the murder aspects of the case and we then went to [defendant] and expressed to him what we had learned by those meetings as well as our own assessment.

I have a vague recollection of having discussions about the different types of murder involved but I cannot recall a specific date and a specific conversation when we discussed felony murder specifically.

In light of this evidence presented at the remand hearing, which was conducted by the same judge who presided at trial, the court made substantial findings of fact and conclusions of law, including the following:

49. That the uncontroverted evidence is that the Defendant called the police to turn himself in after committing the crimes and gave a statement to the police confessing to the crimes.

Additionally, the Defendant spontaneously stated to the District Court judge at the probable cause hearing of this matter that he, the Defendant, was guilty of the murders and was ready to accept a death sentence.

. . . .

83. That in view of the admissible evidence against the Defendant, including his detailed confession to the police and the physical evidence which corresponded to his description of the crimes and the lack of any mental health evidence that the Defendant was insane at the time of the crimes, the attorneys for the Defendant concluded that competent prosecution of the case by the State would easily persuade the jury of the Defendant's guilt beyond a reasonable doubt of the physical acts alleged in the indictments.

84. That Mr. Riley and Mr. Boyce, based on their knowledge and experience as trial attorneys, believed it invariably to be the case that a Defendant who puts forward a non-credible defense in the guilt phase of a trial receives a very unsympathetic hearing from the jury in the punishment phase.

. . . .

88. That the attorneys with whom Mr. Riley and Mr. Boyce talked at the North Carolina Resource Center concurred with this evaluation and the strategy. . . .

. . . .

100. That the "Defendant's Consent to Theory of Defense and Admission of All Acts Alleged in Indictments" document does not incorporate in detail all of the conversations Mr. Riley and Mr. Boyce had with the Defendant nor does it incorporate in detail the Defendant's concurrence with the strategy proposed by Mr. Riley and Mr. Boyce. However, throughout the trial and sentencing hearing of this matter the Defendant authorized Mr. Riley and Mr. Boyce at every stage of the case to file such motions, take such actions, make such arguments and all other such things as Mr. Riley and Mr. Boyce did.

101. That the Defendant appeared to understand what Mr. Riley and Mr. Boyce were proposing to do, the rationale for it, and the consequences both direct and indirect at each step and concurred in each and every decision and recommendation of his

attorneys except as to their recommendation that he, the Defendant, should not testify on his own behalf at the sentencing hearing.

102. That the "Defendant's Consent to Theory of Defense and Admission of All Acts Alleged in Indictments" document in Mr. Riley's opinion could have been expanded so as to better describe the defenses and ramifications the Defendant's lawyers had described to the Defendant.

. . . .

113. That the Defendant understood that in all likelihood he was going to be found guilty of first degree murder and that by this strategy, withdrawing his plea of Not Guilty by Reason of Insanity and pleading guilty to the two sexual offenses, the Defendant was putting himself in the best position possible given the facts, evidence and the law, to avoid being sentenced to death. This was true even though the Defendant had on numerous occasions stated that he wanted to be put to death and it was his attorneys who had persuaded him to let them fight to save his life.

The full record on appeal, including the trial and the hearing on remand, shows: an educated, articulate, strong-willed defendant; reflects the close and frequent communication between defendant and his counsel over a period of many months; and reflects that the trial court observed defendant on numerous occasions prior to trial at pretrial hearings and throughout jury selection, the trial and sentencing phase. The evidence presented at the hearing on remand reflects that, notwithstanding what he now asserts, the defendant understood full well the theory of defense proposed by his attorneys and its probable effect. In one of his letters to his defense counsel, defendant wrote: "Gentlemen, I am growing weary and faltering under the continual anxiety of anticipating the inevitable. It is an undeniable fact that either I am going to get the death penalty or life imprisonment."

In light of the foregoing, we conclude that the trial court's findings of fact are abundantly supported by the evidence and that the findings of fact support the conclusions of law that the defendant understood the theory of defense and the consequences of his plea at the time he pled and that defendant freely, voluntarily and understandingly entered the plea. Specifically, we conclude that, notwithstanding defendant's present legal posture as presented through his post-conviction counsel, the evidence as a whole entirely supports

the trial court's conclusion that defendant "was fully aware of the direct consequences of his plea, including the fact that in all likelihood he would be convicted of first-degree murder under the Felony Murder Rule, at least," and that defendant "had competent counsel and a full opportunity to assess the advantages and disadvantages of pleading guilty to the two counts of second-degree sexual offense."

North Carolina's test for ineffective assistance of counsel is identical to the test under our federal Constitution. *State v. Thomas*, 329 N.C. 423, 438, 407 S.E.2d 141, 151 (1991). In *Thomas*, this Court stated:

> A defendant is entitled to relief if he can show both (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that his counsel's deficient representation was so serious as to deprive him of a fair trial.

Id. at 439, 407 S.E.2d at 151.

In the case *sub judice*, defendant has failed to demonstrate ineffectiveness of counsel under either standard. Clearly, defendant has failed to show that under the circumstances here presented, including the overwhelming evidence of defendant's guilt on all counts, that he was prejudiced to any extent by any deficient performance of counsel. In this regard, this Court has further stated:

> "The question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." [*State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987).] When a court undertakes to engage in such an analysis, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [*Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694 (1984).]

State v. Mason, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994).

In view of defendant's detailed, tape-recorded confession and the other evidence in the case, we conclude that defendant had no realistic defense to the sexual offense charges and hence no defense to

first-degree murder predicated on the felony murder rule. We further note that defendant was subject to application of the felony murder rule by virtue of his robbery of Ms. Pena and that he was also convicted of first-degree murder of both victims on the basis of premeditation and deliberation. This assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the trial court erred in denying his pretrial motion for an instruction on parole eligibility to prospective jurors. Defendant also contends that the trial court committed plain error in failing to admonish a juror as to her concerns and conceptions regarding parole eligibility. We disagree.

Defendant filed a pretrial motion requesting permission to question jurors on their understanding of "life imprisonment without parole." The trial court heard this motion on 3 April 1995. During this hearing, the trial court noted that effective 1 October 1994, the General Assembly amended N.C.G.S. § 15A-2002 to provide that in a capitally tried case, where a sentence of life imprisonment without parole is imposed, the trial judge "shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (1997). The trial court then asked counsel if the offense predated the change of law. Defense counsel told the judge that the law took effect after the crimes in the instant case occurred and then conceded that the new law did not apply in the instant case. Therefore, the trial court correctly denied defendant's pretrial motion to question the jurors about their understanding of life imprisonment.

[3] Defendant also contends that he was prejudiced by the seating of Ms. Pansy Brannan as a juror. During *voir dire*, Ms. Brannan stated:

> I have had a personal experience. I don't know if it would judge my thinking or not but my uncle was shot when he was 23. The guy was sentenced to life and got out on parole and killed someone else and back in court and killed a jailor. So I wanted to share that. [Crying]

The State then asked Ms. Brannan whether that experience would affect her decision in this case, and Ms. Brannan replied, "I think I can set [that experience] aside."

When defendant's counsel questioned Ms. Brannan as to whether she would be inclined to vote for death if she feared the consequences of parole, the following colloquy occurred:

Q. I mean, what I am wondering—let me be blunt about it. I am just wondering if you would be inclined when it came down to the nub and you saw we have got to recommend life imprisonment or we have got to recommend death but I know that if we recommend life imprisonment maybe this man will escape or maybe sometime there could be a parole or maybe he could be in contact with somebody in prison and hurt somebody else, would that—and your personal experiences cause you to unfairly weigh the issues here?

A. I think if it wasn't for that experience I would have to say no, I could not impose the death penalty because I do not feel like that was right but because of the experience I feel like there could be circumstances where death would be necessary but not always.

Q. But where you are sitting right now you are not inclined toward the death penalty. You don't have—

A. No.

Q. —and certainly there's nothing automatic about it?

A. No.

Q. You think your mind is going to be open and your heart pure, so to speak, about and not having any prejudice against the defendant or sympathy that would sway your decision?

A. Again, I think I would have to go by the judge's guidelines on how that decision would be made. I think I could follow whatever the guideline is.

Defendant neither challenged Ms. Brannan for cause nor exercised one of his two remaining peremptory challenges to remove her from the jury. Additionally, at the conclusion of defendant's examination of Ms. Brannan, counsel for the defendant stated, "[t]he defendant is content." However, defendant now contends that his sentencing hearing was fatally compromised because after Ms. Brannan was selected as a juror, the trial court did not instruct her to not consider the issue of parole in deliberations.

Defendant failed to request any instruction or admonition regarding parole following Ms. Brannan's selection as a juror. Defendant concedes this point. Therefore, we must limit our review to whether

the trial court's failure to admonish Ms. Brannan constitutes plain error. *State v. Campbell*, 340 N.C. 612, 641, 460 S.E.2d 144, 160 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996). "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)).

There is no evidence in the record which in any way suggests or infers that Ms. Brannan or any juror erroneously considered the issue of parole eligibility during jury deliberations in the sentencing phase. Ms. Brannan clearly stated that she had no prejudice on this issue, that she could consider both sentencing options and that she would follow the guidelines set out by the trial court. Therefore, we cannot conclude that had the trial court instructed Ms. Brannan not to consider the possibility of parole, defendant would have received a life sentence rather than a sentence of death. This assignment of error is overruled.

[4] In his next assignment of error, defendant argues that he is entitled to a new trial because the trial court failed to suppress his 24 January 1994 confession to the police. Defendant asserts that in order for his confession to be voluntary, he must have been sober or unimpaired when the confession was made. Specifically, he contends that as a result of his cocaine binge prior to his arrest, he did not knowingly waive his Fifth and Sixth Amendment rights.

In this regard, we note that the United States Supreme Court has declined to create a constitutional right for defendants to confess to their crimes "only when totally rational and properly motivated," in the absence of any official coercion by the State. *Colorado v. Connelly*, 479 U.S. 157, 166, 93 L. Ed. 2d 473, 484 (1986). Additionally, the Supreme Court determined that it was more appropriate for state laws governing the admission of evidence to resolve this issue. *Id.* at 167, 93 L. Ed. 2d at 484. Citing *Connelly*, the Supreme Court of North Carolina ruled that "police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily," and without police coercion, the question of voluntariness does not arise within the meaning of the Due Process Clause of the Fourteenth Amendment. *State v. McKoy*, 323 N.C. 1, 21-22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

There is no evidence in the record to indicate that defendant's confession was not voluntary. Furthermore, defendant fails to identify any evidence that demonstrates or indicates he was intoxicated or otherwise impaired at the time he made the statements. This assignment of error is overruled.

[5] In his next assignment of error, defendant contends that the trial court erred by ordering that if defendant's mental health experts failed to provide the State with a report at the time the expert was called as a witness, the State could conduct a *voir dire* of that expert prior to his testimony to the jury. We disagree.

The State requested the trial court to order defendant's mental health expert to produce a written report of his findings prior to that expert's testifying at trial. Defendant replied that his expert had not prepared a written report but that the expert had sent a one-page letter summarizing his position. On 28 June 1995, the trial court notified defendant that if a written report was not produced, then the State would be able to conduct a *voir dire* of defendant's expert before the presentation of any evidence to the jury by that witness.

Defendant acknowledges that this Court has held that N.C.G.S. § 15A-905 authorizes the trial court to order a defendant to produce a written report of the examination results relied upon or to be used by defendant's expert witness. *See State v. East*, 345 N.C. 535, 545, 481 S.E.2d 652, 659, *cert. denied*, — U.S. —, 139 L. Ed. 2d 236 (1997). However, defendant now requests this Court to reconsider its holding in *State v. East* in light of *Wardius v. Oregon*, 412 U.S. 470, 37 L. Ed. 2d 82 (1973). In *Wardius*, the United States Supreme Court held that reciprocal discovery is required by fundamental fairness. *Id.* at 475-76, 37 L. Ed. 2d at 88. Therefore, defendant contends that since he is required to produce a document that does not exist, then the State must be held to the same standard.

This argument is without merit. The trial court did not order the production of a document that did not exist. Rather, the trial court ordered that if a written report was not produced, then the State would be able to conduct a *voir dire*. Moreover, this Court has construed N.C.G.S. § 15A-905 as providing for reciprocity when the defendant has obtained discovery under N.C.G.S. § 15A-903. *State v. East*, 345 N.C. at 545, 481 S.E.2d at 659. This assignment of error is overruled.

[6] Defendant next assigns error to the trial court's denial of defendant's request to have counsel present at a court-ordered examination

by a psychiatrist. Defendant requested that he be allowed to have counsel present during the examination in order to protect his Fifth and Sixth Amendment privileges. Defendant asserts that counsel's presence would be necessary because of his prior repeated spontaneous cries for help, which included inculpatory and prejudicial statements and which were a result of his mental illness.

Defendant's contentions under this assignment of error are moot because no such examination occurred. Two psychiatrists and one psychologist examined defendant, but defendant insisted that these examinations take place. The State raised the possibility of defendant's examination by a State-selected psychiatrist when defendant indicated that he would rely on an insanity defense. However, defendant subsequently abandoned the insanity defense, and no court-ordered psychiatric examination ever occurred. This assignment of error is without merit and is overruled.

[7] In his next assignment of error, defendant argues that the trial court erred in allowing the State's challenge for cause of prospective juror Linda Davenport, who indicated that she might have difficulty voting in favor of a death sentence. We disagree.

In order to determine whether a prospective juror may be excused for cause because of 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). During *voir dire*, Ms. Davenport indicated that she would be unable to recommend the death penalty for defendant because of emotional and other reasons:

> Q. As you look across the room at [defendant], that's the man that this jury may be asked to sentence to death. Can you personally do that? It is not an academic question.
>
> A. No, ma'am.
>
> Q. And that's fine. And is that based on—you indicated that you had thought quite a lot about the death penalty.
>
> A. Yes. I am ambivalent. Sometimes I think it is the thing but I can't come down one way or the other and say that I absolutely agree with it.

Q. But you, in answer to the question of if those things are found to be true, that you personally could not sentence the man who is sitting over there to die?

A. No.

Q. Is that based on religious feelings or philosophical or just values that you have developed over the years?

A. Probably a little of all of those.

. . . .

A. Well, to be fair to the Court, I won't take up any more of your time, I will say that I could not [sentence defendant to death].

Q. And do you feel comfortable that's your position?

A. Yes.

[PROSECUTOR]: Thank you. Your Honor, based on that I would challenge for cause.

Following the prosecutor's challenge for cause, defendant was permitted to question Ms. Davenport:

Q. Don't you believe that having been given an opportunity to hear all the evidence and weighed that evidence yourself and with the other jurors and having been told by the Court what all the law is to be applied to that evidence in arriving at a choice as to the appropriate penalty, don't you believe you could do that as a good citizen?

A. I believe, I am a fair and unbiased person but when you asked me the question about what I thought about the death penalty, I feel I need to be honest and let you know about that ambivalence but I do believe I could be fair and unbiased.

In view of these answers, the trial court inquired further of Ms. Davenport as follows:

THE COURT: Mrs. Davenport, I just want to get it straight in my mind. What I understand you saying is that—

A. Uh-huh.

THE COURT: —intellectually you can go through the process.

A. Uh-huh.

THE COURT: And that you agree with the process and you are having doubts about whether you can participate in the process, is that correct?

A. Yes.

THE COURT: Now, you are the only judge that we've got as far as determining whether you can participate in the process or not. It would not be fair to the State of North Carolina, it would not be fair to the defendant for you not to be able to participate fully in the process—

A. Right.

THE COURT: —and be a fair and impartial juror for both the State of North Carolina and to [defendant].

A. That's right.

THE COURT: And so what I want to know is as best you can right now to tell me yes or no whether or not you feel that you can participate in this particular trial as a juror and give fair consideration to everything that is presented as you sit right now.

A. I would say no to be fair to everyone to start out.

THE COURT: Well, this Court is going to find that the juror's answers on voir dire concerning her attitude toward the death penalty shows considered contextually that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath and, therefore, the challenge by the State is hereby allowed.

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, Ms. Davenport stated that she felt her personal beliefs may affect her consideration of the death penalty for defendant. Ms. Davenport's responses were at best equivocal, and the trial court gave ample opportunity to both sides to explore and elicit her 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), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 522 (1999). In light of the questioning and responses here, we cannot conclude that the trial court abused its discretion by excusing prospective juror Davenport. This assignment of error is overruled.

[8] In his next assignment of error, defendant contends that the trial court erred in overruling defendant's objection to the introduction into evidence and publication to the jury of photographs of the victims before and after their deaths. Defendant argues that the photographs inflamed the jurors' passions, and thus were unfairly prejudicial.

In determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant. *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999); N.C.G.S. § 8C-1, Rule 403 (1992). The trial court's ruling on this issue should not be overruled on appeal unless the ruling was " 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *Goode*, 350 N.C. at 258, 512 S.E.2d at 421 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)) (alteration in original).

This Court has held that photographs of a murder victim may be introduced into evidence to illustrate the testimony of a witness. *State v. Call*, 349 N.C. 382, 414, 508 S.E.2d 496, 516 (1998); *State v. Holden*, 321 N.C. 125, 140, 362 S.E.2d 513, 524 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). This Court has also previously held that it is not error to admit the photograph of a victim when alive. *State v. Bishop*, 346 N.C. 365, 388, 488 S.E.2d 769, 781 (1997). In this case, it is apparent the trial court gave due consideration to the objection and arguments of counsel and made findings that the photographs were relevant, were not repetitive and were no more gruesome than would be the case in other murders of the same nature. Additionally, the trial court found that the probative value of the photographs outweighed the danger of any prejudice to defendant. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends that the trial court erred in overruling defendant's objections to the State's cross-examination of Dr. Roy Mathew, a Duke psychiatry professor and expert in addictive medicine. Defendant asserts that the prosecutor improperly injected her own knowledge as to the importance of treatises relied upon by the expert witness. Additionally, defendant asserts that during this cross-examination, the prosecutor was allowed, over defendant's objection, to improperly state that defendant had lied to Dr. Mathew and that the prosecutor improperly stated her opinion. Defendant therefore claims that his due process rights under the Fourteenth Amendment were violated.

On cross-examination, the State first questioned Dr. Mathew regarding his familiarity with the sources he used in forming his opinion:

> Q. Now, Dr. Mathew, you used some terms when you were testifying. As best I could I wrote them down. You made a reference one time to DSM?
>
> A. DSM, yes.
>
> Q. And DSM would be the Diagnostic and Statistical Manual of Mental Disorders. I think it is in the fourth edition now, is it not?
>
> A. Yes, it is.
>
> Q. How familiar are you with DSM?
>
> A. Reasonably familiar.
>
> . . . .
>
> A. When I was in private practice diagnosis was not as important as they are right now. The recent changes in health care financing diagnosis have become much more important than what they were years ago.
>
> So at that time, during the DSM-I and DSM-II they were not used as extensively as they are now.
>
> So I would have turned from DSM-II when I was in private practice. I believe that was in the 1970's.

This Court has frequently explored the proper scope of cross-examination of an expert witness, and this Court has consistently stated:

North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed. 1988) (footnotes omitted) (citations omitted).

State v. Bacon, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), *quoted in State v. Hipps*, 348 N.C. 377, 409, 501 S.E.2d 625, 644 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 114 (1999). The degree of Dr. Mathew's familiarity with the sources upon which he based his opinion is certainly relevant as to the weight and credibility the jury should give to Dr. Mathew's testimony. The State's questions in this regard were proper.

[10] Defendant next argues that the State improperly accused defendant of lying to Dr. Mathew, as the State challenged the validity of the expert's opinion:

Q. So to the extent that the defendant lied to you or intentionally misled—

[DEFENDANT]: Objection.

THE COURT: Overruled.

Q. To the extent that the defendant lied to you—

[DEFENDANT]: Objection. You are not objecting.

THE COURT: You may continue.

[DEFENDANT]: If you are not going to object, I am. That's the Supreme Court. I am going to object on my own. The Constitution will holdup [sic] that. I will take it all the way up.

THE COURT: Objection is noted for the record. You may continue.

Q. To the extent the defendant lied to you or intentionally misled you and you were not able to verify that and may not know that right now then there might be some information like

that that would make your opinion not as accurate as if you had accurate information?

A. Yes.

In forming an opinion in circumstances such as this, a mental health expert necessarily must weigh and assess information obtained from his interviews with a client such as defendant. Here, the State was attempting to impeach the credibility of Dr. Mathew's testimony by reminding the jury that defendant had a choice with respect to what he decided to tell the expert. Since a mental health expert such as Dr. Mathew would have to weigh, assess and analyze his conversations with a client such as defendant in forming his opinion and then either accept or reject in whole or in part the information received, it was proper for the State to examine the reliability or truth of defendant's statements and the degree of reliance placed upon them by the expert witness in forming his opinions.

[11] Finally, part of defendant's expert's testimony concerned the fact that defendant claimed not to remember anything about the crimes. Defendant contends that the prosecutor improperly stated her opinion that defendant's confession indicated that defendant had a good memory and a cognitive thought pattern:

Q. Well, Dr. Mathew, you were here yesterday when the defendant's statement was played and you heard his voice in this courtroom?

A. Yes.

Q. And that was played, and that tape was made at 6:35 a.m. on Monday morning, January the 24th, '94?

A. Yes.

Q. Right when he was in the middle or toward the end of the four day delirium intoxication, very unique individual, craziness or whatever it is, correct?

A. Correct.

. . . .

Q. . . . I was asking you about the defendant's voice itself on that tape player in this courtroom. Because I grant you that sometime transcribing something from a tape down on paper can be difficult. And on that tape that was played yesterday his memory

apparently was good enough that morning when he met with the doctor, with the police he said that he remembered going back in and looking at Ramona's body and saying to himself, what have you done. You've [f—ked] up now. This state has the [f—king] death penalty.

Now, that sounds like a pretty rational, cognitive, reality thought that I've killed somebody in a state, I've committed a crime, not an accident, in a state and recognizing that particular state, how ever he came to have that knowledge, has capital punishment.

[DEFENSE COUNSEL]: Objection.

Q. Isn't that true?

THE COURT: Overruled.

Again, under the broad standard that this Court allows for the cross-examination of an expert witness, we conclude that the prosecutor's questions were well within the bounds of a proper cross-examination. Defendant's expert had stated that defendant's mental state was so afflicted that he could not coherently remember what occurred during the murders. It was proper for the State to attack this conclusion in order to impeach the expert witness and his opinion. *See Hipps*, 348 N.C. at 409, 501 S.E.2d at 644. Accordingly, the trial court did not err in overruling defendant's objection to the State's question. This assignment of error is overruled.

[12] Defendant contends in his next assignment of error that the trial court erred in denying defendant's motion to admit his written transcript of plea in the sentencing hearing. At the conclusion of the guilt phase, the trial court did not admit into evidence, or publish to the jury, the defendant's written transcript of plea regarding the two counts of sexual offense with which defendant was charged. Defendant contends this ruling prevented the jury from considering defendant's guilty plea as to these offenses as a nonstatutory mitigating circumstance and thus violated the standard set out in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978).

In *Lockett*, the United States Supreme Court required that the jury not be precluded from considering any mitigating circumstance. *Id.* at 604, 57 L. Ed. 2d at 990. In the instant case, the record reveals that defendant requested the trial court to inform the jury as to defendant's change in plea. The trial court granted defendant's request and

instructed the jury that the defendant changed his plea to "guilty on the two charges of second-degree sexual offense and that the State is now proceeding on the two charges of first-degree murder." During the sentencing phase, the trial court submitted to the jury two statutory and twenty-seven nonstatutory mitigating circumstances as to both murders. One of these twenty-seven nonstatutory mitigating circumstances was that defendant "accepted responsibility for the sex offenses." Therefore, the trial court's denial of defendant's motion to admit the written plea did not preclude the jury from considering the defendant's guilty pleas to the sexual offenses as a mitigating circumstance. This assignment of error is overruled.

[13] In his next assignment of error, defendant contends that the trial court erred in submitting the charge of first-degree murder of Ms. Pena on the basis of premeditation and deliberation and under the felony murder rule. Specifically, defendant contends that there was insufficient evidence for the jury to find that defendant had the capacity to form a specific intent to kill. Defendant also contends here that the trial court erred in failing to notify the State that it could not proceed on the theory of felony murder for the killing of Ms. Pena since there was no causal or transactional relationship between defendant's fit of anger which led to Ms. Pena's murder and the subsequent appropriation of Ms. Pena's property. This contention is duplicative of defendant's twelfth assignment of error, and we will consider this argument at that point.

With regard to defendant's capacity to form a specific intent to kill, we note first that at the close of the State's evidence, defendant made a motion to dismiss all the charges on the grounds that there was insufficient evidence for the jury to find every element of the charged offenses. This motion was denied, and defendant proceeded to put on evidence in defense. Defendant's motion to dismiss was waived by his decision to put on evidence. N.C. R. App. P. 10(b)(3); *State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632, *appeal dismissed and disc. rev. denied*, 311 N.C. 765, 321 S.E.2d 148 (1984). However, defendant preserved this error for review by making a motion to dismiss at the close of all the evidence. *See* N.C.G.S. § 15A-1227 (1997).

The evidence of defendant's actions surrounding the two murders tended to show that he had the capacity to form the specific intent to kill. After first choking Ms. Pena, defendant repeatedly slashed and stabbed her. Immediately after Ms. Pena's murder, defendant had the ability to pick out various property items from Ms. Pena's apartment

in order to sell them to purchase cocaine. Thereafter, within a relatively short period, defendant saw Ms. Lee and decided to "get her." Defendant was capable of creating an excuse to trick Ms. Lee into Ms. Pena's apartment. After Ms. Lee entered the apartment, defendant began choking her; however, defendant did stop choking her long enough to force her to perform oral sex on him. Defendant then choked Ms. Lee again until he killed her. We, therefore, conclude that there was sufficient evidence for a jury to find that defendant had the capacity to form the specific intent to kill. Accordingly, the trial court did not err in submitting the charge of first-degree murder based on premeditation and deliberation. This assignment of error is overruled.

[14] Defendant next assigns error to the trial court's failure to instruct the jury on the defense of automatism. During the charge conference in the guilt phase of the trial, defendant requested the trial court to instruct the jury on the defense of voluntary intoxication and on the defense of automatism. The trial court granted defendant's request as to the instruction for voluntary intoxication but denied defendant's request as to automatism.

When a defendant requests an instruction for voluntary intoxication, he essentially concedes that he was in control of his physical actions but submits that his reason was so " 'overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.' " *State v. Boyd*, 343 N.C. 699, 713, 473 S.E.2d 327, 334 (1996) (quoting *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988)), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997). On the other hand, the rule for automatism is that " 'where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious.' " *State v. Fisher*, 336 N.C. 684, 705, 445 S.E.2d 866, 877 (1994) (quoting *State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983)), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995). The defenses of voluntary intoxication and automatism are fundamentally inconsistent, and this Court has stated that "unconsciousness as a result of voluntary ingestion of alcohol or drugs will not warrant the instruction [for automatism] requested here by defendant." *Fisher*, 336 N.C. at 705, 445 S.E.2d at 877.

Even though defendant claims not to remember all of his actions during the murders, there is no evidence in the record which indicates that defendant was either unconscious or not conscious of his

actions. For example, immediately after killing Ms. Pena, defendant gathered up several items of Ms. Pena's property with the intent to sell them. Defendant was also able to describe in detail his activities on the days between the murders and the immediate events surrounding Ms. Lee's murder. Furthermore, defendant presented a substantial amount of evidence concerning the amount of alcohol and cocaine he voluntarily ingested. Defendant's own evidence tended to show that he had consumed two forty-ounce containers of beer and smoked about eighty to ninety dollars' worth of crack cocaine in the period surrounding the two murders. This evidence clearly supports an instruction on voluntary intoxication, and the trial court correctly instructed the jury as to this defense. Additionally, because defendant failed to present evidence which would support an instruction on automatism, the trial court did not err in refusing to instruct the jury as to that defense. This assignment of error is overruled.

[15] In his next assignment of error, defendant contends that the trial court erred by instructing the jury that defendant could be found guilty of felony murder if, among other elements, defendant's intent to rob was formed after the murder. Defendant recognizes that the trial court's instruction is consistent with this Court's ruling in *State v. Handy*, 331 N.C. 515, 419 S.E.2d 545 (1992), where this Court held:

> Where there is a continuous transaction, the temporal order of the killing and the taking is immaterial. Provided that the theft and the killing are aspects of a single transaction, it is immaterial whether the intent to commit the theft was formed before or after the killing.

Id. at 528, 419 S.E.2d at 552-53. Defendant requests this Court to reconsider the *Handy* rule in light of the specific facts of this case.

Here, the evidence does not tend to establish that robbery was defendant's primary motivation for the killing. Defendant's motive appears to have been frustration, embarrassment or rage. The evidence in this case shows that defendant was frustrated with having quickly squandered $108.00 in wages on cocaine and a prostitute. Defendant's account of Ms. Pena's murder and his actions following the murder indicate that the murder and robbery were all part of the same continuous transaction. In his confession to the police on 24 January 1994, defendant described the events leading up to Ms. Pena's murder as he answered the officer's questions:

A. I said, well, I got to go in and face this woman and I went in. I just said, "Ah, sh—." And I didn't, like, think of doing anything like that or plan it. And I had one more small [amount of crack cocaine], you know, like a piece of it. I went in the bathroom and did it and came back out and I was sitting there and she got up to go down the hall and I walked down the hall and I just grabbed her. Started choking her, drug her on into the bedroom and I choked her and choked her and she still seemed like she didn't want to just go out. I don't know if I cut her wrists first or cut her throat. I don't remember the order and the sequence of how, but I know I did it, okay.

Q. Okay.

A. I mean, you know, and it was weird. Like, I could see with my, you know, eyes that I'm doing it, but something inside of me saying, what are you doing, hold on, wait a minute. It was like, you know, and then it was like I couldn't stop, so, you know, I don't know. I don't really fully understand it all, but . . . So, and then I went all through the apartment, stacked up all the stuff. She had one of those real modern TV's with the VCR. You see a lot of stuff is missing, over there in the racks, a bunch of video tapes, you know, top name movies, CD's the CD player, the stereo system, and uh, I don't know, just a checkbook. Found the two credit cards. Found about seventeen, eighteen dollars in cash. So, and bagged the stuff up. And what did I do? I think I asked the guy downstairs for a ride. I says, "I got to go over to my sister's on Poole Road. Run me over on to Poole Road." And, uh, he said, "Well, I ain't got no gas or nothin'." And I said, "Well, I ain't got no money for gas." Cause now I'm in this advantage, getting this cocaine, so I ain't giving up no money even though I got all this stuff here. . . .

Well, anyway, I think he rode me over. No, he went over next door somewhere, one of his buddies and borrowed like two or three bucks to put some gas in it. And while he was over at the next room, directly across from us, as you come out the door at 3901 directly over, I don't know what number that one is, I kind of loaded the stuff up in the back bed of his pickup, so that he wouldn't, you know . . . But I had these travel bags and luggage bags. Didn't take the television that night, because I figured that would be too obvious, have him drop me right there at Woodpecker, not at my sister's. I went over this lady's house and

told her, you know, "Look I'm moving, and, you know, and leaving and I want to sell all this stuff, you know." She says, "Wow! You know, da da da . . ." So somebody came by to see her and she got him to ride me around and sold it.

This Court has reaffirmed the rule set out in N.C.G.S. § 14-17:

"[A] killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction."

State v. Braxton, 344 N.C. 702, 713, 477 S.E.2d 172, 178 (1996) (quoting *Handy*, 331 N.C. at 529, 419 S.E.2d at 552).

A reasonable juror could infer from this evidence that defendant's murder and subsequent robbery of Ms. Pena were all part of one continuous transaction. The trial court's instructions to the jury on this issue were supported by the evidence. This assignment of error is overruled.

[16] In his final assignment of error, defendant contends that the trial court erred in permitting the State to cross-examine defendant's mental health expert during the trial's sentencing phase. During the sentencing phase of trial, defendant called Dr. Brad Fisher, an expert in the field of clinical forensic psychology. Dr. Fisher's testimony focused on defendant's inability to control his emotional impulses in and out of prison. During the State's cross-examination of Dr. Fisher, the trial court permitted the State to read defendant's prison write-ups concerning the details of his disciplinary reports, medical requests and special religious requests. Defendant argues that the record does not indicate that the State was trying to discredit defendant's expert witness. Defendant contends that as a result of this cross-examination, the jury believed that if defendant did not get the death penalty, he would continue to ask for special prison favors, harass prison guards and inmates, and file complaints against the prison.

However, defendant made only one objection during the State's cross-examination of Dr. Fisher. Defendant concedes that his other complaints concerning the State's cross-examination under this assignment of error should be reviewed by this Court under the plain error rule. This Court has previously defined the plain error standard of review:

> Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996).

Assuming *arguendo* that the State's cross-examination of Dr. Fisher elicited inadmissible evidence, we hold that such evidence did not rise to the level of plain error. At sentencing, defendant's counsel focused on the argument that defendant was less culpable for the murders than would otherwise be the case because defendant's rage was the product of the cocaine and alcohol. During direct examination, Dr. Fisher confirmed that the source of defendant's temper and aggression was the combination of cocaine and alcohol he consumed. Dr. Fisher also stated that he agreed with "Dr. Mathew's observation that the defendant is addicted to alcohol" and that defendant is "addicted to cocaine."

Since defendant elicited this evidence during direct examination, it was permissible for the State to ask questions regarding defendant's behavior and temperament in a setting when defendant was not consuming drugs. Defendant can show no prejudice here.

[17] Defendant did make one objection during the cross-examination of Dr. Fisher when the State asked a question regarding defendant's prison disciplinary reports. In *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 132 (1998), this Court stated:

> "The Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any evidence the court 'deems relevant to sentence' may be introduced at this stage." *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, [516] U.S. [1079], 133 L. Ed. 2d 739 (1996); *accord* N.C.G.S. § 15A-2000(a)(3) (1988) (amended 1994). During a capital sentencing proceeding, the State must be permitted to present any competent evidence supporting the imposition of the death penalty. *Daughtry*, 340 N.C. at 517, 459 S.E.2d at 762.

Holden, 346 N.C. at 418-19, 488 S.E.2d at 521. A question as to whether defendant needed to be disciplined while in prison is relevant to the issue of defendant's temper. This evidence also refutes defendant's argument that he is aggressive only when consuming

alcohol and cocaine. Since this evidence tends to rebut defendant's main theory of defense, it is also relevant to the State's argument during sentencing. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises eight additional issues which he concedes have been decided contrary to his position previously by this Court: (1) the North Carolina death penalty statute is unconstitutional; (2) the trial court erred in denying defendant's motion for a bifurcated jury; (3) the trial court erred in denying defendant's request for individual *voir dire*; (4) the trial court erred in denying defendant's request for a bill of particulars; (5) the statutory aggravating circumstance in N.C.G.S. § 15A-2000(e)(9), that the murder was especially heinous, atrocious, or cruel, is unconstitutionally vague and misapplied; (6) the pattern jury instructions are so confusing that jurors are apt to believe that unanimity is required for a verdict of life imprisonment; (7) the trial court erred by instructing the jury that it had a duty to recommend the death sentence if it answered "yes" to issue four; and (8) the trial court erred by failing to give a peremptory instruction *ex mero motu* for defendant's nonstatutory mitigating circumstances.

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

[18] 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 circumstances found by the jury and upon which the sentencing court based its sentence of death; (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 circumstances found by the jury. Further, we find no indication that the sentences of death in this case were imposed under the influence of

passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

[19] In the present case, defendant was found guilty of two counts of murder under the theories of premeditation and deliberation and felony murder. Following a capital sentencing proceeding, the jury found three aggravating circumstances submitted as to each murder: that (i) defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); and (iii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted and the jury found, as to each murder, two statutory mitigating circumstances: (i) the murder was committed while defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2); and (ii) the defendant's capacity to appreciate the criminality of or to conform his conduct to the law was impaired, N.C.G.S. § 15A-2000(f)(6). 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-seven nonstatutory mitigating circumstances submitted as to each murder, the jury found thirteen 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*, 522 U.S. 900, 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 the 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). The jury in this case also found all three of the aggravating circumstances submitted. This Court has not found the death penalty disproportionate in any case where the jury has found three aggravating circumstances. *State v. Trull*, 349 N.C. 428, 458, 509 S.E.2d 178, 198 (1998). Finally, 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*, 519 U.S. 894, 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.' " *Trull*, 349 N.C. at 458-59, 509 S.E.2d at 198 (quoting *Lyons*, 343 N.C. at 27, 468 S.E.2d at 217).

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

Finally, 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.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ERROL DUKE MOSES

No. 574A97

(Filed 20 August 1999)

1. Criminal Law— joinder—first-degree murders—transactional connection

The trial court did not abuse its discretion by allowing two first-degree murder charges against defendant to be joined for trial, although the murders occurred two months apart, where a transactional connection was established by the following substantial similarities between the two murders: both were murders of young men whom defendant knew and with whom he was associated in the drug trade; both murders occurred after the victims had paged defendant; both victims were shot in the head with the same gun at a range of approximately two feet or less; both murders occurred in Winston-Salem on the premises of the victims; and both murders occurred after defendant argued with the victims.

2. Jury— capital case—jury selection—death penalty views—excusal for cause

The trial court did not err in a capital case by allowing the State's challenge for cause of a prospective juror because of his

death penalty views where the juror responded affirmatively to the trial court's initial inquiry concerning his inability to impose the death penalty, and the juror repeatedly stated during examination by defense counsel that it would be hard for him to sentence defendant to death because of his death penalty views.

3. Jury— capital case—jury selection—death penalty views—life qualifying standard—excusal for cause

The trial court did not violate the "life qualifying" standard of *Morgan v. Illinois*, 504 U.S. 719 (1992), by denying defendant's challenge for cause of a prospective juror based upon her death penalty views where the juror admitted to defense counsel that she had a tendency to "lean more strongly towards the death penalty" for a premeditated murder, but the juror responded negatively when the trial court and the prosecutor asked her on numerous occasions whether she was predisposed to automatically apply the death penalty in all first-degree murder cases, she responded affirmatively when both the trial court and the prosecutor inquired whether she could put her personal views aside and follow the trial court's instructions and consider a sentence of life imprisonment rather than the death penalty, and she confirmed upon reexamination by defense counsel that she could follow the trial court's instructions with regard to the possible penalties for first-degree murder.

4. Evidence— other crimes—similar modus operandi—admissibility to show identity

Evidence of defendant's murder of Griffin was properly admitted under Rule 404(b) to show defendant's identity as the perpetrator of the Dunkley murder, and vice versa, where the modus operandi of the two murders was similar enough to make it likely that the same person committed the two murders in that the two victims were associates of defendant in the drug trade and were shot multiple times with the same gun; witnesses testified that the gun belonged to defendant; the victims were killed in the same manner and in the same city within a period of two months; both victims argued with and paged defendant prior to their deaths; Griffin was seen with defendant prior to his death and Dunkley was to meet with defendant when last seen alive; and both men were murdered on their premises. Furthermore, the trial court did not abuse its discretion in refusing to exclude this evidence under Rule 403 as being more prejudicial than probative. N.C.G.S. § 8C-1, Rules 403, 404(b).

5. Evidence— prior misconduct with gun—identification of gun—credibility of witness

In a prosecution for two first-degree murders in which a former drug associate of defendant testified he had seen defendant on several occasions in possession of a gun similar to the 9-mm Ruger which was used in both murders, testimony by the witness that after he told defendant he had been robbed of defendant's drugs and money, defendant pulled out his 9-mm Ruger, put it to the witness's head, and threatened him was relevant and probative of the witness's identification of the gun. The State was entitled to have the jury know the circumstances of the possession in order to allow the jury to judge the credibility of the witness. Furthermore, the trial court did not err by failing to exclude this evidence under Rule 403. N.C.G.S. § 8C-1, Rule 403.

6. Evidence— ballistics expert—opinion testimony—same conclusion by any other expert—absence of prejudice

Defendant was not prejudiced by the testimony of an SBI ballistics expert on cross-examination that any other competent expert would have reached the same conclusion that bullets and cartridge cases were fired by defendant's gun where this comment was a statement of the expert's confidence in his opinion in response to a challenge by defendant; during closing argument, defense counsel turned the statement to defendant's advantage and impeached the expert on the statement; another expert testified that he had reviewed the same evidence and had reached the same conclusion; and there was no reasonable possibility that the jury would have reached a different verdict if the testimony had been disallowed.

7. Evidence— admission by defendant—not vague and uncertain—relevancy

Testimony by a witness about defendant's admission to him that he killed a murder victim was not so vague and uncertain as to be inadmissible where the witness was certain defendant made a statement to him admitting the killing but was uncertain about the exact words defendant used and did not want to attribute anything to defendant that he did not say. Furthermore, this testimony was relevant to the issue of the identification of defendant as the perpetrator of the murder, and any uncertainty by the witness goes only to the weight and credibility of the testimony rather than to its admissibility. N.C.G.S. § 8C-1, Rule 401.

8. Sentencing— capital sentencing—aggravating circumstance—course of conduct—common modus operandi and motivation

The trial court did not err by submitting the (e)(11) course of conduct aggravating circumstance for each of two first-degree murders where a common modus operandi and similar motivation exists between the two murders. Further, the fact that the murders occurred two months apart goes to the weight rather than the admissibility of this evidence. N.C.G.S. § 15A-2000(e)(11).

9. Evidence— capital sentencing—expert witness—bias—fees in this and other cases

The prosecutor was properly permitted to cross-examine defendant's sentencing expert in this capital sentencing proceeding about his fee in the instant case and previous cases and the number of times he had testified for defendants in the last two years for the purpose of showing bias.

10. Evidence— capital sentencing—defendant's state of mind—entries in defendant's notebook—cross-examination of expert witness

The prosecutor was properly permitted to cross-examine defendant's mental health expert in this capital sentencing proceeding for two first-degree murders about entries in a notebook possessed by defendant near the time of the murders, including a handwritten list of serial killers, to determine to what extent, if any, these entries entered into the expert's opinion regarding defendant's state of mind at the time of the murders.

11. Sentencing— capital sentencing—death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where the conviction for one murder was based upon both premeditation and deliberation and the felony murder rule; the conviction for the second murder was based only upon the felony murder rule; the jury found the course of conduct aggravating circumstance for both murders and that one murder was committed while defendant was engaged in the commission of an armed robbery; a sentence of death has not been found to be disproportionate in a case in which the jury has found a defendant guilty of murdering more than one victim; and the course of conduct

aggravating circumstance has been held sufficient, standing alone, to support a sentence of death.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Eagles, J., on 18 November 1997 in Superior Court, Forsyth County, upon jury verdicts finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 May 1999.

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

J. Clark Fischer for defendant-appellant.

WAINWRIGHT, Justice.

Defendant Errol Duke Moses (a/k/a, Craig Briskin, Henry Perry, Michael Gordon, Ethan Chen, Tony Moses, Thomas Hilton, and Ian Jackman) was born 2 December 1971. Defendant was indicted on 7 October 1996 for the first-degree murders of Ricky Nelson Griffin and Jacinto E. Dunkley. The cases were consolidated for trial, and the following evidence was presented by the State.

GRIFFIN MURDER

Between 10:00 p.m. and 11:00 p.m. on 24 November 1995, Ronald Webb, Anthony Sheppard, and Ricky Griffin (Griffin) were at Crockett's Barber Shop in Winston-Salem. As the three men were leaving the barber shop, defendant approached Griffin. They began arguing, and Griffin pulled a knife on defendant. After a brief skirmish, Griffin apologized, and they went their separate ways.

On 25 November 1995, around 2:30 a.m., Donald Brooks saw Griffin talking with defendant on a street corner near Griffin's house. Griffin was a drug dealer who also stole property and sold it to make money. Griffin frequently dealt with defendant. During this encounter, Brooks testified that Griffin was attempting to sell a telephone to defendant. According to Brooks, defendant told Griffin he did not want the telephone, but he did want marijuana. Griffin told defendant he would return to his house and page Larry Cason to get some marijuana. Brooks then asked defendant to take him home, and the two men left in defendant's Volkswagen automobile.

Soon thereafter, Griffin's brother, Randolph Griffin, saw Griffin in the kitchen of their residence in Winston-Salem. Griffin told his

brother he was trying to page defendant and Cason. Telephone records indicate that six calls were placed from the telephone at Griffin's residence during the early morning hours of 25 November 1995 between 2:47 a.m. and 2:55 a.m., including two calls to defendant's pager and four calls to Cason's pager. According to Randolph Griffin, when he left to go upstairs to his bedroom, his brother was still in the kitchen. Thereafter, he heard three gunshots outside his house. When he ran outside to see what had happened, he found his brother lying in a pool of blood in front of the house. Randolph Griffin called 911, and law enforcement and emergency rescue personnel arrived within a few minutes. Griffin was transported to the hospital and pronounced dead shortly thereafter.

At the crime scene, law enforcement officers found a 9-mm shell casing on the ground approximately fifteen feet from the victim's body. On 27 November 1995, Randolph Griffin was raking the front yard of his house when he found two additional 9-mm shell casings on the ground. He called law enforcement, who came and retrieved the shell casings.

According to Cason, on 25 November 1995, after receiving the second page from Griffin, he returned the call from a residence where he was playing cards. He told Griffin he did not have any marijuana to sell. Thereafter, Cason testified he left the card game and was driving home when he received the third page from Griffin. At that point, Cason pulled over and called Griffin from a pay telephone but received no answer. He then decided to go see what Griffin wanted. When he arrived at Griffin's house, he saw Randolph Griffin holding his brother in the front yard. Each of the telephone calls placed to and from the Griffin residence was confirmed by telephone records.

Dr. Patrick Lantz, a Forsyth County medical examiner, performed an autopsy on Griffin's body on 25 November 1995. Lantz determined Griffin died as a result of three gunshot wounds to the head: two wounds were about one inch apart in front of the victim's right ear, and one wound was to the left side of his head. The two wounds on the right side of the face were surrounded by stippling, which is caused when gunpowder comes out of the barrel of a gun, strikes the skin's surface, but does not completely burn. Because of the presence of stippling, Lantz determined these two shots were fired from a range of approximately two feet or less. The third wound, on the left side of the face, did not have stippling present. Therefore, Lantz could not determine the distance from which the shot was fired.

Further, projectiles recovered from Griffin's body were determined to be from a medium-caliber handgun, possibly a 9-mm handgun.

DUNKLEY MURDER

Sabrina Mims met defendant in December 1995, and they began dating shortly thereafter. That same month, defendant introduced Mims to Jacinto Dunkley. Defendant informed Mims that Dunkley was the person for whom defendant sold drugs. During the time they dated, Mims observed both a .380-caliber pistol and a 9-mm Ruger handgun in defendant's possession. Sometime during the week prior to 27 January 1996, defendant attempted to get Mims' cousin, Shatina Givens (Givens), to set up Dunkley by meeting him and finding out where he kept money and drugs in his house. Defendant offered to pay Givens to carry out the plan, but Givens refused.

On 26 January 1996, Mandy Wood, Dunkley's girlfriend, was watching television at Dunkley's house when defendant called. Dunkley answered the telephone. He and defendant began arguing about how Dunkley had been trying to get in touch with defendant, but defendant had been avoiding him. At one point, Dunkley got upset and hung up the telephone. Defendant called back, and this time Wood answered the telephone. She handed the telephone to Dunkley, and he and defendant began arguing again. The two ended the conversation by agreeing to meet the next night, 27 January 1996, at 9:00 p.m.

On 27 January 1996, defendant and Casey McCree were at Mims' apartment in Winston-Salem, "drinking and partying" with a number of different people. According to McCree, it was an "all day event." Telephone records indicate that at approximately 9:09 p.m., defendant received a page from Dunkley. Thereafter, between 9:30 p.m. and 10:00 p.m., defendant asked McCree to ride with him to Dunkley's house. Defendant told McCree that Dunkley owed him money and that he was going to collect it. Defendant and McCree left the apartment in defendant's Volkswagen and proceeded to Dunkley's house. Defendant told McCree he was "going to go do something and if another person is there you're going to have to go ahead and do her, too."

On the way to Dunkley's house, defendant stopped at the Enterprise Car Rental. While there, defendant stole a Buick automobile. McCree then drove the Volkswagen and defendant drove the stolen Buick to an undisclosed area, where they left defendant's

Volkswagen. They proceeded to Dunkley's house, and when they arrived, defendant parked the stolen Buick just across and down the street from the house. Defendant and McCree approached the house, and McCree knocked on the door. Dunkley answered the door, and McCree shook his hand and walked in. Defendant pulled out his 9-mm Ruger and approached Dunkley, who backed into the kitchen. In a fierce tone, defendant began asking Dunkley where his money was located. When Dunkley asked what he was talking about, defendant shot him in the chest. Defendant asked again where his money was located, and then shot Dunkley in the head. While Dunkley lay dead on the kitchen floor, defendant asked McCree to help him ransack the house so it would look like a robbery. McCree saw defendant take a wad of money from a drawer in Dunkley's house and a gold-colored diamond ring from Dunkley's finger.

When defendant left Dunkley's house, he took the keys to Dunkley's Pontiac and asked McCree to drive it. McCree followed defendant, who was driving the stolen Buick, and they abandoned Dunkley's automobile. Defendant and McCree drove the stolen Buick back to Enterprise Car Rental and parked it in the same space it was parked earlier. From there, defendant and McCree stopped briefly at Robyn Gardner's apartment in Winston-Salem. Defendant lived in the apartment next door with his girlfriend Anesha. According to Gardner, she was not sure exactly what time it was when defendant and McCree arrived at her apartment, but it was dark outside. She testified that defendant asked her to hide a gun, later identified as the 9-mm Ruger used in both murders. Around 11:30 p.m., defendant and McCree returned to Mims' apartment.

Later, defendant, McCree, and Givens left the apartment and were involved in an automobile accident. When Winston-Salem Police Officer John Tesh arrived on the scene, he found defendant, who had been driving the automobile, lying about twenty feet from the wreckage. Defendant complained that his right arm was hurt, and he tried to stuff a wad of money into his pants pocket. Tesh also observed a pager, a gold-colored diamond ring, a black leather jacket, and a torn tee shirt lying on the ground three to five feet from defendant. Additionally, Tesh discovered McCree lying near the car and Grenecia Givens' body inside the car. Grenecia Givens was pronounced dead at the scene, and defendant and McCree were rushed to the hospital.

According to Wood, Dunkley's girlfriend, Dunkley drove her to work at 6:00 p.m. on 27 January 1996 and was supposed to pick her

up when she got off work at 2:00 a.m. the next morning. However, Dunkley never arrived, and she did not hear from him. On 30 January 1996, Wood went by Dunkley's house, but no one answered the door. On 31 January 1996, Winston-Salem police officers responded to a possible break-in call at Dunkley's house. When the police arrived, they discovered Dunkley's body in the kitchen. The house was in disarray. A 9-mm shell casing was seized from the scene.

On 1 February 1996, Lantz, the same medical examiner who examined Griffin's body, performed an autopsy of Dunkley's body. According to Lantz, Dunkley died as a result of two gunshot wounds: one wound to the left side of the head, above and behind the left ear, and the other to the abdomen and right arm. The head wound was surrounded by stippling, indicating a shot was fired from approximately two feet or less. The wound to the abdomen was caused by a bullet which entered below the rib cage, exited above the right hip, and lodged in the right arm. The projectile recovered from Dunkley's body was also determined to have been fired from a 9-mm handgun.

A few days after the murder, defendant was incarcerated in the Forsyth County jail on other charges. Defendant telephoned Anesha from jail and asked her to get the 9-mm Ruger from Gardner's apartment and take it to Tony Duncan. According to Duncan, he spoke with defendant on the telephone, and they agreed that Duncan could buy the handgun. Thereafter, on approximately 1 April 1996, a Winston-Salem police detective seized the 9-mm Ruger from Duncan in the course of his investigation of the Dunkley murder.

Special Agent Thomas Trochum of the North Carolina State Bureau of Investigation (SBI) performed a ballistics test on the 9-mm Ruger and compared it with the evidence seized in both the Griffin and Dunkley murder cases. In the Griffin case, Trochum examined three cartridge cases which were recovered from the crime scene and a bullet fragment which was removed from Griffin's head during the autopsy. After examining these items, he determined that each was fired by defendant's 9-mm Ruger to the exclusion of all other handguns. In the Dunkley case, Trochum examined a cartridge case recovered from the crime scene and two bullet fragments taken from Dunkley's body during the autopsy. Again, after inspecting these items, he determined that each was fired by defendant's 9-mm Ruger to the exclusion of all other handguns.

The two murder charges were joined for trial, and the trial began in Forsyth County on 3 November 1997. On 14 November 1997, the

jury found defendant guilty of one count of first-degree murder under the felony murder rule and a second count of first-degree murder under both premeditation and deliberation, and the felony murder rule. Thereafter, on 18 November 1997, the jury recommended death on both charges, and the trial court entered judgment accordingly. Defendant appeals to this Court as of right from the sentences of death.

PRETRIAL ISSUE

[1] In defendant's first assignment of error, he contends the trial court erred by joining the Griffin and Dunkley cases for trial. On 25 July 1997, the trial court granted the State's motion to join both murder charges for trial pursuant to N.C.G.S. § 15A-926. Defendant contends the trial court's joinder of the two cases was error, and this error substantially prejudiced him from receiving a fair trial.

At the outset, we note that N.C.G.S. § 15A-926 provides:

> (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

N.C.G.S. § 15A-926(a) (1997). In short, there must be some "transactional connection" between the two separate offenses in order for joinder to be proper. *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981).

In addressing this issue, this Court has stated:

> In ruling upon a motion for joinder of offenses, the trial judge should consider whether the accused can be fairly tried if joinder is permitted. If joinder would hinder or deprive defendant of his ability to present his defense, the motion should be denied. *Pointer v. U.S.*, 151 U.S. 396 (1894); *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296. However, it is well established that such a motion is ordinarily addressed to the sound discretion of the trial judge, and his ruling will not be disturbed absent a showing of abuse of discretion.

State v. Greene, 294 N.C. 418, 421-22, 241 S.E.2d 662, 664 (1978). Furthermore, one of the factors which may be considered to deter-

mine whether certain acts or transactions constitute "parts of a single scheme or plan" is the nature of the offenses. *Id.* at 422, 241 S.E.2d at 665; N.C.G.S. § 15A-926(a).

According to defendant, "any surface similarities between the Griffin and Dunkley matters were far outweighed by their differences, and the [t]rial [c]ourt's ruling improperly allowed the [p]rosecution to bootstrap the extremely weak Griffin case by trying it together with the Dunkley case." We disagree.

This Court rejected a similar argument in *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). In *Chapman*, the defendant was charged with the first-degree murders of two women in Hickory, North Carolina. Even though the murders occurred approximately two months apart, there were substantial similarities. The State moved to join the two cases for trial, and the defendant objected. Following a hearing, the trial court allowed the cases to be joined. The defendant was found guilty on both counts of first-degree murder and was sentenced to death. The defendant appealed to this Court from the two death sentences, contending the trial court erred by joining the two cases for trial "because the charges were not transactionally related, in that none of the witnesses testified concerning both the . . . murders, and the murders occurred approximately two months apart." *Id.* at 342, 464 S.E.2d at 668. This Court sustained the joinder of the two murder cases, holding:

> The facts incident to the two murders here reveal a common *modus operandi* and a temporal proximity sufficient to establish a transactional connection. Both victims were young women with drug habits; defendant knew both and had smoked crack with each. One victim was nude when found, and the other was nude from the waist down. Both victims suffered blunt-force injuries to their heads . . . . The women were killed within two months of each other, and their bodies were found in the lowest part of vacant houses within two blocks of each other.

Id. at 343, 464 S.E.2d at 668.

In the instant case, we find the following substantial similarities which justify joinder for trial: both were murders of young men whom defendant knew and with whom he was associated in the drug trade, both murders occurred after the victims had paged defendant, both victims were shot in the head with the same gun at a range of

approximately two feet or less, both murders occurred in Winston-Salem, both murders occurred on the premises of the victims, and both murders occurred after defendant argued with the victims. In light of this evidence, we conclude the trial court did not abuse its discretion by allowing the two murder charges to be joined for trial. After a careful review of the entire record, we hold the two offenses "were not so separate in time and place and so distinct in circumstance that joinder was unjust and prejudicial to defendant." *Id.* at 344, 464 S.E.2d at 669. Therefore, this assignment of error is overruled.

JURY SELECTION

[2] In defendant's next assignment of error, he contends the trial court erred by allowing the State's challenge for cause of prospective juror James Henry, Jr., because of his views with regard to the possible imposition of capital punishment. This Court has long recognized the United States Supreme Court's decision in *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), to be determinative in such cases. The United States Supreme Court articulated the standard to be applied in such situations as follows:

> 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." We note that . . . this standard . . . does not require that a juror's bias be proved with "unmistakable clarity." 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 851-53 (footnotes omitted). Therefore, in such situations, we must defer to the discretion of the trial court in determining whether a prospective juror is unable to follow the law

with regard to the possible imposition of capital punishment unless a clear abuse of discretion is shown. *State v. Hill*, 347 N.C. 275, 288, 493 S.E.2d 264, 271 (1997), *cert. denied*, — U.S. —, 140 L. Ed. 2d 1099 (1998).

In the instant case, the transcript reveals unequivocally that prospective juror Henry responded affirmatively to the trial court's initial inquiry concerning his inability to impose the death penalty. The following exchange between the trial court and Henry demonstrates this bias:

> THE COURT: Do . . . you have any personal, moral, or religious beliefs against the death penalty as a possible appropriate sentence for someone convicted of first degree murder?
>
> MR. HENRY: I do.
>
> THE COURT: Mr. Henry, you do?
>
> MR. HENRY: Yes, ma'am.
>
> THE COURT: Would it be impossible for you under any circumstances to vote for a sentence of death?
>
> MR. HENRY: I don't think it would be impossible but that weighs heavy on my conscience, that particular thing.
>
> THE COURT: All right, the law requires that [if] someone is convicted of first degree murder, the jury has to make the sentencing decision and I would give you instructions about aggravating circumstances and mitigating circumstances and weighing those and the burden of proof and such. Would you be able to follow those instructions about sentencing or are your personal views and reservations about the death penalty such that you would not be able to follow those instructions?
>
> MR. HENRY: I might have some problems. My belief is the essence of who I am and what you say may conflict with what I believe, and then therefore that's going to put me in an awkward position.
>
> THE COURT: Would your personal beliefs substantially impair your ability to follow the law that I would give you on the death penalty?
>
> MR. HENRY: It may.

THE COURT: And you're saying that because you don't know what I'm going to tell you?

MR. HENRY: Yes, ma'am.

THE COURT: And if what I told you differed from what you believed about the death penalty, you would not be able to follow that law. Is that what you're saying?

MR. HENRY: Yes, ma'am.

Thereafter, defense counsel questioned Henry with regard to his personal views of the death penalty, and Henry repeatedly said it would be hard for him to sentence defendant to death because of his views. At one point, he stated:

MR. HENRY: I understand that I only can judge based upon the evidence that is presented but to me there could be things that were not said that could make the difference between being right and being wrong and when you put a man's life on the line like that, to me every avenue needs to be explored and the truth need [sic] to be brought out, no one side on part of it and don't tell you certain things about certain things and I know that's getting on into the trial. What I'm trying to say is that when you sentence a man to death, you need to be pretty sure within yourself that that man is guilty and is not lawyers running around, you know, confusing you or whatever. So I would have a problem, yes, ma'am. I would have a problem.

Thereafter, the trial court excused Henry for cause pursuant to N.C.G.S. § 15A-1212(8), stating:

He clearly indicated to me that if the law, as I instructed him, was different from his personal views about the death penalty, he would not be able to follow them and I think he gave some ambiguous answers otherwise but he was not ambiguous about that and his body language and looking at him as he answered the questions, while some of the words were ambiguous, I felt that his ability to follow the law as I would give it to him was substantially impaired so I wanted to—some of that was my looking at him and a lot of it was exactly what he said in response to my questions about following the law. I wanted to be sure that was clear.

After a careful review of the transcript, we conclude the trial court did not abuse its discretion in excusing Henry because of his

perceived inability to follow the law with regard to the possible imposition of capital punishment. The trial court, as well as defense counsel, thoroughly questioned Henry about his views, and in the trial court's sound discretion, Henry was not fit to serve on the jury. Therefore, this assignment of error is overruled.

[3] In defendant's next assignment of error, he contends the trial court violated the United States Supreme Court's mandate in *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), by not allowing defendant's challenge for cause of prospective juror Terri Hendrix because of her views with regard to the possible imposition of capital punishment. In *Morgan*, the United States Supreme Court adopted a "life qualifying" or "reverse-*Witherspoon*" standard for such cases, holding:

> [a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Id. at 729, 119 L. Ed. 2d at 502-03. However, we again note it is within the trial court's sound discretion to determine whether a prospective juror should be excused for cause. *Hill*, 347 N.C. at 288, 493 S.E.2d at 271.

During the *voir dire* of Hendrix, both the trial court and the prosecutor asked her on numerous occasions whether she was predisposed to automatically applying the death penalty in all first-degree murder cases. Hendrix responded negatively. Furthermore, both the trial court and the prosecutor inquired whether she could put her personal views aside and follow the trial court's instructions, applying the law to the facts presented, and consider a sentence of life imprisonment rather than the death penalty, to which she responded affirmatively. During his *voir dire* of Hendrix, defense counsel asked whether "there [was] anything in your personal beliefs that would prevent you from fully considering life without parole as a possible

punishment if we get that far," to which she responded "no." Thereafter, the following exchange occurred between defense counsel and Hendrix:

> [DEFENSE COUNSEL]: Do you feel that in all cases of premeditated murder, if the jury so found, that the death penalty is the only possible appropriate punishment?
>
> MS. HENDRIX: Sometimes, yes.
>
> . . . .
>
> [DEFENSE COUNSEL]: So is it your opinion that if the jury in this case should find [defendant] guilty of at least one count of premeditated murder, that you would then automatically vote for death as a punishment?
>
> MS. HENDRIX: Yes.
>
> [DEFENSE COUNSEL]: Your Honor, I'd offer her for cause.

The trial court then sought to clarify Hendrix's answer by asking the following:

> THE COURT: Okay, Ms. Hendrix, the law would require you, even if you found the defendant guilty of first degree murder under the premeditation theory as you've just expressed, to consider both possible alternatives—life imprisonment without parole and the death penalty. Could you set aside your personal view that the death penalty should be imposed in all—
>
> MS. HENDRIX: —It depends on what the evidence is in the case and I've not heard anything so I don't know but my belief today is that I support the death penalty if it's premeditated. Now whether it's—now what the evidence that has been presented, I've not heard.
>
> THE COURT: You would base your verdict on the evidence and the circumstances?
>
> MS. HENDRIX: Yes.
>
> THE COURT: Would you be able to follow the law that I will give you on that?
>
> MS. HENDRIX: Yes.
>
> THE COURT: And would you—you would not automatically impose the death penalty just because the defendant had

been found guilty of first degree murder? Is that right or is that wrong?

MS. HENDRIX: I mean that's an option I'd have, correct? Would that be an impose [sic]?

THE COURT: To impose it?

MS. HENDRIX: Yes.

THE COURT: Yes. But the law requires that you consider both options and that you not[] say going in, without knowing the circumstances, that you would automatically impose one or the other. Can you do that?

MS. HENDRIX: Well, I would like to think I could.

Defense counsel then continued his questioning of Hendrix as follows:

[DEFENSE COUNSEL]: Do you think, Ms. Hendrix, based upon what you said in the last few minutes that if the defendant was found guilty of premeditated murder—not felony murder but premeditated and deliberated murder on at least one of these two cases—that the beliefs you have expressed a few minutes ago would substantially impair your ability to consider life without parole as opposed to the death penalty?

MS. HENDRIX: It may. I can't sit here and say it wouldn't.

[DEFENSE COUNSEL]: You can't say that it wouldn't?

MS. HENDRIX: It wouldn't. I mean I can't sit here and say that I can go in—I think I can possibly consider it but I would be leaning more strongly towards the death penalty based on my beliefs.

[DEFENSE COUNSEL]: Your Honor, I'd renew the challenge.

Thereafter, the trial court heard arguments from both sides on defendant's challenge for cause of Hendrix. The trial court then denied the challenge, stating:

She said she could follow the law. I know she certainly indicated a leaning one way or the other but the law doesn't prevent that but she indicated she could fairly consider both possibilities and I think she said any number of times it would depend on the circumstances so I'll deny that . . . .

Upon reexamination by defense counsel, Hendrix confirmed she did not have any preconceived notions, and could follow the trial court's instructions with regard to the possible penalties for first-degree murder.

Defendant contends it is "inescapable that Hendrix should have been excused for cause" because of her admitted tendency to "lean[] more strongly towards the death penalty." However, as previously noted, jurors cannot be asked enough questions to make their bias unmistakably clear because the jurors may not know how they will react or they may want to hide their true feelings. *Wainwright*, 469 U.S. at 424-25, 83 L. Ed. 2d at 852. Therefore, after careful consideration, we conclude the trial court did not err by denying defendant's challenge for cause of Hendrix based on her death penalty views. The trial court conducted a lengthy *voir dire* of the prospective juror and determined, in its sound discretion, she could follow the instructions and apply the law in an unbiased fashion. Finding no abuse of discretion on the part of the trial court, we overrule this assignment of error.

GUILT-INNOCENCE PHASE

[4] In defendant's next assignment of error, he contends the trial court committed prejudicial error by allowing the prosecution to present evidence of the Griffin murder as Rule 404(b) evidence of the Dunkley murder, and vice versa. The trial court ruled the evidence was admissible under Rule 404(b) to show opportunity and identity. Defendant contends that neither case was probative of the other for any legitimate 404(b) purpose and amounted only to general bad character evidence. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence reads as follows:

> 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. 1998). This Court has recognized that Rule 404(b) is a rule of inclusion rather than a rule of exclusion, holding:

> 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).

Furthermore, in order to be admissible under Rule 404(b) on the issue of identity, "[t]he 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. 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).

Defendant contends the only common element between the two murders was that they were committed with the same gun. However, as previously noted, the *modus operandi* of the two murders was similar enough to make it likely that the same person committed the two murders. The two victims were associates of defendant in the drug trade and were shot multiple times with the same gun. Witnesses testified the gun belonged to defendant. The victims were killed in the same manner and in the same city within a period of two months. Both victims argued with and paged defendant prior to their deaths. Griffin was seen with defendant prior to his death. Dunkley was to meet with defendant when last seen alive. Both men were murdered on their premises. These numerous similarities supported the trial court's 404(b) ruling.

It is significant that the same gun was used to commit both murders. In *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992), this Court, under Rule 404(b), upheld the admission of testimony about an attempted murder occurring three weeks after the armed robbery and murder for which Garner was on trial. This Court held this evidence "tended to prove the defendant's possession and control of the weapon at a time close in proximity to that of the Harrelson murder." *Id.* at 509, 417 S.E.2d at 512. Similarly, in *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), this Court approved the admission under Rule 404(b) of evidence of a felonious assault which occurred two months prior to the murder for which defendant was on trial. *Id.* at 337, 451 S.E.2d at 142. Additionally, in *State v. Hoffman*, 349 N.C. 167, 505 S.E.2d 80 (1998), *cert. denied*, — U.S. —, 143 L. Ed. 2d 522

(1999), a capital robbery-murder of a jewelry store owner, this Court approved the admission under Rule 404(b) of testimony about armed robberies of banks occurring in the months preceding the murder for the purpose of proving the identity of the perpetrator of the crimes. *Id.* at 184, 505 S.E.2d at 90. In each of these cases and in the instant case, the evidence established the same gun was used for both crimes.

In *State v. Howell*, 343 N.C. 229, 470 S.E.2d 38 (1996), the defendant was tried capitally for the murder of a twenty-nine-year-old prostitute. This Court considered whether the testimony of another woman, Ms. Farabee, about an encounter she had with the defendant several months prior to the murder was properly admitted under Rule 404(b). This Court found the factual similarities between the two crimes "so strikingly similar as to permit Farabee's testimony for the purpose of proving defendant's identity as well as showing a common opportunity, plan, and *modus operandi* to defendant's attacks." *Id.* at 236, 470 S.E.2d at 42. This Court noted the following similarities: both women were black prostitutes in Hickory, North Carolina; the murder victim was last seen near the location where the defendant had picked up Farabee; both women were bound (one with duct tape and one with wire); and objects were inserted into the vaginas of both women. In the instant case, there were even more similarities that made evidence of the Dunkley murder admissible as to the Griffin murder, and vice versa.

Despite the striking similarities between the two murders in the instant case, defendant argues the dissimilarities between the two murders preclude admission of the Rule 404(b) evidence. In *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995), this Court addressed a similar argument as follows:

> We acknowledge, as defendant points out in his brief, that *there are dissimilarities between the crimes charged and defendant's conduct with Ms. Dawson.* Ms. Dawson was not beaten or strangled, the assaults on Ms. Dawson did not occur outdoors, and Ms. Dawson was not a stranger to defendant. *However, a prior act or crime is sufficiently similar under N.C.G.S. § 8C-1, Rule 404(b) to warrant admissibility if there are " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " State v. Riddick*, 316 N.C. 127, 133, 340

> S.E.2d 422, 426 (1986) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). *It is not necessary that the similarities between the two situations "rise to the level of the unique and bizarre." State v. Green*, 321 N.C. at 604, 365 S.E.2d at 593. Rather, the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts.

Moseley, 338 N.C. at 42-43, 449 S.E.2d at 437-38 (emphasis added).

Defendant claims that even if evidence of the other murder is admissible under Rule 404(b), it should have been excluded under Rule 403. Rule 403 of the North Carolina Rules of Evidence reads as follows:

> 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).

"The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *State v. Hipps*, 348 N.C. 377, 405-06, 501 S.E.2d 625, 642 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 114 (1999). After careful review, we conclude defendant has shown no abuse of discretion in the trial court's ruling. For the reasons stated herein, this assignment of error is overruled.

[5] In defendant's next assignment of error, he contends the trial court erred by allowing the prosecution to present evidence of defendant's prior misconduct with a handgun, on the grounds that this evidence is irrelevant and served only to prejudice the jury against defendant. We disagree.

During the trial, the State presented the testimony of Steven Cherry, a former drug associate of defendant, in order to identify the murder weapon which the State contends was used by defendant in both murders. Cherry testified he had seen defendant on several occasions in possession of a gun very similar to the 9-mm Ruger which was used in both murders. Cherry further testified about an incident which occurred between defendant and him in November

1995, just weeks before the Griffin murder. Cherry testified defendant became very upset when Cherry told him he had been robbed of defendant's drugs and money. While defendant and Cherry were looking for the thieves, defendant pulled out his 9-mm Ruger, put it to Cherry's head, and threatened him. Defendant objected to this testimony, and a *voir dire* of the witness was conducted. Following arguments of counsel, the trial court allowed Cherry's testimony, stating, "I'll admit it for the purpose of showing—explaining why this witness remembers the gun but I don't expect to allow any arguments about prior similar acts and this somehow proving any other fact." Defense counsel then requested a limiting instruction, upon which the trial court reserved ruling. Defendant contends this evidence was inadmissible because it was irrelevant under Rule 401. Alternatively, defendant claims that regardless of whether the evidence was relevant, it nevertheless was highly prejudicial and should have been excluded under Rule 403.

Rule 401 of the North Carolina Rules of Evidence defines "relevant" evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Defendant bears the burden of proving the testimony was erroneously admitted and he was prejudiced by the erroneous admission. N.C.G.S. § 15A-1443(a) (1997). "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987).

In this case, the testimony about defendant's prior possession of the gun the State contends was the murder weapon was relevant. Cherry testified defendant was in possession of the 9-mm Ruger as recently as late October or early November 1995. The facts and circumstances of this incident were relevant and probative of the witness' identification of the weapon. The State was entitled to have the jury know the circumstances of the possession in order to allow the jury to judge the witness' credibility. The fact the gun was actually put to Cherry's head adds credence to his identification of the gun. The trial court indicated the testimony was being admitted for that purpose alone and would not be allowed to show defendant acted in conformity with this prior act.

Defendant also contends that even if the testimony was relevant, it should have been excluded under Rule 403 of the North Carolina Rules of Evidence. However, as this Court has stated:

> 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. White, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (quoting *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)), *cert. denied*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 3772 (1999).

Furthermore, following the State's questioning, defense counsel elicited testimony from Cherry that he knew defendant was just kidding with him and that Cherry was not scared during this incident. Later in the trial, the trial court asked defense counsel if he would like a limiting instruction on this evidence. Defense counsel responded by stating, "[w]ell, Your Honor, quite frankly in light of his additional responses that he thought they were kind of just playing around anyway, I'm not sure it's necessary anyway." Defendant then withdrew his request for a limiting instruction.

As a result of the foregoing and the strong evidence of defendant's guilt in each of the murders, it is unlikely that a different result would have occurred had this evidence been excluded. Defendant has failed to meet the burden of proving that the testimony was erroneously admitted and he was prejudiced by the admission. Therefore, this assignment of error is overruled.

[6] In defendant's next assignment of error, he contends the trial court committed prejudicial error by allowing Trochum, an SBI ballistics expert, to state on cross-examination that any other competent expert would have reached the same conclusion. Defendant contends this testimony was nonresponsive to the question and was speculative. Following the State's direct examination of Trochum, the following cross-examination occurred between defense counsel and Trochum:

> [DEFENSE COUNSEL]: So basically what you're saying what you did in this case to draw the conclusions that you testified to was to eyeball these various items at some unspecified magnification between five and 60 and then decide in your mind it was a match?

[TROCHUM]: No, sir. What I did here was I looked at them at a magnification that was sufficient to make an identification. It is not a routine standard procedure in our laboratory to record the magnification. It's not necessary to do so.

Secondly, it was not just that I eyeballed it. I looked at it and based on my experience and training came to the conclusion that any other competent firearms examiner would come to—

[DEFENSE COUNSEL]: —Objection to that, Your Honor.

THE COURT: Overruled. Go ahead.

[TROCHUM]: —and that is that these bullets and these cartridge cases matched the test and were indeed fired by State's Exhibit No. 1.

Defendant contends this testimony was irrelevant pursuant to Rule 401. At this point in questioning, Trochum was being cross-examined and challenged about his opinion. His comment was a statement of his confidence in his opinion in response to the challenge. After the trial court overruled the objection, defense counsel revisited the subject in the following exchange:

[DEFENSE COUNSEL]: Now I believe you testified a few minutes ago though that any other forensic firearms examiner would have reached the same conclusion. Is that what you said?

[TROCHUM]: I said any other firearms examiner who was of the same competent training and education would, yes, I'm sure reach the same conclusions.

[DEFENSE COUNSEL]: You're comfortable that the other 698 besides you and Agent Bishop would agree with you?

[TROCHUM]: That's correct.

Assuming *arguendo* that defendant did not waive his previous objection, defense counsel made the following remarks during his closing argument:

We are the SBI, we are experts. Every expert in the world—they said—would agree with us. Now that's enough right there to discredit their testimony because I suggest to you that there is no discipline out there—chemistry, law, medicine, philosophy, fingerprints, DNA—in which you can find every expert in the world that agrees. That's what they said, just like they said the bullets

matched this gun and none other in the world—the same phrase that they used and it doesn't make any sense. Nothing is that conclusive and certainly not somebody looking through a microscope with a five to sixty power microscope and that's all there was.

As a result of the foregoing, defense counsel actually turned Trochum's statement to his advantage and impeached him on that statement. Furthermore, in addition to Trochum's testimony, Agent Eugene Bishop testified he had reviewed the exact same evidence and had reached the same conclusions. Even if the testimony had been disallowed, there is no reasonable possibility the jury would have reached a different verdict. Therefore, this assignment of error is overruled.

[7] In defendant's next assignment of error, he contends the trial court erred by allowing witness Casey McCree to testify he was "pretty sure" defendant admitted to killing Griffin. Defendant claims this evidence is so vague and uncertain that it fails to meet the standards for relevance under Rule 401, it is unfairly prejudicial to defendant, and it should have been excluded under Rule 403.

According to McCree, he met defendant during the summer of 1995 and began selling drugs for defendant soon thereafter. When questioned about Griffin's death, McCree testified he saw defendant at the crime scene in a group of people who gathered to see what happened, and defendant stated that "whoever [killed Griffin] had to be smart, you know, cause they didn't get caught, they didn't leave no trace."

McCree further testified that sometime between Thanksgiving and Christmas of 1995, he and defendant were having a conversation about assassinations when the topic of Griffin's murder was raised. When McCree asked defendant if he knew who killed Griffin, defendant "looked at [him] and he kind of smiled and from that point, [McCree] knew that [defendant] did it." Thereafter, the following exchange, which is the subject of this assignment of error, occurred between the prosecutor and McCree:

[PROSECUTOR]: Now, Casey, do you recall what the defendant said exactly with respect to [Griffin]?

[MCCREE]: He looked at me and he kind of, you know, gave a smile and then he said in a roundabout way that he did do it. I can't—

[DEFENSE COUNSEL]: —Objection, Your Honor. Non-responsive.

[MCCREE]: —I can't quite figure the right words.

THE COURT: Well you can go into it with him on cross examination. If he didn't say anything, then the jury will disregard it.

[PROSECUTOR]: Casey, did he say anything to you after you asked the question about [Griffin]?

[DEFENSE COUNSEL]: Objection. Asked and answered, Your Honor.

THE COURT: Overruled. You may answer.

[PROSECUTOR]: Do you recall whether he actually verbalized the words to you?

[MCCREE]: Yes.

[PROSECUTOR]: Okay. He made statements to you other than just smiling? Is that correct?

[MCCREE]: He made a statement.

[PROSECUTOR]: Okay. Can you remember the gist of the statement? If you can't remember the exact words, can you remember some of the words or what he was saying to you.

[MCCREE]: After he smiled, you know, I don't know. I don't want to say anything he didn't tell. He said that I did it—him. Talking about him, you know. He said those words but—

[PROSECUTOR]: —The defendant said those words?

[MCCREE]: He said that he had did it but the way that he had put it it was like, you know, it was justifiable for him doing it. I mean, I don't—

[DEFENSE COUNSEL]: —Objection, Your Honor.

THE COURT: Overruled.

[MCCREE]: —I don't recall the whole statement that he made but I'm pretty sure that he told me that he did it.

[DEFENSE COUNSEL]: Objection, Your Honor. Pretty sure?

THE COURT: Overruled.

As a result of the foregoing, McCree reiterated that although he did not remember the exact words defendant used, he did say something about killing Griffin. McCree was certain defendant made a statement to him admitting killing Griffin. He was only uncertain about the exact words defendant used, was making an effort to be truthful, and did not want to attribute anything to defendant that he did not say.

Defendant contends the trial court erred by admitting this testimony because of McCree's uncertainty. However, an identification of the perpetrator of a crime is not inadmissible because the witness is not absolutely certain of the identification, so long as the witness had a " 'reasonable possibility of observation sufficient to permit subsequent identification.' " *State v. Turner*, 305 N.C. 356, 363, 289 S.E.2d 368, 372 (1982) (quoting *State v. Miller*, 270 N.C. 726, 732, 154 S.E.2d 902, 906 (1967)). Such uncertainty goes to the credibility and weight of the testimony, and it is well established that "[t]he credibility, probative force, and weight [of the testimony are] matter[s] for the jury." *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940).

Furthermore, defendant contends the statement was irrelevant and should have been excluded pursuant to Rule 401. As previously noted, Rule 401 defines "relevant" evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. In the instant case, McCree's testimony was relevant to the issue of the identification of defendant as the perpetrator of Griffin's murder. As the trial court instructed, the witness' doubt was a factor for the jury to consider. Therefore, this assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[8] In defendant's next assignment of error, he contends the trial court erred in the capital sentencing proceeding of both cases by admitting evidence of the other murder in each case to support the N.C.G.S. § 15A-2000(e)(11) course of conduct aggravating circumstance. The course of conduct circumstance was the sole aggravating circumstance submitted in the Griffin case and was one of two circumstances submitted in the Dunkley case.

Similar to defendant's argument with regard to joinder of the two cases for trial, defendant claims the Griffin and Dunkley murders

were significantly different and were not linked by any common *modus operandi*. According to defendant, the Griffin and Dunkley murders were fundamentally different types of killings, and the sole point of similarity between the killings was the ballistics evidence that both crimes were committed with the same handgun. We disagree.

N.C.G.S. § 15A-2000(e)(11) provides that jurors in a capital sentencing proceeding may consider other violent criminal conduct as part of a course of conduct, and therefore an aggravating circumstance, when "[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) (1997); *see State v. Cummings*, 332 N.C. 487, 508, 422 S.E.2d 692, 704 (1992) (*Cummings I*). In *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997) (*Cummings II*), *cert. denied*, — U.S. —, 139 L. Ed. 2d 873 (1998), this Court defined the requisite factors necessary for the submission of course of conduct in support of a sentence of death as follows:

> Submission of course of conduct requires that "there is evidence that the victim's murder and the other violent crimes were part of a pattern of intentional acts establishing that in defendant's mind, there existed a plan, scheme or design involving the murder of the victim and the other crimes of violence." *State v. Walls*, 342 N.C. 1, 69, 463 S.E.2d 738, 775 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 794 (1996). This Court has refused to require a conviction of the offense before the State may use that offense to establish the course of conduct aggravating circumstance. *See State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (course of conduct aggravator in defendant's conviction of a robbery-murder supported by evidence of a robbery-murder that was committed three hours later without any evidence of whether defendant was convicted of those offenses), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994) (evidence of unadjudicated murder and rapes in another county that occurred three months before the murder for which defendant had been convicted admissible to support course of conduct aggravator), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995).
>
> In determining whether there is sufficient evidence to submit an aggravating circumstance to the jury, the trial court must con-

sider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving all contradictions in favor of the State. *State v. Skipper*, 337 N.C. 1, 53, 446 S.E.2d 252, 281 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). " 'If there is substantial evidence of each element of the [aggravating] issue under consideration, the issue must be submitted to the jury for its determination.' " *State v. Gregory*, 340 N.C. 365, 411, 459 S.E.2d 638, 664 (1995) (quoting *State v. Moose*, 310 N.C. 482, 494, 313 S.E.2d 507, 516 (1984)), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). In determining whether the evidence tends to show that another crime and the crime for which defendant is being sentenced were part of a course of conduct, the trial court must consider a number of factors, including the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons.

Cummings II, 346 N.C. 328-29, 488 S.E.2d at 572.

Furthermore, in *Cummings I*, 332 N.C. 487, 422 S.E.2d 692, this Court considered whether the course of conduct aggravating circumstance had properly been submitted in a case involving two murders that occurred twenty-six months apart. This Court held temporal proximity ordinarily affects weight rather than admissibility. *Id.* at 510, 422 S.E.2d at 705. Additionally, this Court determined the common *modus operandi* and similar motivations justified the submission of N.C.G.S. § 15A-2000(e)(11). *Id.* at 512, 422 S.E.2d at 706.

As previously noted in *Chapman*, 342 N.C. 330, 464 S.E.2d 661, this Court approved the joinder of two separate murders which occurred approximately two months apart. This Court further upheld the submission of N.C.G.S. § 15A-2000(e)(11) based on the similarities of the two murders, holding:

[S]everal similarities tie the instant murders together and suggest a common motivation or *modus operandi*. The victims were young women with drug habits; defendant knew both and had smoked crack with each. Their bodies were disposed of in virtually the same fashion and within two blocks of each other. Both victims suffered blunt-force injuries to their heads. Defendant was seen with, and had sex with, Conley shortly before her death; he made incriminating statements to three people about having killed Ramseur. Defendant had a foreboding attitude toward

> women when he was smoking crack. These similarities supported the finding of a transactional connection for purposes of joinder, and, considering the evidence in the light most favorable to the State, they also supported the submission and finding of the course of conduct aggravating circumstance.

Id. at 345-46, 464 S.E.2d at 670.

In the instant case, as previously noted, we hold a common *modus operandi* and motivation existed between the Griffin and the Dunkley murders. Further, although the murders occurred two months apart, this goes to the weight rather than the admissibility of the evidence.

After careful review of the instant case, we hold the similarities in the two murders demonstrate there did exist in the mind of defendant a plan, scheme, or design involving the two violent crimes. Therefore, the trial court did not err by submitting the N.C.G.S. § 15A-2000(e)(11) course of conduct aggravator. This assignment of error is overruled.

[9] In defendant's next assignment of error, he contends the trial court committed prejudicial error by allowing the prosecutor to cross-examine defendant's sentencing expert regarding the amount he had been paid in past court-appointed cases. At sentencing, the defense called Dr. Jerry Noble, a clinical psychologist, to testify regarding psychological mitigating circumstances. On direct examination, Noble testified defendant suffered from a mental or emotional disorder at the time of the Griffin and Dunkley murders and as a result, defendant's capacity to conform his conduct to the requirements of law was impaired. On cross-examination, the State questioned Noble about his fee in the instant case and previous cases, including how many times he had testified in the last two years and how much money he had been paid to testify in those cases. Defendant contends this line of questioning was totally irrelevant to the case before the jury and served only to inflame the passions of taxpaying citizens. Further, defendant asserts the cross-examination was improper because the jurors, as taxpayers, would be prejudiced against Noble's testimony. We disagree.

At the outset, we note that in a sentencing hearing, the Rules of Evidence do not apply. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). The trial court has broad discretion concerning the scope of cross-examination, and this discretion 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." *State v. Locklear*, 349 N.C. 118, 156, 505 S.E.2d 277, 299 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 559 (1999). This Court has repeatedly held cross-examination of an expert regarding compensation is permissible. *See, e.g., State v. Atkins*, 349 N.C. 62, 83, 505 S.E.2d 97, 111 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3732 (1999); *State v. Creech*, 229 N.C. 662, 671, 51 S.E.2d 348, 355 (1949). Such cross-examination is allowed "to test the bias or partiality of the witness towards the party by whom he was called or introduced." *Creech*, 229 N.C. at 671, 51 S.E.2d at 355.

In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), this Court allowed the prosecutor's questioning of the defendant's mental health expert which revealed: (1) he testified only for defendants; (2) he had diagnosed ninety percent of them with psychological problems; and (3) he billed at a rate of $120 per hour, with the trial court setting his fee. *Id.* at 89-90, 446 S.E.2d at 553-54.

Further, in *State v. Brown*, 335 N.C. 477, 439 S.E.2d 589 (1994), this Court held:

> "[W]here evidence of bias is elicited on cross-examination the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias so that the witness may stand in a fair and just light before the jury." *State v. Patterson*, 284 N.C. 190, 196, 200 S.E.2d 16, 20 (1973); *see also State v. Hicks*, 233 N.C. 511, 64 S.E.2d 871, *cert. denied*, 342 U.S. 831, 96 L. Ed. 629 (1951).
>
> If defendant believed at trial that the circumstances surrounding the retention and payment of the expert witness were such that the jury would have inferred no bias on his part, he was free to demonstrate this through redirect examination.

Brown, 335 N.C. at 493, 439 S.E.2d at 599.

In the instant case, the cross-examination of Noble was proper to allow the jury to assess his credibility in light of his status as a paid expert witness for the defense. The prosecutor was properly allowed to explore the expert's bias. Furthermore, defendant did not choose

to establish that the witness was not biased toward defendant through redirect examination. As such, this assignment of error is overruled.

[10] In defendant's next assignment of error, he contends the trial court erred in allowing the prosecution to cross-examine defendant's expert psychologist about the contents of a book bag found in the trunk of defendant's automobile. Prior to trial, defendant moved *in limine* to exclude evidence of certain materials found in defendant's book bag following the automobile crash in which Grenecia Givens was killed. The trial court deferred ruling until such time as the State chose to offer the exhibits into evidence. The materials included a handwritten notebook referring to certain infamous "serial killers" throughout history. While the prosecution was allowed to allude to the contents of the book bag during its guilt phase presentation, the specifics of the "serial killer" references were not mentioned. Defendant contends the sentences of death were tainted by the trial court's error. In addition, defendant claims the prosecutor's effort to link defendant with "serial killers" was an attempt to induce the jury to make its decision between life and death in a manner prohibited by Rule 403. We disagree.

As noted above, Noble testified on defendant's behalf. On direct examination, Noble testified extensively about defendant's life from birth and early childhood. Defense counsel sought to elicit evidence of psychological mitigating circumstances from Noble. Noble testified defendant had five previous psychological evaluations. One of those evaluations indicated defendant in the past had tried to "make himself appear as a powerful criminal with a threatening, dangerous organization behind him." Noble testified about defendant's mental state at the time he committed these murders and about personality testing he conducted on defendant. Noble concluded defendant had a severe, complicated mixture of personality problems. He testified defendant's problems "might include ideas to do things that are violent."

This Court has previously held:

> [I]n order to prevent an arbitrary or erratic imposition of the death penalty, the state must be allowed to present, by competent relevant evidence, any aspect of a defendant's character or record and any of the circumstances of the offense that will substantially support the imposition of the death penalty.

State v. McDougall, 308 N.C. 1, 23-24, 301 S.E.2d 308, 322, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

Defendant claims the cross-examination of Noble about the materials contained in defendant's notebook violated Rule 403. However, as previously noted, the Rules of Evidence do not apply to sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3). Furthermore, in *Cummings II*, 346 N.C. 291, 488 S.E.2d 550, the defendant contended Rule 403 prohibited the introduction of certain evidence. This Court rejected that contention, holding the trial court was not required to conduct the Rule 403 balancing test because the Rules of Evidence were inapplicable. *Id.* at 330, 488 S.E.2d at 573.

As a result of the foregoing, the State was entitled to cross-examine Noble about how the entries in defendant's notebook supported or refuted Noble's findings. The prosecutor asked Noble whether "things like this would be indicative of what this man collects and thinks about." The list of serial killers defendant possessed near the time of the two murders was relevant for cross-examination of the mental health expert. The jury was entitled to know to what extent, if any, these materials entered into the expert's opinion regarding defendant's state of mind at the time of the crimes. Therefore, the trial court did not err by allowing this cross-examination. This assignment of error is overruled.

PROPORTIONALITY REVIEW

[11] Finally, defendant contends the death sentences imposed were excessive or disproportionate. Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, it is our statutory duty to ascertain as to each murder (1) whether the evidence supports the jury's findings of the aggravating circumstance or circumstances upon which the sentence of death was based; (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1997).

In the instant case, defendant was convicted of two counts of first-degree murder. In the first count, the Griffin murder, the conviction was based on the felony murder rule. In the second count, the Dunkley murder, the conviction was based on both premeditation and deliberation, and the felony murder rule. Following a capital sentenc-

ing proceeding as to each murder, the jury found the following submitted aggravating circumstance: this 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 other persons. N.C.G.S. § 15A-2000(e)(11). In the Dunkley murder, the jury further found the following submitted aggravating circumstance: this murder was committed while defendant was engaged in the commission of a robbery with a dangerous weapon. N.C.G.S. § 15A-2000(e)(5).

As to each murder, four statutory mitigating circumstances were submitted for the jury's consideration, but were not found: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); (3) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (4) 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). As to each murder, of the eleven nonstatutory mitigating circumstances submitted, four were found by the jury to exist and have mitigating value.

After a thorough review of the record, including the transcripts, briefs, and oral arguments, we conclude the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

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). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded 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 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*, 522 U.S. 900, 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 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 a 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 for the Dunkley murder under the theory of premeditation and deliberation. This Court has stated "[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, in each murder, the jury found the following aggravating circumstance: "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. *Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. The N.C.G.S. § 15A-2000(e)(11) course of conduct circumstance, which the jury found here, is among them. *Id.*

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 of proportionately review, we reemphasize that we will not undertake to discuss or cite all of those 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 this 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.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and the sentences of death recommended by the jury and entered by the trial court are not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. ROWLAND ANDREW HEDGEPETH

No. 578A97

(Filed 20 August 1999)

1. **Evidence— capital sentencing—prior violent outbursts and assaults—rebuttal of character and mitigating evidence**

The trial court did not err by permitting the State to rebut evidence of defendant's good character in a capital sentencing proceeding by evidence of defendant's prior violent outbursts and assaultive behavior. Furthermore, testimony by the victims of these violent outbursts and assaults regarding the circumstances of these incidents, which occurred prior to the time defendant received a brain injury in a 1976 fall, was admissible to rebut defendant's mitigating evidence that a personality disorder he had prior to 1976 was exacerbated by the 1976 fall and brain injury and that defendant's lack of control of his emotions resulting from the fall contributed to his shooting of the victim.

2. **Evidence— capital sentencing—mental health testimony—exclusion on redirect—same as direct evidence—harmless error**

Any error by the trial court in excluding in this capital sentencing proceeding redirect testimony by defendant's mental health expert that linked defendant's personality disorder and brain damage to his killing of the victim was not prejudicial to defendant where this testimony was essentially the same as testimony previously elicited through the direct examination of this witness and testimony previously elicited from a second mental health expert.

3. Sentencing— capital sentencing—mitigating circumstances—peremptory instructions not required

The trial court did not err in refusing to give defendant's requested peremptory instruction in a capital sentencing proceeding on the (f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturbance or the (f)(6) mitigating circumstance that defendant's ability to conform his conduct to the requirements of the law was impaired where evidence of defendant's mental health experts supporting these mitigating circumstances was controverted by the State's evidence tending to show that defendant's shooting of the victim was planned in advance and that defendant was cold, calm, and calculated in carrying out his plan. N.C.G.S. § 15A-2000(f)(2), (f)(6).

4. Sentencing— capital sentencing—instructions—distinction between statutory and nonstatutory mitigating circumstances

The trial court's instructions in a capital sentencing proceeding properly distinguished between statutory and nonstatutory mitigating circumstances, although the court did not specifically instruct that the jurors must give weight to statutory mitigating circumstances, where the trial court properly informed the jurors that, in order to find the existence of a statutory mitigating circumstance, one or more jurors must find that the circumstance is supported by a preponderance of the evidence, and that in order to find the existence of a nonstatutory mitigating circumstance, one or more jurors must (1) find by a preponderance of the evidence that the circumstance exists, and (2) find that the circumstance has mitigating value.

5. Evidence— lay opinion—victim alive after shooting

A lay opinion by a restaurant customer that he thought the victim was alive when he was wheeled out of the restaurant after being shot by defendant was properly admitted in this capital sentencing proceeding since it was an inference rationally based upon the perception of the witness and helped to clarify his testimony.

6. Jury— capital sentencing—jury selection—preference for death penalty—ability to follow law—denial of challenge for cause

The trial court did not abuse its discretion in denying defendant's challenge for cause of a prospective juror in a capital resentencing proceeding whose questionnaire responses and some of her responses on voir dire indicated that she preferred the death penalty for those convicted of murder where the trial court was able upon further questioning to discern that she was capable of putting aside her personal preference for the death penalty and of following the law.

7. Jury— capital sentencing—jury selection—difficulty finding mitigating circumstance—denial of challenge for cause

The trial court did not abuse its discretion in denying defendant's challenge for cause of a prospective juror in a capital resentencing proceeding who stated on voir dire that he would find it difficult to find a mitigating circumstance for a premeditated first-degree murder and indicated during questioning by the trial court that he was not certain that he could be fair and impartial where, upon further questioning by the trial court, the juror indicated that he could fairly and impartially apply the law, consider the evidence, and render a recommendation based on the evidence presented and the law as instructed by the trial court.

8. Jury— capital sentencing—jury selection—brain tumor—memory loss—denial of challenge for cause

The trial court did not abuse its discretion in denying defendant's challenge for cause of a prospective juror in a capital resentencing proceeding who suffered from short-term memory loss as a result of an inoperable brain tumor where the trial court determined the brain tumor and consequent memory loss had not interfered with the juror's full-time job as a loan officer and office supervisor and that note-taking during the trial would likely compensate for any impairment of his memory.

9. Jury— capital sentencing—jury selection—inability to return death penalty—excusal for cause

The trial court in a capital resentencing proceeding did not abuse its discretion by allowing the prosecutor's challenges for cause of two prospective jurors where the first juror's responses during voir dire strongly indicated his potential inability to con-

sider the death penalty, the second juror's responses revealed a complete unwillingness to impose the death penalty, and the trial court reasonably found that the personal views of both jurors would substantially impair their performance as jurors.

10. Capital sentencing— death penalty not disproportionate

Imposition of the death penalty on defendant for first-degree murder was not excessive or disproportionate where defendant was convicted on the theory of premeditation and deliberation; the jury found the aggravating circumstance that the murder of the victim was part of a course of conduct in which defendant engaged and which included another violent crime, the shooting of his estranged wife; defendant intended to kill both the victim and his estranged wife; a statement made by defendant at the police station indicated that his only regret was that he did not succeed in killing his estranged wife; and the course of conduct aggravating circumstance has 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 a judgment imposing a sentence of death entered by Smith (W. Osmond, III), J., at a new capital sentencing proceeding held at the 19 May 1997 Criminal Session of Superior Court, Halifax County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 11 May 1999.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Thomas K. Maher for defendant-appellant.

ORR, Justice.

On 23 February 1987, defendant Rowland Andrew Hedgepeth was indicted for the first-degree murder of Richard Casey and for assault with a deadly weapon with intent to kill inflicting serious injury on Beverly Hedgepeth, defendant's estranged wife. In October of 1987, defendant was tried capitally to a jury and found guilty. After a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial judge entered judgment accordingly. On appeal, we affirmed the murder conviction but found reversible error in the sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Accordingly, we vacated the sentence of death and remanded for a new capital

sentencing proceeding. *State v. Hedgepeth*, 330 N.C. 38, 409 S.E.2d 309 (1991).

The new capital sentencing proceeding was held at the 19 May 1997 Criminal Session of Superior Court, Halifax County. The jury found the aggravating circumstance that the murder was part of a course of conduct in which defendant engaged, including defendant's commission of other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11) (1997). The jury also found the statutory mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and seven nonstatutory mitigating circumstances. After determining that the aggravating circumstance found outweighed the mitigating circumstances found and that it was sufficiently substantial to call for imposition of the death penalty, the jury recommended a sentence of death for the first-degree murder conviction, and the trial judge entered judgment accordingly.

Defendant appeals as of right from the sentence of death. After thorough consideration of the assignments of error brought forth on appeal by defendant, the transcript of the proceeding, the record on appeal, the briefs, and oral arguments, we hold that defendant received a fair capital sentencing proceeding, free from prejudicial error, and that the sentence of death is not disproportionate.

Because the facts were presented fully in our earlier opinion, *State v. Hedgepeth*, 330 N.C. 38, 409 S.E.2d 309, we restate them here only as necessary to address and determine the issues presented in this appeal. At the new sentencing hearing, the State presented evidence tending to show that Beverly Hedgepeth and defendant married in 1980 and separated in 1986. On 13 February 1987, Mrs. Hedgepeth; Richard Casey; Dennis Morgan; and Dennis Morgan's wife, Ruth Morgan, went to a Howard Johnson's restaurant for breakfast after attending a dance. At the time of the sentencing rehearing, Mrs. Hedgepeth had remarried. She is referred to as Ms. Jolly in the transcript. They were seated at a booth when defendant entered the restaurant and sat in a booth adjacent to theirs.

Because Mr. Morgan had noticed the handle of a gun sticking out from under defendant's coat as defendant entered the restaurant, he rose and sat in the booth with defendant. According to Mr. Morgan, defendant was angry and told Mr. Morgan, *inter alia*, that he loved Mrs. Hedgepeth; "that Ricky Casey had slept with every woman in

Roanoke Rapids" but would not sleep with Mrs. Hedgepeth that night; and that he was going to kill Casey, Mrs. Hedgepeth, and himself. In the course of their conversation, Mr. Morgan informed defendant that Mrs. Hedgepeth's first husband had raped a child and subsequently killed himself. Defendant became more upset because he had not previously been informed of this occurrence.

A short time later, defendant approached the booth where Mrs. Hedgepeth, Casey, and Mrs. Morgan sat and asked Casey to step outside the restaurant. After Casey told defendant that he did not want any trouble, defendant replied, "Let me show you trouble" or "this is trouble"; pulled out the gun; and fired several times, killing Casey and wounding Mrs. Hedgepeth.

The defense, in mitigation, presented evidence by defendant's brother Billy Hedgepeth, who testified about defendant's childhood. Billy testified, among other things, that defendant's parents raised three children, including Billy and defendant. For a time, both parents worked in a cotton mill. Later, defendant's father became a construction worker. Defendant's father was a "weekend drunk."

Billy Hedgepeth testified that in 1976 defendant fell from a three-story building and suffered head injuries. As a result, defendant was out of work for a year or more and was unable to return to his former position. From the late 1970s to the early 1980s, Billy and defendant worked at construction sites in Ashland, Virginia; Good Hope, Louisiana; and Georgetown, South Carolina. Defendant worked in Louisiana for six or seven months of the time he was married to Mrs. Hedgepeth and sent all his pay except what he needed to live on home to Mrs. Hedgepeth. Defendant had a good relationship with the son born of his union with Mrs. Hedgepeth and was supportive of Mrs. Hedgepeth's daughter from her previous marriage.

Dr. Joseph Neil Ortego, a board-certified psychiatrist and neurologist, testified based on his review of twelve reports of examinations of defendant, including school records and hospital records, and his two-hour evaluation of defendant. Dr. Ortego's testimony included his reading into the record a report prepared by him. In his report, Dr. Ortego concluded that defendant has a mixed personality disorder, is alcohol dependent and has permanent structural and functional brain damage as a result of the head injury. Dr. Ortega, reading from his report, testified that defendant's brain damage dramatically changed his degree of aggressiveness, rage, and inhibition when he was intoxicated, impairing his ability to control his emotions.

Dr. Ortego contrasted defendant's 1973 preinjury antisocial behavior when he had separated from his first wife with two incidents after the injury: defendant's behavior after he separated from Janis Hovis, a former girlfriend who once lived with him, and defendant's behavior on the night of 13 February 1987. In explaining defendant's behavior on the night of 13 February 1987, Dr. Ortego testified that "at the point when [defendant] was intoxicated and enraged his ability to appreciate the criminality and the consequences [of his actions was] very much impaired."

Dr. Helen Rogers, a clinical psychologist with a specialty in clinical neuropsychology, testified that she conducted a five-to six-hour neuropsychological evaluation that consisted of a battery of tests designed to gauge brain function. Dr. Rogers' evaluation of defendant indicated "impairment in memory, verbal memory performance and a variety of difficulties in areas that suggest frontal lobe damage." Dr. Rogers also reviewed other medical records of defendant's, including a report prepared by the North Carolina Department of Correction in 1980 and one prepared at Dorothea Dix Hospital in March 1987. Dr. Rogers further testified that a person with frontal lobe injury would be "more vulnerable to the effects of any kind of stress [including] chemical stressors like . . . alcohol."

The State presented rebuttal evidence tending to show the following:

Over defendant's objection, the State presented rebuttal evidence of defendant's prior bad acts. Defendant's first wife, Donna Rice, testified to incidences of defendant's abusive behavior towards her and her uncle, Clyde Hargrave. Rice testified that on one occasion, defendant struck her after forcing her to leave an evening program at the elementary school where she was employed.

Rice testified further that after she left defendant in June 1973, she moved in with her grandmother. When defendant called and announced that he was coming to get her, Rice summoned her uncle, Clyde Hargrave, to protect her. When Hargrave informed defendant that Rice did not wish to go with him, defendant struck Hargrave. After Hargrave obtained a warrant for defendant's arrest, defendant attacked him again.

Hargrave also testified to the June 1973 incident in which defendant assaulted him. Carlon Nicholson, another of Rice's uncles, testified that a week after the incident in which Hargrave was assaulted,

defendant appealed to him for help in getting Rice back. Nicholson testified that when he refused defendant's request for help, defendant struck him.

Vicky Proctor, a former girlfriend of defendant's, testified that prior to defendant's head injury, defendant once took her out of a van and assaulted her in the street. On another occasion, she sustained injuries when she jumped out of a moving car that defendant was driving after he began beating her.

Several witnesses testified to a 10 August 1979 incident in which defendant chased Janet Hovis, who had been living with defendant at the Henry Street Apartments for several months. Defendant then got into his car and drove towards two of his neighbors who were standing in front of some apartments. He drove over the curb and onto the cement steps of an apartment, pinning two people between his car and an apartment door. Defendant then got out of his car, grabbed one of the neighbors by her throat, threatening to kill her. He eventually got back into his car and left the scene.

[1] On appeal, defendant first argues that the trial court erred by allowing the State to introduce unfairly prejudicial evidence of prior bad acts committed by defendant. In mitigation, through the expert testimony of Drs. Rogers and Ortego and through the testimony of Billy Hedgepeth, defendant presented evidence that a personality disorder he had prior to 1976 was exacerbated by the brain injury he suffered in the 1976 fall and that defendant's lack of control of his emotions resulting from the fall contributed to the shooting. Defendant argues that because this evidence was not offered to show that defendant had been nonviolent prior to the fall and because defendant did not attempt to rely on good character as a mitigating circumstance, evidence of defendant's assaultive behavior was not permissible rebuttal under N.C.G.S. § 8C-1, Rule 404.

Defendant contends that evidence of his violent outbursts did not rebut mitigating evidence of his personality disorder and that evidence of his violent outburst in 1979 was not logically relevant in that it occurred after his head injury and, therefore, could not rebut defendant's evidence that his brain injury affected his impulse control and susceptibility to alcohol. Furthermore, he argues that the trial court's admission of extensive evidence of his violent acts was inflammatory and unfairly prejudicial and should have been excluded under Rule 403 of the North Carolina Rules of Evidence.

"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. Atkins*, 349 N.C. 62, 77, 505 S.E.2d 97, 107 (1998), *cert. denied*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 3732 (1999). Because the Rules of Evidence do not apply in capital sentencing proceedings, N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992), "a trial court has great discretion to admit any evidence relevant to sentencing." *State v. Thomas*, 350 N.C. 315, 359, 514 S.E.2d 486, 513 (1999). "Any evidence that the trial court deems relevant to sentencing may be introduced in the sentencing proceeding." *State v. Perkins*, 345 N.C. 254, 283-84, 481 S.E.2d 25, 38, *cert. denied*, — U.S. —, 139 L. Ed. 2d 64 (1997).

In *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995), we explained that in a capital sentencing proceeding,

> "the state may not in its case in chief offer evidence of defendant's bad character. A defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in section (f) of the statute. Often this may be evidence of his good character. The state should be able to, and we hold it may, offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence, including defendant's good character."

Id. at 120, 449 S.E.2d at 740 (quoting *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997)) (citation omitted).

Here, defendant proffered some evidence of his good character. Through Billy Hedgepeth's testimony particularly, a portrait emerged of defendant as a good father and stepfather and a devoted husband who worked hard, got along with his co-workers, and provided for his family. We conclude that the trial court did not abuse its discretion in allowing the State to rebut this evidence of defendant's good character.

The transcript reveals that the trial court conducted *voir dire* to determine the admissibility of the evidence to be presented by Donna Nicholson Rice, Clyde Hargrave, and Vicky Proctor and concluded

that the evidence was relevant and admissible rebuttal evidence. The trial court also conducted inquiry as to the admissibility of the testimony of several witnesses to the Hovis incident and concluded that their testimony was admissible. We also cannot conclude that the trial court abused its discretion in admitting evidence of defendant's prior violent outbursts to rebut the testimony in mitigation of Drs. Rogers and Ortego. Since their evidence attempted to explain the impact of defendant's brain injury on his assaultive behavior, evidence regarding the circumstances surrounding these incidents as testified to by the victims of this behavior was appropriate on rebuttal. This assignment of error is overruled.

Furthermore, in *State v. Williams*, 350 N.C. 1, 510 S.E.2d 626 (1999), we addressed a similar issue. In *Williams*, the defendant argued that the trial court erred in allowing details of his prior criminal activity into evidence in his capital sentencing proceeding. As we stated in *Williams*, "[o]nce any evidence is introduced in a capital sentencing proceeding tending to show a history of prior criminal activity by defendant, defendant and the State are free to present all evidence available concerning the extent and significance of that history." *Id.* at 12, 510 S.E.2d at 634. Certainly, as in *Williams*, once defendant in the case *sub judice* proffered evidence of his prior violent outbursts, the State was free to offer a more comprehensive account of that assaultive behavior. We, therefore, conclude that the trial court did not err in allowing the testimony at issue.

Rule 403 of the North Carolina Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992). We have consistently noted that " '[n]ecessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree.' " *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 512-13 (1996) (quoting *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994)). It is also well established that "the exclusion of evidence under the balancing test of Rule 403 . . . is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Here, the trial court found that the probative value of the evidence was not outweighed by the danger of unfair prejudice. We cannot conclude that the trial court abused its discretion in allowing evidence of defendant's prior violent acts, and we therefore reject defendant's contention that the probative value of the evidence of his prior violent acts was substantially outweighed by the danger of unfair prejudice under Rule 403.

[2] In his next assignment of error, defendant contends that the trial court erred in excluding expert testimony that linked defendant's personality disorder and brain damage to the killing of Casey. During redirect examination and outside the presence of the jury, the following exchange occurred between defense counsel and Dr. Rogers:

> Q. Dr. Rogers, in your professional opinion did the defendant's brain damage contribute to his commission of the crime for which he's been convicted, that is, the murder of Richard Casey?
>
> A. Yes.
>
> Q. Excuse me?
>
> A. Yes.
>
> Q. And what is the basis for that opinion?
>
> A. That a compromised brain particularly when matched with alcohol and under stress is much more likely to respond impulsively and not be able to inhibit reaction.

The State objected, arguing that the question of whether defendant's injury contributed to the commission of the crime called for a legal conclusion, and the trial court sustained the State's objection.

Defendant argues that because Dr. Roger's testimony explained the link between defendant's medical condition and the commission of the crime, it was relevant, mitigating evidence, and the trial court's refusal to admit it was constitutional error. In sustaining the objection, the trial court duly noted that the question was being asked on redirect and that the testimony had previously been elicited from the witness.

On redirect examination of a witness, "the calling party is ordinarily not permitted to . . . have the direct testimony repeated." *State v. Weeks*, 322 N.C. 152, 169, 367 S.E.2d 895, 905 (1988). Here, the testimony defendant attempted to elicit from Dr. Rogers is essentially

the same as testimony previously elicited through direct examination of Dr. Rogers and testimony previously elicited from Dr. Ortego. Even assuming *arguendo* that the trial court erred, any prejudice to defendant is not sufficient so as to entitle him to a new sentencing hearing.

[3] Defendant next contends that the trial court erred in refusing to give the requested peremptory instruction that the murder was committed while defendant was under the influence of a mental or emotional disturbance and that defendant's ability to conform his conduct to the requirements of the law was impaired as set forth in N.C.G.S. § 15A-2000(f)(2) and (f)(6), respectively. Even though the trial court refused to give the requested peremptory instruction on the (f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, one or more of the jurors still found it to exist; however, none of the jurors found the (f)(6) mitigator that defendant's ability to conform his conduct to the law was impaired.

Defendant argues that the facts in the instant case are similar to those in *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994). In *Holden*, we held that the defendant was entitled to a new capital sentencing proceeding because the trial court refused to give a peremptory instruction to the jury on the (f)(2) mitigating circumstance despite the fact that the defendant presented uncontroverted evidence that the defendant suffered a mental or emotional disturbance at the time of the murder.

"[A] trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence." *State v. Adams*, 347 N.C. 48, 70, 490 S.E.2d 220, 232 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 878 (1998). "If the evidence supporting the circumstance is controverted or is not manifestly credible, the trial court should not give the peremptory instruction." *State v. Bishop*, 343 N.C. 518, 557, 472 S.E.2d 842, 863 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). Furthermore, "[t]he trial court's refusal to give the peremptory instruction does not prevent defendant from presenting, or the jury from considering, any evidence in support of the mitigating circumstance." *Id.*

Here, defendant's evidence supporting the (f)(2) and (f)(6) mitigating circumstances was in fact controverted. Dr. Ortego and Dr. Rogers testified that the brain injury defendant suffered in the 1976

fall resulted in defendant's lack of control of his emotions when enraged and intoxicated, which contributed to the shooting. While the testimony of Dr. Ortego and Dr. Rogers supported the (f)(2) and (f)(6) mitigating circumstances, the State presented evidence to the contrary.

The State's evidence tended to show that the shooting of Casey and Mrs. Hedgepeth was planned in advance and that defendant was cold, calm, and calculated in carrying out his plan. There is evidence that he was neither enraged nor intoxicated at the time of the shooting. For example, after defendant informed Mr. Morgan that he intended to kill Casey and Mrs. Hedgepeth, Mr. Morgan suggested that defendant think about what he was doing. Defendant responded that "he had been thinking about it for several months or seven months." Defendant selectively shot only Casey and Mrs. Hedgepeth. Furthermore, Mrs. Hedgepeth testified that when defendant fired the first shot, his face looked calm and he did not appear to be intoxicated. Detective David Brown of the Roanoke Rapids Police Department, who apprehended defendant after the shooting, testified that defendant was not intoxicated.

In *State v. Neal*, 346 N.C. 608, 487 S.E.2d 734 (1997), *cert. denied*, — U.S. —, 140 L. Ed. 2d 131 (1998), we concluded that a peremptory instruction was inappropriate because the evidence surrounding the issue was conflicting. Because we conclude that the evidence as to the (f)(2) and (f)(6) mitigating circumstance was conflicting, we overrule this assignment of error.

[4] In his next assignment of error, defendant contends that the trial court committed plain error in not instructing the jurors that they must give weight to statutory mitigating circumstances and in leading the jurors to believe they could give no weight to statutory mitigating circumstances. Defendant argues that the trial court's instruction to the jurors that they were "the sole judges of the weight to be given to any individual circumstance . . . , whether aggravating or mitigating," along with the trial court's failure to inform the jurors that statutory mitigating circumstances must be given mitigating weight, deprived defendant of his constitutional right to have the jury give mitigating effect to the evidence of his mental and emotional disturbance and to his impaired capacity to conform his conduct to the requirements of the law.

"If a juror determines that a statutory mitigating circumstance exists, . . . the juror must give that circumstance mitigating value. The

General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value." *State v. Jaynes*, 342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995) (citations omitted), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). In *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996), we found reversible error where the jury was "thrice instructed . . . to decide whether any of the sixty-one mitigating circumstances had mitigating value."

Here, the trial court instructed the jury with regard to the (f)(2) and (f)(6) mitigating circumstances in part as follows:

> If one or more of you finds by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.

As to nonstatutory circumstances, the trial court instructed the jury as follows:

> You should also consider the following circumstances arising from the evidence which you find to have mitigating value. If one or more of you finds by a preponderance of the evidence that any of the following circumstances exist and also are deemed by you to having [sic] mitigating value, you would so indicate by having your foreperson write, "Yes," in the space provided. If none of you finds the circumstance to exist, or if none of you deems it to have mitigating value, you would so indicate by having your foreperson write, "No," in that space.

With respect to the statutory catchall mitigating circumstance, the trial court instructed the jury as follows:

> If one or more of you so finds by a preponderance of the evidence you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds any such circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.

These instructions are consistent with the pattern jury instructions for separate capital sentencing proceedings. *See* N.C.P.I.—Crim. 150.10 (1996) (amended June 1997).

In *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3748 (1999), we distinguished the jury instructions in question as to mitigating circumstances, which were in form and content substantially similar to the ones in question in the instant case, from those in *Jaynes*. We explained that "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." *Id.* at 55, 506 S.E.2d at 485. Here, as in *Davis*,

> 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.

Id. at 56, 506 S.E.2d at 485. For the reasons stated in *Davis*, we conclude that the jury instructions in the instant case did not constitute error.

[5] Defendant next contends that the trial court erred in allowing a lay opinion that the victim remained alive for a period of time following the shooting. On direct examination, Mike Lucas, a customer in the restaurant at the time of the shooting, testified in part as follows:

> Q. Were you there at Howard Johnson's when the EMS, Emergency Medical Services arrived?
>
> A. Yes, sir.
>
> Q. And what, if anything, do you recall about their arrival, what they did while they were there?
>
> A. Well, I was back out of the way of and I know they went directly straight to that corner and I couldn't see what was happening in that corner when the EMT's arrived, but I know they were working on Mr. Casey and I saw him being wheeled out of there on a stretcher.

Q. Do you know whether he was dead or alive at that time?

A. I think he was alive when he went by.

Defense counsel objected and moved to strike. The trial court overruled the objection.

Defendant argues that Lucas was not competent to assess whether Casey was alive when he was wheeled out of the restaurant. Allowing this testimony, defendant contends, was prejudicial error entitling defendant to a new capital sentencing proceeding because it led the jury to believe that Casey survived the shooting and suffered until the time of his death.

"The Rules of Evidence, although not applicable to capital sentencing proceedings, nevertheless may be relied upon for guidance when determining questions of reliability and relevance." *State v. Strickland*, 346 N.C. 443, 460, 488 S.E.2d 194, 204 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 757 (1998). Rule 701 of the North Carolina Rules of Evidence provides:

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

N.C.G.S. § 8C-1, Rule 701 (1992).

The Court of Appeals' decision in *State v. McCain*, 6 N.C. App. 558, 170 S.E.2d 531 (1969), is also instructive. There, the court held that a detective's opinion that the deceased was dead at the crime scene was admissible. The court stated, "The question of whether a person is living or dead is not wholly scientific or of such a nature as to render valueless any opinion but that of an expert. Common inferences derived from the appearance, condition, or mental or physical state of persons . . . are proper subjects of opinion testimony by non-experts." *Id.* at 561, 170 S.E.2d at 533 (citation omitted). Here, the testimony of Lucas that "I think he was alive" when he was wheeled out of the restaurant was an inference rationally based on Lucas' perception and helped to clarify his testimony. Thus, we conclude that Lucas' statement was properly admitted.

Defendant next assigns error to the trial court's denial of his challenge for cause to two prospective jurors who he argues could not serve impartially and a prospective juror who suffered from a physi-

cal infirmity. Defendant contends that jurors Denise Boone and Charles Britton should have been excused because of their views on capital punishment and that juror Richard Thiele should have been excused because he suffered from memory loss. Defendant contends that the trial court's refusal to strike Boone, Britton, and Thiele for cause violated defendant's rights under the Fourteenth Amendment to the United States Constitution.

[6] In *voir dire* in response to questioning by the State, Boone stated that she would listen to the evidence and keep an open mind. However, in filling out the jury questionnaire, Boone indicated that her view on the death penalty was that someone who kills someone should be executed. Defense counsel questioned Boone based on her responses in the questionnaire in part as follows:

> Q. Now, is it your opinion that if you go out and kill somebody, that is, commit murder, that you ought to get the death penalty?
>
> A. Yes.
>
> Q. And would you be inclined to vote for the death penalty in this first degree murder case if you were on the jury?
>
> A. Yes.
>
> Q. Your answer is "yes?"
>
> A. Yes.
>
> Q. Is that in preference, that is, over top of life imprisonment?
>
> A. No.
>
> Q. Which would you prefer in this case, the death penalty or life imprisonment?

After the prosecutor objected and the trial court overruled the objection, the dialogue continued as follows:

> A. Death.
>
> Q. Your preference is death . . .
>
> A. (Interjected) Yes.
>
> Q. . . . in a first degree murder case?
>
> A. Yes.

After defense counsel further questioned Boone, he challenged her for cause. The trial court then questioned Boone in part as follows:

> THE COURT: Is your view of preference for the death penalty so strong that it would cause you to automatically vote for the death penalty and against life in every first degree murder case without regard to the evidence presented or the law?
>
> MS. BOONE: No.
>
> THE COURT: Is your feeling of preference to the death penalty such that it would prevent or substantially impair your ability to follow your duties as a juror and to follow the law of North Carolina?
>
> MS. BOONE: Yes.
>
> THE COURT: You're saying that your preference for the death penalty is so strong that it would prevent or impair your ability to follow the law?
>
> MS. BOONE: Yes.
>
> THE COURT: Are you saying to me then that you feel so strongly about the death penalty that if the law tells you to consider both possible punishments that it would impair or prevent your ability to follow the law?
>
> MS. BOONE: No.
>
> THE COURT: Are your feelings about the death penalty in favor of the death penalty so strong that regardless of the facts and circumstances—let me back up. Taking into account your feelings about the death penalty and your preference as you expressed it, would you be able to render a verdict in this case with respect to the law of North Carolina, in accordance with the law of North Carolina?
>
> MS. BOONE: Yes.

In response to further questioning by the trial court, Ms. Boone indicated that she could follow the law and keep an open mind until she heard all the evidence and the trial court's instructions, but upon further questioning by defense counsel, the following exchange occurred:

Q. Are you saying to me that if you serve on this jury, you will vote for the death penalty in this case because this man has been convicted of murder?

A. Yes.

Q. You're saying that. And is it your testimony to me now that without hearing anything but knowing he's convicted, been convicted, you favor the death penalty in this case, is that what you're saying?

A. Yes.

In an attempt to reconcile and clarify Boone's responses, the trial court questioned Boone again as follows:

THE COURT: Are your feelings in favor of the death penalty so strong that you cannot consider life imprisonment?

MS. BOONE: No.

THE COURT: Are your feelings in favor of the death penalty so strong that it would substantially impair your ability to consider life imprisonment?

MS. BOONE: No.

After questioning Boone further, the trial court denied defendant's challenge for cause, and defendant excused Boone peremptorily.

"[T]o 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) [(quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980))]." *State v. Bowman*, 349 N.C. 459, 469-70, 509 S.E.2d 428, 435 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3784 (1999). "Absent an abuse of discretion, it is the trial court's decision as to whether [a] prospective juror's beliefs would affect [his or] her performance as a juror." *Id.* at 471, 509 S.E.2d at 436.

"The trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial." *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997). While Boone's

questionnaire responses and some of her responses during *voir dire* indicated that she preferred the death penalty for those convicted of murder, the trial court was able upon further questioning to discern that she was capable of putting aside her personal preference for the death penalty and of following the law. We conclude that the trial court did not abuse its discretion in denying defendant's challenge for cause of prospective juror Boone.

[7] During *voir dire*, defense counsel questioned prospective juror Britton as follows:

> Q. My question was, would you find it difficult, in view of your attitude, would you find it difficult to recommend the existence of mitigating circumstances in this case or any case?
>
> A. I can't answer fully until I've heard everything, but I believe that in my personal beliefs I believe that premeditated murder, it would be hard for me to find a mitigating circumstance for that.
>
> Q. All right, sir. And in view of that response, would you say to me that in a first degree premeditated murder case that you would find it difficult to recommend the existence of a mitigating circumstance?
>
> A. Yes, sir, that's a true statement.
>
> Q. All right. And on the other hand, you would not find it difficult to recommend the existence of an aggravating circumstance?
>
> A. No, sir.

During further questioning by the trial court, Britton stated that he would do his best to follow the law as instructed by the trial court, that he believed that he could be a fair and impartial juror in the case, but that he was not certain that he could be fair and impartial. Upon further questioning from the trial court, Britton indicated that he could fairly and impartially apply the law, consider the evidence, and render a recommendation in the case based on the evidence presented and the law as instructed by the trial court.

We have previously stated that " 'in a case . . . in which a juror's answers show that he could not follow the law as given . . . by the judge in his instructions to the jury, it is error not to excuse such a juror.' " *State v. Cunningham*, 333 N.C. 744, 754, 429 S.E.2d 718, 723 (1993) (quoting *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992)) (alterations in original). Britton's answers, however, do

not sufficiently show that he could not follow the law. To the contrary, they evince a willingness to follow the law as instructed by the trial court. We, therefore, cannot conclude that the trial court abused its discretion in denying defendant's challenge for cause of prospective juror Britton.

[8] Under N.C.G.S. § 15A-1212(2), a party may challenge a juror for cause on the grounds that the juror "[i]s incapable by reason of mental or physical infirmity of rendering jury service." N.C.G.S. § 15A-1212(2) (1997). Defendant argues that prospective juror Thiele suffered from memory loss that rendered him incompetent to serve as a juror.

During *voir dire*, in response to the prosecutor's questioning, Thiele discussed the fact that he was under treatment for an inoperable brain tumor. The following exchange later occurred between defense counsel and Thiele during *voir dire*:

> Q. . . . Now, as a result of your brain tumor, have you experienced any mental difficulty?
>
> A. Memory, short-term memory.
>
> Q. And does that have any effect on your attention, your ability to pay attention or your ability to focus your attention?
>
> A. I don't believe so.
>
> Q. All right. But it might have an impact on your ability to remember?
>
> A. Possibly, I mean it's hard to answer that.

After defense counsel challenged Thiele for cause, the trial court questioned Thiele further about his memory loss in part as follows:

> THE COURT: . . . Do you feel that you have any memory loss that would impair or affect your ability to serve on a jury knowing what a jury is expected to do?
>
> MR. THIELE: It's hard to say. I would try to as best—to the best of my ability. I don't know how else to answer that.
>
> THE COURT: I certainly understand that, but what do you think the best of your ability will do in that regard? Thinking about what you do in your other activities such as work, whether it's remembering lectures or sermons or other things you do in church or family, other things as well?

MR. THIELE: I hope that it wouldn't affect it, but that's a hard question for me to answer.

THE COURT: Have you noticed any significant change in that since, that is, has it gotten worse as time has gone on in the last year and a half, gotten better, remain [sic] the same, or is it something you noticed before the diagnosis?

MR. THIELE: I think it's gradual worsening.

THE COURT: You said it's not affecting your ability to concentrate on matters, that is . . . .

MR. THIELE: (Interjected) I can do the tasks at hand.

THE COURT: And you're not having any trouble maintaining your attention on tasks at hand as you said?

MR. THIELE: That's correct.

In response to the trial court's questioning, Mr. Thiele went on to state that as a consequence of his memory loss, he had "to pay more attention to scheduling and writing things down" but that he was "functioning all right." He also stated that his memory loss sometimes caused him to lack confidence in his ability to recall facts. On further questioning by the trial court, Thiele stated that the ability to take notes during the trial would be helpful to him.

It is well settled that "[t]he trial court's ruling on a challenge for cause will not be overturned absent abuse of discretion." *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991). In the case *sub judice*, the trial court seemed convinced that Thiele's brain tumor and consequent loss of memory had not interfered with his full-time job as a loan officer and office supervisor and that note-taking during the trial would likely compensate for any impairment of his memory. After carefully examining Thiele, the trial court, in its discretion, was satisfied that he was competent to render jury service. Consequently, the trial court rejected defendant's challenge of Thiele for cause and denied defendant's request for an additional peremptory challenge.

We conclude that the denial of defendant's challenges for cause of prospective jurors Boone, Britton, and Thiele did not constitute an abuse of discretion. This assignment of error is overruled.

[9] Defendant next contends that the trial court erred in excusing prospective jurors Harold Vick and Frank Luis for cause. Defendant

argues that these prospective jurors should not have been excused for cause because although they stated that they would be uncomfortable imposing the death penalty, they also expressed support for the death penalty. Defendant contends that the trial court's excusing Vick and Luis for cause violated defendant's constitutional rights.

When, during *voir dire*, the prosecutor asked prospective juror Vick how he felt about the death penalty, Vick initially answered, "I don't quite know how to answer that." When asked again, he responded, "Well, I guess it would depend on the case." The following exchange occurred as the prosecutor questioned Vick further:

> Q. . . . You understand there are some people and there's nothing wrong with this, there are some people who would say, well, yeah, I guess I believe in it, but I could never sit on a jury where that was one of the choices. You understand? Do you feel that way, you say, you know, I believe in the death penalty or it might be all right in some cases but I would never vote to impose it on anybody?
>
> A. Well, I would say I believe in it but like you say when you get right down to it, when a person's life is in your hands regardless of what they've done, you know, it might be difficult.

When the trial court questioned Vick further, the following exchange occurred:

> Q. . . . But every juror who sits in there has got to be willing to do both [recommend the death penalty or life imprisonment] . . . , you understand what I'm saying?
>
> A. Uh huh.
>
> Q. Okay. Do you feel you're that type person, that you're willing to consider both punishments?
>
> A. I would say so.
>
> Q. Have you felt that the death penalty was a necessary law, have you felt that most of your adult life?
>
> A. Is this a yes or no question?
>
> Q. Yes, sir.
>
> A. Well, you got to draw the line somewhere, so I would have to say yes.

Later, the prosecutor asked Vick the following question:

> Q. If the State of North Carolina was to present evidence in this case and the defendant was to present evidence, if they chose, if after hearing this evidence and the law that the Judge gives you if you were satisfied that the death penalty ought to be imposed in this case right here, could you, yourself, recommend the death penalty knowing that the Court would be bound and would follow your recommendation?

After the trial court overruled an objection by defense counsel, Vick answered as follows, and the following exchange took place:

> A. I don't know that.
>
> Q. Can you explain why you don't know that?
>
> A. It's like I told you while ago, you know, when you take another human's life into your hands, I'd be doing the same thing that he did or if he did it, or whatever, you know. Right or wrong, I still would have to live with that.
>
> Q. Well then, would it be fair to say that you would just be—for whatever reason you feel that you just could not because of your views about imposing the death penalty, that you simply could not vote to impose the death penalty in this case no matter what the evidence is?
>
> A. I won't say I could not, but I could say it would be difficult.

After the prosecutor challenged Vick for cause, the court questioned Vick in part as follows:

> THE COURT: . . . Are your feelings such that you could ever vote in favor of a death penalty?
>
> MR. VICK: I really think that would depend on the circumstances.
>
> THE COURT: So, is that saying to me that there are circumstances under which you could vote for a death penalty?
>
> MR. VICK: Naturally, you know, if you know somebody that's involved in something it would be easier to vote or if you have feelings toward somebody that's been involved in something it would be easier. If it was a family member of mine it could be easier for me to vote for the death penalty, but people you don't

know, you know, it's—maybe it's just feelings. I'm trying to be honest again.

THE COURT: In that case that you gave an example of would that be a situation where maybe you wouldn't feel like you were being fair and impartial?

MR. VICK: Right.

THE COURT: Now, being a fair and impartial juror, are there circumstances under which you could vote in favor of a death penalty?

MR. VICK: I don't know that.

THE COURT: All right. Are your feelings about this such then that they would prevent or substantially impair your ability to perform your sworn duties as a juror?

MR. VICK: I would say so.

The trial court then granted the prosecutor's challenge for cause and ruled "that the feelings expressed by this juror indicate that his views are such that [they] would prevent or substantially impair his ability to perform his sworn duties as a juror and that he would not be qualified to serve."

During questioning by the prosecutor in the *voir dire* of prospective juror Luis, Luis stated his belief that the death penalty is "necessary in certain circumstances." During further questioning, after Luis was asked, over defense counsel's objection, whether he "could be part of the legal machinery which might bring the death penalty about in this particular case as a juror," the following exchange occurred:

A. Like you said, I believe in the death penalty but I don't know if I could, you know, be the one, you know, that says, well, he's sentenced to death, you know, that's a lot of responsibility.

Q. Right. Would you say that you've got mixed feelings about that?

A. Yeah.

Q. And you understand that's all right, that's fine, and all we want you to do is just be completely honest about what you could and couldn't do?

A. Right.

Q. You understand that in order for somebody to sit on this jury, okay, regardless of who it is, whether it's you or any other juror, they must be able to consider imposing the death penalty on this defendant, okay?

A. Right.

Q. And they must be willing to do it under certain circumstances and they must be willing to consider imposing a life sentence on this defendant and be willing to do it under certain circumstances? You understand what I mean?

A. Yes, I understand.

Q. Are you saying that you feel that you just couldn't do that?

A. I think so.

Q. Okay. Is that because even though you, even though you feel like the death penalty is a necessary law, you just feel that you couldn't vote to impose it on anybody?

A. Right.

After further questioning in which Luis unequivocally stated that, because of both personal and religious reasons, he could not vote to impose the death penalty on Hedgepeth or anyone else and acknowledged that his views on the death penalty would either prevent or substantially impair his ability to perform his duties as a juror, the prosecutor challenged Luis for cause. Defense counsel objected but did not request to examine the witness, and the trial court allowed the challenge for cause of Luis.

"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding [prospective jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968). Jurors, however, may be excluded for cause if their views on capital punishment would " 'prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath.' " *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams*, 448 U.S. at 45, 65 L. Ed. 2d at 589). "A prospective juror's bias or inability to follow the law does not have to be proven with unmistakable clarity, and the decision as to whether a juror's views would substantially impair the performance

of his [or her] duties is within the trial court's broad discretion." *State v. Gregory*, 340 N.C. 365, 394, 459 S.E.2d 638, 655 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

Here, prospective juror Vick's responses during *voir dire* strongly indicated his potential inability to consider the death penalty, while the responses of prospective juror Luis revealed a complete unwillingness to consider the death penalty. The trial court reasonably found that the personal views of both Vick and Luis would substantially impair their performance as jurors. Thus, we conclude that the trial court did not abuse its discretion in excusing prospective jurors Vick and Luis for cause.

PROPORTIONALITY REVIEW

Having found no error in the guilt-innocence phase in *State v. Hedgepeth*, 330 N.C. 38, 409 S.E.2d 309, and no error in defendant's new capital sentencing proceeding herein, we are required to review the record and determine (1) whether the record supports the aggravating circumstance found by the jury; (2) whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor"; and (3) whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). We engage in proportionality review as a safeguard "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).

Here, as noted above, the jury found the aggravating circumstance that the murder was part of a course of conduct in which defendant engaged, including defendant's commission of other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11). After meticulous review and careful deliberation, we conclude that the aggravating circumstance submitted to and found by the jury is fully supported by the record. We further conclude that there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or another arbitrary factor.

[10] Finally, we must consider whether imposition of the death penalty in defendant's case is disproportionate or excessive in comparison to similar cases. We note that on seven occasions, this court has concluded that the sentence of death was disproportionate. *State*

v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 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 has several characteristics that distinguish it from those cases in which we have determined the death penalty to be disproportionate. Here, in upholding defendant's conviction, we noted that "[t]here [was] plenary and convincing evidence of all elements of first-degree murder, including premeditation and deliberation." *Hedgepeth*, 330 N.C. at 46, 409 S.E.2d at 314. "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). Furthermore, not only did defendant intentionally kill Casey, he also assaulted Mrs. Hedgepeth with a deadly weapon with the intent to kill inflicting serious injury.

Of the cases in which we found the death penalty disproportionate, *Bondurant* and *Rogers* are the only two where the jury found the (e)(11) aggravating circumstance, found in the instant case, that the defendant engaged in a course of conduct which involved a crime of violence against another. In *Bondurant*, immediately after he shot the victim, the defendant directed the driver of the car in which he and the victim had been riding to go the hospital. This Court was impressed by the fact that "[i]n no other capital case among those in our proportionality pool did the defendant express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased." *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. Here, in fact, a news director testified that at the police station after the shooting, defendant looked at him; shrugged his shoulders; smirked; and said, "Man, I ran out of bullets." Such a statement strongly suggests that defendant's only regret was that he did not succeed in killing Mrs. Hedgepeth.

In *Rogers*, the only other case where the jury found the (e)(11) aggravating circumstance and in which we have found the death penalty disproportionate, the defendant mistakenly shot the victim

while attempting to shoot a friend of the victim's. Here, there was evidence that defendant had contemplated killing Casey and Mrs. Hedgepeth for months prior to the shooting. After comparing the case *sub judice* to the seven cases in which this Court has concluded that the sentence of death was disproportionate, we conclude that this case is not substantially similar to any of them.

We continue our inquiry by comparing this case to the cases in which this Court has found the death penalty to be proportionate. "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." *Davis*, 349 N.C. at 60, 506 S.E.2d at 488. As we noted in *Bowman*, 349 N.C. at 482, 509 S.E.2d at 442, the (e)(11) aggravating circumstance, found by the jury here, is one of "four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death." *See also 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 addition, "[a] single aggravating circumstance may outweigh a number of mitigating circumstances and may be sufficient to support a death sentence." *Id.* at 110, 446 S.E.2d at 566.

Here, the trial court submitted and the jury found the aggravating circumstance that the murder of Casey was part of a course of conduct in which defendant engaged and which included another violent crime, the shooting of Mrs. Hedgepeth. Defendant intended to kill both Casey and Mrs. Hedgepeth and succeeded in killing Casey. We conclude that this case is more similar to cases in which we have found the sentence of death to be proportionate than to those in which juries consistently have returned recommendations of life imprisonment. Based on the nature of this crime, we cannot conclude that the sentence of death is disproportionate or excessive.

Defendant received a fair capital sentencing proceeding, free from prejudicial error. Accordingly, we leave the judgment of the trial court undisturbed.

NO ERROR.

SMITH CHAPEL BAPTIST CHURCH; FELLOWSHIP BAPTIST CHURCH, INC.; LAYMAN'S CHAPEL BAPTIST CHURCH; AND CALVARY BAPTIST CHURCH OF DURHAM, NORTH CAROLINA v. CITY OF DURHAM, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 250PA97

(Filed 20 August 1999)

1. Cities and Towns— Stormwater Quality Management Program—funded by utility fees—statutory authority exceeded

The City of Durham's stormwater utility (SWU) ordinance and the fees charged thereunder were invalid as a matter of law because they exceeded the authority granted to the City through N.C.G.S. §§ 160A-311 and -314(a)(1). It is undisputed that the City's stormwater management program funded by the SWU is a fully comprehensive Stormwater Quality Management Program (SWQMP) with separate component parts, the majority of which are not used to fund and maintain the stormwater and storm sewer drainage systems in place, but to fund an EPA-regulated pollution prevention and control program which includes elements not directed at or used for providing a structural and natural stormwater and drainage system or directed at planning, maintaining, or implementing such facilities. The City choose not to fund the expenditures through the general fund and its SWU ordinance went well beyond the scope of authority granted under N.C.G.S. § 160-311 to construct and operate a structural and natural stormwater and drainage system. The rates, fees, and charges imposed far exceed the costs of providing a structural and natural stormwater drainage system as contemplated by the General Assembly in N.C.G.S. § 160A-314.

2. Cities and Towns— stormwater drainage—rate scheme—impervious areas

The rate scheme enacted by the City of Durham pursuant to a stormwater utility (SWU) ordinance was rationally related to the amount of runoff from each lot and was not an arbitrary exercise of the City's statutory authority. Although plaintiffs contended that the fees were illegal in that the impervious area method does not reasonably relate to the stormwater runoff of individual properties and forces consumers to involuntarily pay fees that are not reasonably commensurate with services fur-

nished, N.C.G.S. § 160A-314(a)(1) expressly authorized the City to base the SWU fees on impervious area of the property. It has been held that the test is not whether any particular customer has directly benefitted from the use of a discrete or particular component of the utility plant, but whether the municipal authority has acted arbitrarily in establishing its rates.

3. Damages and Remedies— stormwater utility fees—invalid—full refund plus interest

The trial court correctly held that plaintiffs in an action challenging stormwater utility (SWU) fees were entitled to a full refund plus interest where plaintiffs paid the fees under protest and the ordinance and fees were found invalid as a matter of law. A refund of the invalid fees in this action is similar to the common law doctrine of an action for money had and received.

Justice FRYE dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of a judgment entered by Manning, J., on 11 October 1996 and an amended judgment and order entered on 3 January 1997 in Superior Court, Durham County. Heard in the Supreme Court 19 November 1997; opinion filed 30 July 1998, 348 N.C. 632, 502 S.E.2d 364; said opinion superseded by this opinion filed 20 August 1999 upon the allowance of plaintiffs' petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure. Heard in the Supreme Court 8 February 1999.

Stam, Fordham & Danchi, P.A., by Paul Stam, Jr., and Henry C. Fordham, Jr., for plaintiff-appellants.

Office of the City Attorney, by Karen A. Sindelar, Assistant City Attorney, for defendant-appellee.

Hunton & Williams, by Charles D. Case; and J. Michael Carpenter, General Counsel, North Carolina Home Builders Association, on behalf of North Carolina Citizens for Business and Industry, North Carolina Pork Council, North Carolina Aggregates Association, and North Carolina Home Builders Association, amici curiae.

Ward and Smith, P.A., by Frank H. Sheffield, Jr., on behalf of Chatham County Agribusiness Council, amicus curiae.

North Carolina Farm Bureau Federation, by H. Julian Philpott, Jr., General Counsel, and Stephen A. Woodson, Associate General Counsel, amicus curiae.

North Carolina League of Municipalities, by Gregory F. Schwitzgebel III, Assistant General Counsel, amicus curiae.

City of Charlotte, N.C., by Robert E. Hagemann and Judith A. Starrett, Assistant City Attorneys; and Mecklenburg County, N.C., by Marvin A. Bethune, County Attorney, amici curiae.

Cumberland County, N.C., by Garris Neil Yarborough, County Attorney, Grainger R. Barrett, Senior Staff Attorney, and Karen Musgrave, Staff Attorney; and City of Fayetteville, N.C., by Robert Cogswell, City Attorney, amici curiae.

Michael F. Easley, Attorney General, by Daniel C. Oakley, Senior Deputy Attorney General, and Jennie Wilhelm Mau, Assistant Attorney General, on behalf of North Carolina Department of Environment and Natural Resources, amicus curiae.

WAINWRIGHT, Justice.

Stormwater runoff is rain or snowmelt that does not evaporate or penetrate the ground and is collected by storm drains that transport it to receiving waters.

In 1987, the United States Congress enacted an amendment to the Clean Water Act of 1972 (CWA) known as the Water Quality Act (WQA). *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987). The WQA represented the first major revision of the CWA since 1977, "clarifying certain areas of the law as well as granting new powers and responsibilities to the U.S. Environmental Protection Agency (EPA) and states." Lawrence R. Liebesman & Elliott P. Laws, *The Water Quality Act of 1987: A Major Step in Assuring the Quality of the Nation's Waters*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10311, 10312 (Aug. 1987).

The WQA requires, among other things, that cities of 100,000 or more in population obtain a National Pollutant Discharge Elimination System (NPDES) permit in order to discharge stormwater from their municipal storm sewer systems (MS4s) into the nation's waters. *Id.* at

10324; *see* WQA § 405, Pub. L. No. 100-4, 101 Stat. 69 (1994) (codified at 33 U.S.C. § 1342(p)(2)(D)). Any state desiring to administer its own permit program under the WQA may apply for permission to do so with the EPA. CWA § 402(b), Pub. L. No. 92-500, 86 Stat. 880, 880-81 (1972) (codified at 33 U.S.C. § 1342(b)). In 1975, North Carolina received approval from the EPA to administer its own permit program under the CWA and was granted permission to continue this program under the WQA. As such, article 21 of chapter 143 of the North Carolina General Statutes grants the North Carolina Department of Environment and Natural Resources (DENR) (formerly North Carolina Department of Environment, Health and Natural Resources) and the North Carolina Environmental Management Commission (EMC) the authority to administer this program. N.C.G.S. ch. 143, art. 21, pt. 1 (1993) (amended); *see* N.C.G.S. § 143-214.7(a) (authorizing the EMC to "develop and adopt a statewide plan with regard to establishing and enforcing stormwater rules for the purpose of protecting the surface waters of the State").

When Congress enacted the NPDES permitting program, it did not provide the states with funding to support these comprehensive stormwater management programs. N.C.G.S. § 160A-312(a) allows cities and towns to "acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens." N.C.G.S. § 160A-312(a) (1994). In an effort to partially support local MS4s, the General Assembly ratified a bill in 1989 titled "An Act to Authorize Local Governments to Construct and Operate Storm Drainage Systems as Public Enterprises and to Provide Local Governments With Funding and Taxing Authority to Finance the Construction and Operation of Storm Drainage Systems." Act of July 15, 1989, ch. 643, 1989 N.C. Sess. Laws 1763. As part of this Act, the General Assembly amended N.C.G.S. § 160A-311 to include in its definition of public enterprises "[s]tructural and natural stormwater and drainage systems of all types." *Id.* at 1770; *see* N.C.G.S. § 160A-311(10) (1994).

Defendant City of Durham (City), in response to the impending NPDES permitting requirements, employed outside consultants to assist in planning and preparing for the requirements that would accompany the NPDES permit application process. These consultants opined that in order to comply with EPA regulations in the NPDES permitting process, the City must develop a comprehensive Stormwater Quality Management Program (SWQMP). Furthermore,

the consultants recommended that the SWQMP not be funded through the City's general fund because it "is not a viable source of long-term funding" for the program because political factors constrain the City's willingness to increase property taxes.

On 6 June 1994, the City adopted ordinance number 10183, which created the City's stormwater management program. The ordinance provided for the creation of a stormwater utility (SWU) to finance the stormwater management plan and imposed a utility fee based on the impervious surfaces contained on an individual property. Durham, N.C., Code ch. 23, art. VIII, §§ 23-202, -203 (1994).

On 20 December 1994, plaintiffs filed a complaint in which they challenged the ordinance and the utility fees on several grounds, including the following: (1) the ordinance exceeds the City's enabling authority pursuant to N.C.G.S. §§ 160A-311 and -314, (2) the ordinance violates the express limitation on stormwater fees pursuant to N.C.G.S. § 160A-314(a1), and (3) the ordinance provides for utility fees that are not reasonably commensurate with services furnished. Following a nonjury trial, the trial court entered a judgment on 11 October 1996 in which it concluded that the ordinance and the utility fees were

> invalid as a matter of law in that they [were] operated and conducted in a manner that exceed[ed] the authority granted to the City . . . through [N.C.G.S. §§ 160A-311 and -314(a1)]. As a creature of the legislature, the City . . . may only act within its legislative authority as provided by the General Assembly of North Carolina. The City . . . has stepped far beyond that grant of authority here and the [SWU] Ordinance and fees charged thereby are declared invalid and unenforceable . . . .

On 24 October 1996, the City filed a motion for a new trial or, in the alternative, to amend the trial court's judgment on the ground that the evidence presented at trial was insufficient to support the trial court's conclusions with regard to which of the City's activities were related to stormwater infrastructure. On 26 November 1996, the trial court allowed the motion to reopen the case in order to take additional evidence "in the interest of justice." Thereafter, the trial court entered an amended judgment and order on 3 January 1997 in which it made additional findings of fact and conclusions of law but did not alter or amend its original judgment concluding that the City had operated its SWU in excess of its statutory authority.

The City filed a timely notice of appeal to the Court of Appeals from both the original 11 October 1996 judgment and the amended 3 January 1997 judgment and order. Subsequently, the City filed a petition for discretionary review prior to a determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31, which was allowed by this Court on 23 July 1997. Oral arguments were initially heard in this Court on 19 November 1997, and an opinion was filed on 30 July 1998 in which this Court upheld the City's SWU ordinance on constitutional grounds. *See Smith Chapel Baptist Church v. City of Durham*, 348 N.C. 632, 502 S.E.2d 364 (1998). This Court allowed plaintiffs' petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure on 30 September 1998 and now renders this opinion, which supersedes the previous opinion filed by this Court on 30 July 1998.

On appeal, we are presented with three principal issues: (1) whether the City exceeded its enabling authority by enacting the ordinance and the fees thereunder, (2) whether the impervious area method of calculating the fees is constitutionally permissible, and (3) whether the remedy applied by the trial court was proper.

[1] In deciding the first issue, we note that the City of Durham *chose* to establish a utility as the mechanism by which it would comply with the unfunded mandates of the Water Quality Act of 1987. Municipalities are authorized to establish and operate public enterprises like utilities pursuant to the statutory requirements of N.C.G.S. § 160A-311 and N.C.G.S. § 160A-314, which govern such public enterprises.

N.C.G.S. § 160A-314, which gives authority to fix and enforce rates, provides, in pertinent part:

> (a) A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the *use of* or the *services furnished* by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.
>
> (a1) . . . .
>
> The fees established under this subsection must be made applicable throughout the area of the city. Schedules of rates, fees, charges, and penalties for providing *structural and natural stormwater* and *drainage system service* may vary according to

> whether the *property served* is residential, commercial, or industrial property, the property's use, the size of the property, the area of impervious surfaces on the property, the quantity and quality of the runoff from the property, the characteristics of the watershed into which stormwater from the property drains, and other factors that affect the stormwater drainage system. Rates, fees, and charges imposed under this subsection *may not exceed the city's cost* of providing a *stormwater* and *drainage system.*

N.C.G.S. § 160A-314(a), (a1), para. 2 (Supp. 1998) (emphasis added).

In determining whether the City's public enterprise complies with the statutes, we first must look to the plain language of the statutes themselves. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). "Ordinary rules of grammar apply when ascertaining the meaning of a statute." *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, BSA*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

N.C.G.S. § 160A-314 reinforces this statutory construction by providing that the City may establish fees "for the *use of* or the *services furnished* by any public enterprise" and that fees may vary for "structural and natural stormwater and drainage system service" according to the type and size of "property served." N.C.G.S. § 160A-314(a), (a1) (emphasis added). This clear and unambiguous language contemplates only the collection of fees for the "use of" or "furnishing of" stormwater services by the utility.

The General Assembly amended N.C.G.S. § 160A-314 in 1991 to add the following provision: "Rates, fees, and charges imposed under this section *may not exceed* the city's cost of providing a *stormwater* and *drainage system.*" N.C.G.S. § 160A-314(a1), para. 2 (emphasis added); *see* Act of July 8, 1991, ch. 591, sec. 1, 1991 N.C. Sess. Laws 1283, 1283-84. This statutory provision clearly and unambiguously mandates that the City may not exceed the cost of providing a stormwater and drainage system. Thus, under a plain reading of the statute, SWU fees are limited to the amount which is necessary for the City to maintain the stormwater and drainage system rather than the amount required to maintain a comprehensive SWQMP to meet the requirements of the WQA.

As previously noted, N.C.G.S. § 160A-311 was amended in 1989 by the General Assembly to include in its definition of public enterprises "*structural and natural* stormwater and drainage *systems* of all types." N.C.G.S. § 160A-311(10) (emphasis added). This definition has a plain and clear meaning. The plain meaning is public enterprises, authorized by the applicable statutes, are expressly limited to those systems of physical infrastructure, structural or natural, for servicing stormwater.

While plain language of the statutes is sufficient to determine its meaning, this Court has stated that the title of an act should be considered in ascertaining the intent of the legislature. *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992). As previously noted, the act that added the statutory provisions regarding stormwater was titled:

> AN ACT TO AUTHORIZE LOCAL GOVERNMENTS TO CONSTRUCT AND OPERATE STORM DRAINAGE SYSTEMS AS PUBLIC ENTERPRISES AND TO PROVIDE LOCAL GOVERNMENTS WITH FUNDING AND TAXING AUTHORITY TO *FINANCE* THE *CONSTRUCTION* AND *OPERATION* OF STORM DRAINAGE *SYSTEMS*.

Act of July 15, 1989, ch. 643, 1989 N.C. Sess. Laws 1763 (emphasis added). The title's focus on "construction and operation" of storm drainage systems demonstrates that the legislature intended such public enterprises to be used solely for the establishment and maintenance of physical systems directly related to stormwater removal and drainage of property.

In determining whether the City's ordinance meets the restrictions cited above, an examination of the ordinance is instructive. The ordinance creates a stormwater utility "to develop and operate the stormwater management program." The ordinance defines the stormwater management program as one that not only includes a stormwater system, but also one that "includes, but is *not limited to* . . . the development of ordinances, policies, technical materials, inspections, monitoring, outreach, and *other activities* related to the control of stormwater quantity and quality." Durham, N.C., Code ch. 23, art. VIII, § 23-201 (1994). Thus, the ordinance on its face exceeds the express limitation of the plain and unambiguous reading of the statute, and the operation of the utility exceeds the statutory authority.

As further evidence of the utility exceeding statutory authority, the City created a document containing frequently asked questions with answers, including the following:

> **Q: What does Durham plan to do in their [stormwater] management plan?**
>
> A: Durham's [stormwater] management plan addresses preventative maintenance, repair, and replacement of the storm drainage system to control urban flooding. Our [stormwater] management plan also addresses water pollution control. The City will develop *educational programs* that encourage and help citizens and businesses prevent [stormwater] pollution. We will develop *guidance manuals* for construction activities, industrial sites, and related facilities. We will promote and encourage *used oil recycling*, *household hazardous waste collection programs*, and *reporting* of illegal dumping activities. The City will also test and monitor local runoff and water bodies to see how well our [stormwater] program is doing and to locate areas that need improvement. The City's [stormwater] management plan will strive to meet our current needs, as well as the needs of future generations.

Furthermore, a memorandum from one of the consultants is informative in that it breaks down the line items for operating the SWQMP into "cost centers," including a cost center for stormwater quality management:

> A separate cost center has been identified in the cost of service analysis for [stormwater] quality management. Pursuant to the requirements of the NPDES [stormwater] discharge permit, the City's [stormwater] quality management program is expected to begin in fiscal year 1993/1994. It is expected to include a mix of operational, structural, regulatory, and public education components, all intended to reduce pollution of receiving waters due to [stormwater] runoff.

In addition, during the course of the trial, the City introduced an updated stormwater management fund budget report in which it divided expenditures from the stormwater management fund into three separate components: stormwater quality, stormwater quantity, and clean city. A review of these components is instructive.

According to the budget report, the stormwater *quality* component is described as follows:

> This program provides for the implementation of the City's [SWQMP] approved in the [NPDES] Municipal [Stormwater] Discharge Permit. Program components include industrial and seasonal storm event sampling, identification and correction of illicit connections and illegal dumping, household hazardous waste collection, and development of management programs for commercial, industrial, and residential areas and construction sites.

All funds collected by the utility are placed in one fund, and this fund pays for the City's entire stormwater quality program. The City concedes the utility's activities substantially exceed the providing of stormwater infrastructure. The projected cost for this funding of the stormwater quality component in 1995-96 was $3,686,257 out of a total budget of $5,820,162, and in 1996-97 was $3,751,753 out of a total budget of $6,873,659.

In addition, the stormwater *quantity* component is described in the budget report as follows:

> The [Stormwater] Quantity program includes the routine maintenance and repair of the [stormwater] drainage system located in the public rights-of-way and maintenance and improvements to the public drainage system located on private property. This program also includes response to drainage and flooding inquiries from citizens.

As noted, the quantity component even includes drainage and flooding inquiries from citizens. The projected cost for funding the stormwater quantity component in 1995-96 was $2,133,905 out of a total budget of $5,820,162, and in 1996-97 was $2,171,819 out of a total budget of $6,873,659.

Finally, the clean city component is described in the budget report as follows: "This program includes the City's efforts to maintain clean streets and educate the public regarding litter control." The clean city component was not funded in 1995-96, but the projected cost for funding the clean city component in 1996-97 was $950,087 out of a total budget of $6,873,659.

From its description, it appears that little of the program's emphasis is on the maintenance and construction of a structural and natural stormwater and drainage system. The program instead focuses on educational programs, guidance manuals, used oil recy-

cling, household hazardous waste collection, and enforcement efforts against illegal dumping of hazardous materials.

After a careful and thorough review of the record and the evidence presented in this case, it is undisputed that the City's stormwater management program funded by the SWU is a fully comprehensive SWQMP with separate component parts, the majority of which are not used to fund and maintain the stormwater and storm sewer drainage systems in place. The SWU is funding an EPA-regulated pollution prevention and control program. The program includes elements not directed at or used for providing a structural and natural stormwater and drainage system or directed at planning, maintaining, or implementing such facilities. In fact, according to the City's own admission, the program is designed to satisfy the EPA's NPDES permit requirements required by the WQA's demands for pollution control of stormwater discharges into public waters.

Based on the foregoing, it appears clear that, for reasons of expediency, the City *chose* to establish the SWU as a mechanism by which it would comply with the unfunded mandates of the WQA related to stormwater runoff. In addition, the City also *chose* not to fund the expenditures through the general fund. However, in doing so, the City's SWU ordinance went well beyond the scope of authority granted to the City under N.C.G.S. § 160A-311 to construct and operate a structural and natural stormwater and drainage system in that it authorized the operation of a comprehensive SWQMP as envisioned by the EPA and the WQA. Furthermore, the rates, fees, and charges imposed by the City's SWU far exceed the cost of providing a structural and natural stormwater and drainage system to the City's citizens as contemplated by the General Assembly. *See* N.C.G.S. § 160A-314(a1). Therefore, the City's SWU ordinance and the fees charged thereunder are invalid as a matter of law because they are operated and conducted in a manner that exceeds the authority granted to the City through N.C.G.S. §§ 160A-311 and -314(a1).

[2] As to the second issue, this Court has previously held that the establishment of rates for services furnished by a municipality to its citizens "is a proprietary [function] rather than a governmental one, limited only by statute or contractual agreement." *Town of Spring Hope v. Bissette*, 305 N.C. 248, 250-51, 287 S.E.2d 851, 853 (1982). To that end, N.C.G.S. § 160A-314(a) provides as follows:

> (a) A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or

> the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.

N.C.G.S. § 160A-314(a). According to the Court of Appeals' interpretation of this statute in *Town of Spring Hope*, "[u]nder this broad, unfettered grant of authority, the setting of such rates and charges is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts absent some showing of arbitrary or discriminatory action." *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212-13, 280 S.E.2d 490, 492 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982).

As previously noted, N.C.G.S. § 160A-314(a1) provides in pertinent part:

> The fees established under this subsection must be made applicable throughout the area of the city. Schedules of rates, fees, charges, and penalties for providing structural and natural stormwater and drainage system service may vary according to whether the property served is residential, commercial, or industrial property, the property's use, the size of the property, the area of impervious surfaces on the property, the quantity and quality of the runoff from the property, the characteristics of the watershed into which stormwater from the property drains, and other factors that affect the stormwater drainage system. Rates, fees, and charges imposed under this subsection may not exceed the city's cost of providing a stormwater and drainage system.

N.C.G.S. § 160A-314(a1), para. 2.

Upon review of this statute, the City enacted ordinance number 10183, which provided for a rate schedule based upon the impervious area, size, and use of the property. According to the ordinance, an "impervious area" is

> a surface composed of any material that impedes or prevents natural infiltration of water into the soil, including but not limited to roofs, solid decks, driveways, patios, sidewalks, parking areas, tennis courts, concrete or asphalt streets, or compacted gravel surfaces. Wooden slatted decks and the water area of swimming pools are considered pervious.

Durham, N.C., Code ch. 23, art. VIII, § 23-201. The billing method under the ordinance is as follows:

(a) All developed land in the City, whether public or private, shall be subject to a [stormwater] service charge. Exemptions shall not be allowed based on age, tax exemption, or other status of an individual or organization. Service charges may be subject to a credit system as further provided in this ordinance.

(b) Service charges on all developed land shall begin on July 1, 1994 and shall be computed as follows:

(1) Residential units shall be charged at two rates: $2.17 for residential units with less than 2,000 square feet of impervious surface and $3.25 for residential units with 2,000 square feet or more of impervious surface.

(2) Other residential and nonresidential land shall be charged $3.25 for each equivalent residential unit (ERU). ERUs of less than five-tenths shall be rounded down and those of five-tenths or greater shall be rounded up to the nearest whole number. There will be no service charge for other residential and nonresidential property that contains less than .5 ERU of impervious surface.

Durham, N.C., Code ch. 23, art. VIII, § 23-203. Further, an ERU is defined as "2,400 square feet of impervious surface, which is the average amount of impervious surface on a single family property in the [C]ity." Durham, N.C., Code ch. 23, art. VIII, § 23-201.

Plaintiffs contend the SWU fees are illegal in that the impervious area method does not reasonably relate to the stormwater runoff of individual properties and forces customers to involuntarily pay fees that are not reasonably commensurate with services furnished. However, as the trial court properly noted, the City was completely within its statutory authority when it based the utility fee rates on the impervious area of the property. As our Court of Appeals has noted, "[t]he test is not whether any particular customer has directly benefited from the use of a discrete or particular component of the utility plant, but whether the municipal authority has acted arbitrarily in establishing its rates." *Town of Spring Hope v. Bissette*, 53 N.C. App. at 213, 280 S.E.2d at 493.

We hold that the rate scheme enacted by the City pursuant to the SWU ordinance is rationally related to the amount of runoff from each lot and was not an arbitrary exercise of the City's statutory authority. Furthermore, N.C.G.S. § 160A-314(a1) expressly authorized

the City to base the SWU fees on the impervious area of the property. As such, the trial court correctly concluded that the City's rate scheme was "rational and reasonable." However, as the trial court further noted in its 11 October 1996 judgment, "[t]his finding . . . does not apply to the amount of the stormwater charges that were adopted by the City . . . or the use of the funds collected by the [SWU]."

[3] As to the final issue, we must determine whether the remedy afforded by the trial court was correct. In its decree, the trial court ordered that "plaintiffs in this action, having paid the [SWU] fees under protest, are entitled to a full refund, plus interest, on those fees paid by plaintiffs to the date of this Judgment." As of the date of trial, plaintiff Smith Chapel Baptist Church had paid $22.75 per month to the SWU; plaintiff Fellowship Baptist Church, Inc., had paid $299.00 per month to the SWU; Layman's Chapel Baptist Church had paid $22.75 per month to the SWU; and Calvary Baptist Church of Durham had paid $120.75 per month to the SWU.

A refund of the invalid SWU fees paid by plaintiffs in this action is similar to the common law doctrine of "an action for money had and received." It has been held that this common law action could "be maintained whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff." *Wilson v. Lee*, 211 N.C. 434, 436, 190 S.E. 742, 743 (1937). This Court has stated the common law doctrine as follows:

> "Recovery is allowed upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? The right of recovery does not presuppose a wrong by the person who received the money, and the presence of actual fraud is not essential to the right of recovery. The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it. In short, 'the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the test of natural justice and equity to refund the money.' *Moses v. MacFerlan*, 2 Burrow 1005, 97 Eng. Reprints 676."

Ridley v. Jim Walter Corp., 272 N.C. 673, 677, 158 S.E.2d 869, 872 (1968) (quoting *Allgood v. Wilmington Sav. & Trust Co.*, 242 N.C. 506, 512, 88 S.E.2d 825, 829 (1955)); *see also Wyatt v. Hertz Claim*

Mgmt. Corp., 236 Ga. App. 292, 292-93, 511 S.E.2d 630, 632 (1999); *Conrad v. Evans*, 269 Wis. 387, 392, 69 N.W.2d 478, 481 (1955).

In the instant case, because we have already held that the City's SWU ordinance and the fees charged thereunder are invalid as a matter of law, we further hold that plaintiffs are entitled to a full refund of the illegally collected fees from the City, plus interest on those fees to the date of judgment.

For the reasons stated in this opinion, the trial court's original 11 October 1996 judgment and the amended 3 January 1997 judgment and order are affirmed, and plaintiffs are entitled to a full refund, plus interest, on those fees paid by plaintiffs to the date of judgment.

AFFIRMED.

Justice FRYE dissenting.

I agree with that part of the majority opinion which holds that "the rate scheme enacted by the City pursuant to the SWU [stormwater utility] ordinance is rationally related to the amount of runoff from each lot and was not an arbitrary exercise of the City's statutory authority." I disagree, however, with the majority's conclusion that "the City's SWU ordinance and the fees charged thereunder are invalid as a matter of law because they are operated and conducted in a manner that exceeds the authority granted to the City." I believe that the majority takes an unduly narrow view of the City's authority. Application of the appropriate rule of statutory construction requires us to hold that the applicable public enterprise statutes, N.C.G.S. §§ 160A-311, -312, and -314, are broad enough to authorize the City's SWU ordinance and the expenditure of monies collected thereunder on a "system" for stormwater and drainage collection and transport, including activities that are ancillary to and supportive of the City's physical infrastructure.

For many years, municipalities had the authority to exercise only those powers expressly granted, or those necessarily or fairly implied in or incident to expressly granted powers, or those essential to the accomplishment of the declared objects and purposes of the municipal corporation. *See Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994) (describing the powers of municipalities as stated by the now-defunct "Dillon's rule"); *see also* N.C.G.S. § 160-1 (repealed effective 1 January 1972).

However, in 1971, the General Assembly enacted a comprehensive revision of the laws governing municipalities, codified in chapter 160A of the North Carolina General Statutes. Act of June 30, 1971, ch. 698, 1971 N.C. Sess. Laws 724; *see also Homebuilders Ass'n of Charlotte*, 336 N.C. at 42, 442 S.E.2d at 49. As part of chapter 160A, the General Assembly enacted the following rule of construction for legislative grants of power to municipalities:

> **§ 160A-4. Broad construction.**
>
> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C.G.S. § 160A-4 (1994). In *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, this Court interpreted N.C.G.S. § 160A-4 as a legislative mandate "that the provisions of chapter 160A and of city charters *shall* be broadly construed and that grants of power *shall* be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." 336 N.C. at 43-44, 442 S.E.2d at 50.

When the General Assembly, in 1989, amended N.C.G.S. § 160A-311 to include "structural and natural stormwater and drainage systems of all types," it allowed cities to establish and operate stormwater systems as public enterprises. N.C.G.S. § 160A-311(10) (1994); Act of July 15, 1989, ch. 643, sec. 5, 1989 N.C. Sess. Laws 1763, 1769-70. Municipalities are allowed to "acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens." N.C.G.S. § 160A-312(a) (1994). Further, municipalities are expressly authorized to fix and enforce rates and fees "for the use of or the services furnished by any public enterprise." N.C.G.S. § 160A-314(a) (Supp. 1998). Specifically, cities may set "rates, fees, charges, and penalties for providing structural and natural stormwater and drainage system service," so long as the fees imposed do not "exceed

the city's cost of providing a stormwater and drainage system." N.C.G.S. § 160A-314(a1). These public enterprise statutes, upon which the City relies as enabling authority for its SWU, are a part of chapter 160A, and as such, they are subject to the rule of broad construction mandated by the General Assembly in N.C.G.S. § 160A-4.

The City adopted its SWU ordinance under the authority granted by the General Assembly in the public enterprise statutes. The City operates a structural and natural stormwater and drainage system that must comply with the mandates of the federal NPDES (National Pollutant Discharge Elimination System) permitting requirements. Compliance with federal NPDES regulations is a duty of the City and of other affected municipalities. Any ambiguity in the meaning of the term "stormwater and drainage *system*" must be resolved in favor of enabling municipalities to execute the duties imposed upon them by federal law concerning the discharge of stormwater. The City cannot operate a stormwater and drainage system without complying with federal regulations. Certainly, N.C.G.S. § 160A-4 and *Homebuilders Ass'n of Charlotte* require us to interpret the applicable public enterprise statutes broadly enough to encompass the City's operation of its SWU and collection of fees under the SWU ordinance as "reasonably necessary or expedient" to its expressly granted powers. I would uphold the City's SWU ordinance and the fees charged thereunder as a valid exercise of the City's authority granted by N.C.G.S. §§ 160A-311, -312, and -314.

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILLIAM QUENTIN JONES	)	

No. 395A91-5

(Filed 19 August 1999)

Upon consideration of defendant's Motion to Reconsider the Denial of Writs of Certiorari and Mandamus by order of this Court on 23 July 1999, it appearing to the Court that defendant's Motion to Reconsider should be allowed, the Court, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, suspends the requirements of the Rules of Appellate Procedure and hereby allows the Motion for Reconsideration.

Further, upon the Court's reconsideration of defendant's Petition for Writ of Certiorari and Writ of Mandamus, filed 7 October 1998, it appears to the Court (i) that on 21 June 1996, the effective date of N.C.G.S. § 15A-1415(f), defendant had pending in this Court a Petition for Writ of Certiorari to review the trial court's denial of defendant's first Motion for Appropriate Relief and filed in this Court on 24 June 1996 a Motion to Remand to the Superior Court for discovery pursuant to N.C.G.S. § 15A-1415(f); (ii) that this Court on 31 July 1996 denied defendant's Petition for Writ of Certiorari and Motion to Remand; (iii) that on 20 February 1997 defendant filed in this Court a Petition for Writ of Certiorari to review the trial court's 27 January 1997 order denying defendant's second Motion for Appropriate Relief; (iv) that on this Court's 10 July 1998 remand of defendant's case to the Superior Court for reconsideration of its order in light of this Court's decisions in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), and *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998), the trial court found that "[f]ollowing denial of defendant's first Petition for Writ of Certiorari to the North Carolina Supreme Court, defendant filed his [Petition for] Writ of Habeas Corpus in federal district court [, and a]s part of the federal action, defendant sought and received discovery"; and (v) that the trial court, upon reconsideration of its 22 January 1997 order denying defendant's second Motion for Appropriate Relief reaffirmed its order in its entirety.

Based on the foregoing and our reconsideration of defendant's Petition for Writ of Certiorari and Writ of Mandamus and the State's

response thereto, the Court concludes that under this Court's decision in *State v. Green*, 350 N.C. 400, 514 S.E.2d 724 (1999), defendant would be entitled to discovery pursuant to N.C.G.S. § 15A-1415(f); that defendant, having requested and received discovery in his federal habeas proceeding, the denial of defendant's discovery request by the trial court was harmless beyond a reasonable doubt; and that defendant has shown no basis meriting this Court's issuance of a Writ of Mandamus or a Writ of Certiorari to review the trial court's 27 January 1997 or 16 September 1998 orders denying defendant's second Motion for Appropriate Relief, Motion for Discovery, and Motion for Appointment of Counsel.

NOW, THEREFORE, IT IS ORDERED that defendant's Motion for Reconsideration, filed 29 July 1999 is allowed and, after reconsideration, defendant's 7 October 1998 Petition for Writ of Certiorari and Mandamus is again denied.

By order of the Court in Conference, this 19th day of August, 1999.

George L. Wainwright, Jr.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JOSEPH TIMOTHY KEEL	)	

No. 134A93-6

(Filed 19 August 1999)

Upon consideration of defendant's Petition for Writ of Certiorari, filed 26 July 1999, the following order is entered:

It appears to the Court that (i) on 18 January 1996 the trial court issued an order finding that defendant's Motion for Appropriate Relief was procedurally barred; (ii) on 9 May 1996 defendant filed a Petition for Writ of Certiorari in this Court to review the 18 January 1996 order of the trial court; (iii) on 21 June 1996, the effective date of N.C.G.S. § 15A-1415(f), defendant's Petition for Writ of Certiorari was pending in this Court; (iv) on 30 July 1996 this Court denied defendant's Petition for Writ of Certiorari; (v) on 8 May 1998 defendant filed a Motion for Discovery in the trial court, which he amended on 29 June 1999; and (vi) on 16 July 1999 the trial court denied defendant's Motion for Discovery.

Based on the foregoing and our consideration of defendant's 26 July 1999 Petition for Writ of Certiorari and the State's response thereto, the Court concludes that under this Court's decision in *State v. Green*, 350 N.C. 400, 514 S.E.2d 724 (1999), defendant would be entitled to discovery pursuant to N.C.G.S. § 15A-1415(f); that defendant, by failing to file a motion for post-conviction discovery until almost two years after the effective date of N.C.G.S. § 15A-1415(f), waived any entitlement thereto; and that defendant has shown no basis meriting this Court's issuance of a Writ of Certiorari to review the trial court's 16 July 1999 order denying defendant's motion for post-conviction discovery.

NOW, THEREFORE, IT IS ORDERED that defendant's Petition for Writ of Certiorari filed 26 July 1999 is denied.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on 3 August 1999 is dissolved.

By order of the Court in Conference, this 19th day of August, 1999.

George L. Wainwright, Jr.
For the Court

STATE v. McHONE

[350 N.C. 825 (1999)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
STEVEN McHONE	)	

No. 148A91-4

(Filed 19 August 1999)

Defendant's Petition for Writ of Certiorari is allowed for the limited purpose of entering the following order:

Defendant's Petition for Writ of Certiorari is treated and reviewed by this Court as a Motion for Appropriate Relief filed with this Court, and as incorporating and including all claims and allegations set forth in defendant's amended Motion for Appropriate Relief and defendant's original and supplemented Motions for Appropriate Relief as previously filed in the trial court, and this Court having thoroughly considered the matters raised therein and having determined that none require any further evidentiary hearing and that none merit any further grounds for relief, the motion is therefore DENIED.

By order of the Court in Conference, this the 19th day of August, 1999.

George L. Wainwright, Jr.
For the Court

CARROLL v. SEARS ROEBUCK & CO.

No. 29P99

Case below: 131 N.C.App. 700

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

CARTER v. HUCKS-FOLLISS

No. 484P98

Case below: 131 N.C.App. 145
349 N.C. 528

Motion by defendant (Moore Regional Hospital) for reconsideration of petition of discretionary review under Appellate Rule 2 denied 22 July 1999.

CIOFFI v. CITY OF CHARLOTTE

No. 126P99

Case below: 132 N.C.App. 584

Petition by defendant for discretionary review pursuant to Rule 31 denied 22 July 1999.

CITY-WIDE ASPHALT PAVING, INC. v. ALAMANCE COUNTY

No. 186P99

Case below: 132 N.C.App. 533

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

COLEMAN v. HINES

No. 263P99

Case below: 133 N.C.App. 147

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

COUCH v. PRIVATE DIAGNOSTIC CLINIC

No. 255A99

Case below: 133 N.C.App. 93

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999. Motion by plaintiff for retroactive extension of time to file PWC and, in the alternative, motion for discretionary review denied 22 July 1999.

COX v. BAILEY

No. 289P99

Case below: 133 N.C.App. 347

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

CUFF v. PELICAN BUILDING CTR.

No. 258P99

Case below: 133 N.C.App. 189

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

DANIELS v. REEL

No. 229P99

Case below: 132 N.C.App. 1

Petition by defendant (Cary American Legion Post 67, Inc.) for decisionary review pursuant to G.S. 7A-31 denied 22 July 1999. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

DAVIES v. LEWIS

No. 225P99

Case below: 133 N.C.App. 167

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

DAVIS v. CITY OF MEBANE

No. 162PA99

Case below: 133 N.C.App. 500

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999. Chief Justice Mitchell recused.

DAWSON v. WAL-MART STORES, INC.

No. 297P99

Case below: 133 N.C.App. 347

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

DEESE v. CHAMPION INT'L CORP.

No. 500PA98-2

Case below: 131 N.C.App. 299

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 19 August 1999.

DISHMOND v. INT'L PAPER CO.

No. 180P99

Case below: 132 N.C.App. 576

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

EDWARDS v. BD. OF GOVERNORS OF UNC

No. 262P99

Case below: 133 N.C.App. 189

Petition by plaintiffs (Edwards, Green, Moss and Ross) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999. Conditional petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

ERIE INS. EXCHANGE v. BORDEAUX

No. 188P99

Case below: 132 N.C.App. 585

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

ESTRIDGE v. HOUSECALLS HEALTHCARE GRP., INC.

No. 47A99

Case below: 131 N.C.App. 744

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 22 July 1999. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

FAULKENBURY v. TEACHERS' AND STATE EMPLOYEES' RET. SYS.

No. 335P99

Case below: 133 N.C.App. 587

Motion by defendant for temporary stay allowed 22 July 1999.

FIRST CITIZENS BANK & TRUST CO. v.
4325 PARK RD. ASSOCS.

No. 304P99

Case below: 133 N.C.App. 153

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

FLOYD v. FIRST CITIZENS BANK

No. 165P99

Case below: 132 N.C.App. 527

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

FLOYD AND SONS, INC. v. CAPE FEAR FARM CREDIT

No. 269P99

Case below: 127 N.C.App. 753

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

FOSTER v. CAROLINA MARBLE AND TILE CO.

No. 159P99

Case below: 132 N.C.App. 505

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

GLENN v. GLENN

No. 120P99

Case below: 132 N.C.App. 584

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

GOODWIN v. SCHNEIDER NAT'L, INC.

No. 181P99

Case below: 350 N.C. 593
132 N.C.App. 585

Motion by plaintiffs to reconsider denial of petition for discretionary review dismissed 22 July 1999.

GREEN v. SWIFT TEXTILES, INC.

No. 182P99

Case below: 132 N.C.App. 585

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

HAIGHT v. TRAVELERS/AETNA PROPERTY CASUALTY CORP.

No. 212P99

Case below: 132 N.C.App. 673

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

HAMBY v. SHERWIN WILLIAMS CO.

No. 268P99

Case below: 133 N.C.App. 189

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

HARTZELL v. BRYANT INDUS. CONTR'RS, INC.

No. 310P99

Case below: 133 N.C.App. 657

Petition by defendants (Bryant and Travelers) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

HESTER v. WACHOVIA BANK

No. 298P99

Case below: 133 N.C.App. 347

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

HICKS v. CLEGG'S TERMITE & PEST CONTROL, INC.

No. 131P99

Case below: 132 N.C.App. 383

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

HOOD v. N.C. DEP'T OF ENV'T, HEALTH AND NAT. RESOURCES

No. 309P99

Case below: 133 N.C.App. 657

Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999. Motion by Attorney General to dismiss appeal allowed 19 August 1999.

HOWARD v. OAKWOOD HOMES CORP.

No. 340P99

Case below: 134 N.C.App. 116

Petition by plaintiff for writ of supersedeas and motion for temporary stay denied 19 August 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

IN RE HARGROVE

No. 145P99

Case below: 131 N.C.App. 700

Petition by respondent for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999. Justice Martin recused.

IN RE MITCHELL

No. 236P99

Case below: 133 N.C.App. 190

Petition by respondent (Kimberly Coleman) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

JONES v. LOWE

No. 311P99

Case below: 133 N.C.App. 657

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 August 1999.

LATTIMORE v. MILLER

No. 134P99

Case below: 132 N.C.App. 397

Petition by defendants (B. W. Miller and David M. Bishop) for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

LENOIR COUNTY v. HILLCO, LTD.

No. 207P99

Case below: 132 N.C.App. 584

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

LILLEY v. BLUE RIDGE ELECTRIC MEMBERSHIP CORP.

No. 295P99

Case below: 133 N.C.App. 256

Petition by defendant (Blue Ridge Electric) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

LIN v. LIN

No. 511P98-2

Case below: 128 N.C.App. 533
350 N.C.97

Petition by plaintiff for writ of certiorari to review the order of the North Carolina Court of Appeals denied 22 July 1999.

LUARD v. ROSS ANGEL ASSOCS.

No. 219P99

Case below: 132 N.C.App. 823

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

LYNCH v. N.C. CENTRAL UNIV.

No. 235P99

Case below: 132 N.C.App. 188

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

MARTIN v. E & R FARMS

No. 246P99

Case below: 133 N.C.App. 190

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 as to additional issues dismissed 19 August 1999.

MATTHEWS v. CHARLOTTE-MECKLENBURG HOSP. AUTH.

No. 72P99

Case below: 132 N.C.App. 11

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

NATIONWIDE MUT. INS. CO. v. WEBB

No. 158P99

Case below: 132 N.C.App. 524

Petition by defendant (Samuel Chad Leigh) for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

O'CARROLL v. TEXASGULF, INC.

No. 172P99

Case below: 132 N.C.App. 307

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999. Justice Martin recused.

PARKWOOD ASS'N v. CAPITAL HEALTH CARE INVESTORS

No. 260P99

Case below: 133 N.C.App. 158

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

PATRICK v. ALLSTATE INS. CO.

No. 149PA99

Case below: 132 N.C.App. 586

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999 for the limited purpose of entering an order remanding the case to the North Carolina Court of Appeals for a decision consistent with this Court's decisions in *Progressive Am. Ins. Co. v. Vasquez*, 350 N.C. 386, and *Piazza v. Little*, 350 N.C. 585.

POE v. ATLAS-SOUNDELIER/AMERICAN TRADING & PROD. CORP.

No. 167P99

Case below: 132 N.C.App. 472

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999. Motion by defendants to dismiss petition for discretionary review denied 22 July 1999.

PRIOR v. PRUETT

No. 160P99

Case below: 131 N.C.App. 878

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

ROBINSON v. LEACH

No. 308P99

Case below: 133 N.C.App. 436

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

ROMIG v. JEFFERSON-PILOT LIFE INS. CO.

No. 218A99

Case below: 132 N.C.App. 682

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 August 1999. Motion by plaintiff to dismiss appeal allowed 19 August 1999 in part to dismiss defendant's appeal of right on the basis of a substantial constitutional question.

SIMMONS v. MILLER

No. 293P99

Case below: 133 N.C.App. 348

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. ADAMS

No. 210P99

Case below: 132 N.C.App. 819

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. ARRINGTON

No. 168P99

Case below: 132 N.C.App. 586

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. ARRINGTON

No. 307P99

Case below: 133 N.C.App. 445

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. BACON

No. 209A91-3

Case below: Onslow Superior Court

Motion by Attorney General to set aside order allowing defendant's motion to hold petition for writ of certiorari in abeyance allowed 19 August 199. Motion by defendant to supplement petition for writ of certiorari allowed 19 August 1999. Petition by defendant for writ of certiorari to review the order of the Superior Court, Onslow County denied 19 August 1999. Motion by defendant for summary reversal denied 19 August 1999. Motion by Attorney General for dismissal for untimely filing denied 19 August 1999.

STATE v. BATES

No. 145A91-4

Case below: Yadkin County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Yadkin County, denied 19 August 1999.

STATE v. BLOUNT

No. 284P99

Case below: 133 N.C.App. 445

Petition by defendant for writ of supersedeas denied 19 August 1999. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. BOYD

No. 177A83-3

Case below: Surry County Superior Court

Petition by defendant for writ of supersedeas to stay the Central Prison Warden's order scheduling execution denied 19 August 1999. Petition by defendant for writ of certiorari denied 19 August 1999. Motion by Attorney General to vacate temporary stay of execution allowed 19 August 1999. Motion by defendant for extension of time to file a response to motion to vacate temporary stay allowed 19 August 1999.

STATE v. BRITT

No. 104P99

Case below: 132 N.C.App. 173

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. BROWN

No. 565A83-4

Case below: Martin County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Martin County, denied 22 July 1999.

STATE v. BUCKNER

No. 444PA93-2

Case below: Gaston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Gaston County, allowed 23 July 1999.

STATE v. CHANDLER

No. 343A93-2

Case below: Surry County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Surry County, allowed 22 July 1999.

STATE v. CINTRON

No. 190A99

Case below: 132 N.C.App. 605

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 22 July 1999.

STATE v. COOKE

No. 189P99

Case below: 132 N.C.App. 586

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. CREECH

No. 242P99

Case below: 133 N.C.App. 191

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. CUMMINGS

No. 4A95-2

Case below: Brunswick County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Brunswick County, denied 19 August 1999.

STATE v. DAVIS

No. 45P99

Case below: 131 N.C.App. 879

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. DAVIS

No. 261P99

Case below: 133 N.C.App. 191

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. FLORENCE

No. 343P99

Case below: 133 N.C.App. 658

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. FOREMAN

No. 291PA99

Case below: 133 N.C.App. 292

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 19 August 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 19 August 1999.

STATE v. FOSTER

No. 198P99

Case below: 132 N.C.App. 823

Petition by defendant for writ of supersedeas denied 22 July 1999. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. FRITSCH

No. 141PA99

Case below: 132 N.C.App. 262

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999.

STATE v. GARNER

No. 259P99

Case below: 133 N.C.App. 191

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999.

STATE v. GREEN

No. 385A84-5

Case below: Pitt County Superior Court

Motion by Attorney General to lift stay of execution allowed 22 July 1999.

STATE v. GRIGSBY

No. 364P99

Case below: 134 N.C.App. 315

Motion by Attorney General for temporary stay allowed 9 August 1999.

STATE v. HARRELL

No. 173P99

Case below: 131 N.C.App. 702

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. HASTY

No. 338P99

Case below: 133 N.C.App. 563

Petition by defendant (Harvey Lee Stewart) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999. Petition by defendant (Jarvis S. Hasty) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. HENAGAN

No. 243P99

Case below: 132 N.C.App. 824

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. HILL

No. 535A95-2

Case below: Harnett County Superior Court

Motion by defendant pro se to set execution date denied 22 July 1999. Motion by defendant pro se to terminate appeals denied 22 July 1999.

STATE v. HUGHES

No. 282P99

Case below: 133 N.C.App. 349

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. JOHNSON

No. 205P99

Case below: 128 N.C.App. 361

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. JOHNSON

No. 91P99

Case below: 132 N.C.App. 135

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999. Notice of appeal by defendant pursuant G.S. 7A-30 (substantial constitutional question) dismissed 22 July 1999.

STATE v. JONES

No. 395A91-5

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari to review the order of Superior Court, Wake County, denied 22 July 1999. Petition by defendant for writ of mandamus denied 22 July 1999. Motion by defendant to hold petition for writ of certiorari and writ of mandamus in abeyance dismissed 22 July 1999.

STATE v. JONES

No. 435A90-3

Case below: Jones County Superior Court

Petition by defendant for writ of certiorari to review the order of Superior Court, Jones County, denied 22 July 1999.

STATE v. KANDIES

No. 197A94-3

Case below: Randolph County Superior Court

Petition by defendant for writ of certiorari to review the orders of Superior Court, Randolph County, denied 19 August 1999.

STATE v. KEITH

No. 234A99

Case below: 133 N.C.App. 192

Motion by Attorney General to dismiss appeal allowed 22 July 1999.

STATE v. KIMMER

No. 123P99

Case below: 132 N.C.App. 398

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. KING

No. 254P99

Case below: 133 N.C.App. 192

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. LONG

No. 292P99

Case below: 133 N.C.App. 349

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. LYONS

No. 238A94-2

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County, denied 19 August 1999.

STATE v. MELTON

No. 317P99

Case below: 133 N.C.App. 658

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. MILLER

No. 283P99

Case below: 132 N.C.App. 188

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. MONK

No. 139P99

Case below: 132 N.C.App. 248

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. MOSLEY

No. 385A92-3

Case below: Forsyth County Superior Court

Motion by defendant for amendment of order granting certiorari petition denied 22 July 1999.

STATE v. MURPHY

No. 384P99

Case below: 134 N.C.App. 500

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 19 August 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. OKWARA

No. 122P99

Case below: 132 N.C.App. 585

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. PAGE

No. 239A96-2

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County, denied 22 July 1999.

STATE v. PENUEL & BAGGETT

No. 230A99

Case below: 133 N.C.App. 47

Motion by Attorney General to withdraw the appeal allowed 22 July 199.

STATE v. PHILLIPS

No. 209P99

Case below: 132 N.C.App. 765

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. RANKINS

No. 271P99

Case below: 133 N.C.App. 193

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

STATE v. REAVES

No. 197P99

Case below: 132 N.C.App. 615

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. RICH

No. 161PA99

Case below: 132 N.C.App. 440

Petition by defendant (Rich) for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999.

STATE v. ROBINSON

No. 411A94-2

Case below: Cumberland County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 19 August 1999.

STATE v. ROTEN

No. 314P99

Case below: Wilkes County Superior Court
N.C. Court of Appeals

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wilkes County, and order of the Court of Appeals allowed 19 August 1999 for the limited purpose of remanding to the trial court to conduct an evidentiary hearing on defendant's motion for granting a new trial for recanted testimony, and to make appropriate findings of fact and conclusions of law.

STATE v. SCHIFFER

No. 41P99

Case below: 132 N.C.App. 22

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 22 July 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. SHARPE

No. 45A96-2

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Pitt County, denied 19 August 1999.

STATE v. SIMPSON

No. 43A93-2

Case below: Rockingham County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Rockingham County, denied 19 August 1999.

STATE v. SKIPPER

No. 122A92-4

Case below: Bladen County Superior Court

Motion by defendant for summary reversal denied 19 August 1999. Motion by Attorney General to lift order granting motion to hold petition for writ of certiorari in abeyance allowed 19 August 1999. Petition by defendant for writ of certiorari to review the order of the Superior Court, Bladen County, denied 19 August 1999.

STATE v. SPRUILL

No. 404A92-2

Case below: Northampton County Superior Court

Petition by defendant for writ of certiorari to vacate orders of the Superior Court, Northampton County, denying "Motion for Appropriate Relief," "Motion for Discovery" and "Motion for Reconsideration" denied 19 August 1999.

STATE v. TAYLOR

No. 31A93-3

Case below: Cumberland County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 22 July 1999. Motion by defendant to hold petition for writ of certiorari in abeyance dismissed as moot 22 July 1999.

STATE v. THOMAS

No. 91A95-3

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County, denied 22 July 1999.

STATE v. TRUSELL

No. 324A99

Case below: 133 N.C.App. 446

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 19 August 1999 for limited purpose to review issue No. 1 (sentencing enhancement).

STATE v. WALKER

No. 175P99

Case below: 130 N.C.App. 487

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

STATE v. WHITE

No. 287P99

Case below: 133 N.C.App. 349

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. WILLIAMS

No. 183P99

Case below: 132 N.C.App. 586

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

STATE v. WILLIAMS

No. 264A90-5

Case below: Wayne County Superior Court

Petition by Attorney General for writ of supersedeas allowed 22 July 1999. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Wayne County, allowed 22 July 1999.

STATE ex rel. COMM'R OF INS. v. N.C. RATE BUREAU

No. 42PA99

Case below: 131 N.C.App. 874

Petitions by defendant and plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999 for the limited purpose of remanding to the North Carolina Court of Appeals for consideration and decision consistent with this Court's decision in *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 350 N.C. 539.

SWAN QUARTER FARMS, INC. v. SPENCER

No. 264P99

Case below: 133 N.C.App. 106

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

TERRY v. HOME LUMBER CO.

No. 296P99

Case below: 133 N.C.App. 349

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

THOMPSON v. WATERS

No. 267PA99

Case below: 133 N.C.App. 194

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999. Conditional petition by defendant (Lee County) for discretionary review pursuant to G.S. 7A-31 allowed 22 July 1999.

TUTTLE COMMUNITY CENTER, INC. v. COLEMAN

No. 202P99

Case below: 132 N.C.App. 825

Petition by petitioner (Linda Simmons-Henry) for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

UPCHURCH v. UPCHURCH

No. 302P99

Case below: 133 N.C.App. 446

Petition by defendant (James Elmon Upchurch) for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

VAIL v. ANGLIN

No. 109P99

Case below: 132 N.C.App. 236

Petition by defendant (Donald William Way, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 22 July 1999.

VANASEK v. DUKE POWER CO.

No. 153P99

Case below: 132 N.C.App. 335

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 22 July 1999.

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

WILLIAMS v. MIMS

No. 277P99

Case below: 133 N.C.App. 349

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

PETITIONS TO REHEAR

PROGRESSIVE AMERICAN INS. CO. v. VASQUEZ

No. 286PA98

Case below: 350 N.C. 386

Petition by defendant (Faison) to rehear pursuant to Rule 31 denied 19 August 1999.

STATE v. GREEN

No. 385A84-5

Case below: 350 N.C.App. 400

Motion by defendant for reconsideration of decision dismissed 22 July 1999.

STATE ex rel. COMM'R OF INS. v. N.C. RATE BUREAU

No. 307A98

Case below: 350 N.C. 539

Petition by appellant to rehear pursuant to Rule 31 denied 22 July 1999.

APPENDIXES

ORDER ADOPTING AMENDMENT TO
RULE 7(B)(1) OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENT TO
THE RULE 34 OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING RULE 33A OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING RULE 26 OF THE
GENERAL RULES OF PRACTICE
FOR THE SUPERIOR
AND DISTRICT COURTS

ORDER ADOPTING STANDARDS OF
PROFESSIONAL CONDUCT
FOR MEDIATORS

ORDER ADOPTING AMENDMENTS TO RULES IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS TO THE RULES FOR THE DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING THE NORTH CAROLINA CANONS OF ETHICS FOR ARBITRATORS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATION OF THE JUDICIAL DISTRICT BARS

AMENDMENTS TO THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATION OF THE JUDICIAL DISTRICT BARS

ORDER OF THE NORTH CAROLINA SUPREME COURT IN RE CLIENT SECURITY FUND OF THE NORTH CAROLINA STATE BAR

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING COMMITTEES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

Order Adopting Amendment to Rule 7(b)(1) of the Rules of Appellate Procedure

Rule 7(b)(1) (Paragraph 5) of the Rules of Appellate Procedure is hereby amended to read as follows:

Except in capitally tried criminal cases which result in the imposition of a sentence of death, (t)he trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

Adopted by the Court in Conference this the 8th day of April 1999. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http:/www.aoc.state.nc.us).

Wainwright, J
For the Court

Order Adopting Amendment to the Rule 34 of the Rules of Appellate Procedure

Rule 34(d) is hereby amended to read as follows:

(d) ~~If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed.~~ If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

Adopted by the Court in Conference this 8th day of April 1999. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Wainwright, J.
For the Court

ORDER ADOPTING RULE 33A OF THE RULES OF APPELLATE PROCEDURE

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. §7A-33, the Rules of Appellate Procedure are amended by adding a new Rule 33A to read:

"33A. Secure Leave Periods for Attorneys

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Appellate Division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the Appellate Division during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering

with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the Appellate Division in which the attorney has entered an appearance.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in the Supreme Court, in the office of the Clerk of the Supreme Court;

(2) if the attorney has entered an appearance in the Court of Appeals, in the office of the Clerk of Court of Appeals.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period."

Adopted by the Court in Conference this 6th day of May, 1999, on the recommendation of the Chief Justice's Commission on Professionalism. This amendment is effective January 1, 2000, and applies to all actions and proceedings pending in the Appellate Division on and after that date. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and Court of Appeals and by distribution by mail to each superior and district court judge, district attorney, clerk of superior court, and the North Carolina State Bar.

Wainwright, J.
For the Court

ORDER ADOPTING RULE 26 OF THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. §7A-34, the General Rules of Practice for the Superior and District Courts are amended by adding a new Rule 26 to read:

"26. Secure Leave Periods for Attorneys

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending;

(2) if the attorney has entered an appearance in any civil action, either

(a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or,

(b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district,

(c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district;

(3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending;

(4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.

(G) *Procedure When Court Proceeding Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.

(H) *Procedure When Deposition Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.

(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave.

Adopted by the Court in Conference this 6th day of May, 1999, on the recommendation of the Chief Justice's Commission on Professionalism. This amendment is effective January 1, 2000, and applies to all actions and proceedings pending in the Superior and District Courts on and after that date. This amendment shall be pro-

mulgated by publication in the Advance Sheets of the Supreme Court and Court of Appeals and by distribution by mail to each superior and district court judge, district attorney, clerk of superior court, and the North Carolina State Bar.

Wainwright, J.
For the Court

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR 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 de-certification, 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, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to adopt standards for the conduct of mediators and of mediators training programs participating in the pre-litigation farm nuisance mediation program established pursuant to N.C.G.S. § 7A-38.3, and

WHEREAS, N.C.G.S. § 7A-38.4(l) provides for this Court to adopt standards for the conduct of mediators and of mediators training programs participating in the pilot program for the settlement of equitable distribution and other family financial matters established pursuant to N.C.G.S. § 7A-38.4.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), N.C.G.S. § 7A-38.3(e), and N.C.G.S. § 7A-38.4(l), Standards of Professional Conduct for Mediators are hereby adopted to read as in the following pages. These standards shall be effective on the 1st day of October, 1999. Until that date, the Standards of Professional Conduct for Superior Court Mediators adopted by this Court on the 30th day of December, 1998, shall remain in effect.

Adopted by the Court in conference the 24th day of June, 1999. The Appellate Division Reporter shall publish the Standards of Professional Conduct for Mediators in their entirety at the earliest practicable date.

Wainwright, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR ~~SUPERIOR COURT~~ MEDIATORS

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, NCGS 7A-38.3, or NCGS 7A-38.4 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 nonparty, any information communicated to the mediator by a party within the mediation process.

B. Even where there is a statutory duty to report information if certain conditions exist, a mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality.

C. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, provided identifying information is removed.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator

shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall 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 pre-

sented 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 Amendments to Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes established a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), Rule 7 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby amended as follows:

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is ~~selected by agreement of the parties,~~ stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of ~~$100~~ $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$100~~, $125 which is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

~~C.~~ D. **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, subse-

quent 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.

E. **POSTPONEMENT FEES.** As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business (7) days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

F. **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.

G. **SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.** Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

This amendment shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. It shall be effective on the 1st day of October 1999.

Adopted by the Court in Conference this 24th day of June, 1999.

Wainwright, J.
For the Court

Order Adopting Amendments to the Rules for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertifcation, and

WHEREAS, N.C.G.S. §7A-38.2(b) provides for this Court to implement section 7A-38.2 by adopting rules and regulations governing the operation of the Commission,

NOW, THEREFORE, pursuant to N.C.G.S. §7A-38.2(b), Rule B. under Section IV. Meetings of the Commission, is amended to read as follows:

> B. Quorum. A majority of Commssion members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to discipline or decertify a mediator or mediator training program shall require an affirmative vote of 8 members.

This amendment shall be effective on the 1st day of October, 1999.

Adopted by the Court in conference the 24th day of June, 1999. The Appellate Division Reporter shall publish this amendment in the Advance Sheets of the Supreme Court and the Court of Appeals at the earliest practicable date.

Wainwright, J.
For the Court

Order Adopting the North Carolina Canons of Ethics for Arbitrators

WHEREAS, section 7A-37.1 of the North Carolina General Statutes authorizes court-ordered nonbinding arbitration as an alternative to civil procedure, and

WHEREAS, N.C.G.S. § 7A-37.1(b) provides for this Court to adopt rules governing this procedure,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-37.l(b), the North Carolina Canons of Ethics for Arbitrators are hereby adopted, to read as in the following pages, for court-ordered nonbinding arbitration in the State of North Carolina. The supervising Chief District Court Judge or Senior Resident Superior Court Judge shall be the enforcing authority for these Canons. These Canons shall be effective on the 1st day of October, 1999.

Adopted by the Court in conference the 19th day of August, 1999. The Appellate Division Reporter shall publish the North Carolina Canons of Ethics for Arbitrators in their entirety, as amended through this action, at the earliest practicable date.

Wainwright, J.
For the Court

NORTH CAROLINA CANONS OF ETHICS FOR ARBITRATORS

I. An arbitrator shall uphold the integrity and fairness of the arbitration process.

A. Fair and just processes for resolving disputes are indispensable in our society. Arbitration is an important method for deciding many types of disputes. For arbitration to be effective, there must be broad public confidence in and understanding of the integrity and fairness of the process. Therefore, an arbitrator has a responsibility not only to the parties but also to the courts, the public and the process of arbitration itself and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator has a responsibility to the public, parties whose rights will be decided, the courts, and other participants in the proceeding. These Canons shall be construed and applied to further these objectives.

B. It may be inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves. However, persons may indicate a general willingness to serve as arbitrators, e.g., by listing themselves with institutions that sponsor arbitration, or with courts that have court-annexed arbitration programs. Arbitrators may advertise, consistent with the law.

C. Persons may accept appointment as arbitrators only if they believe that they can be available to conduct the arbitration promptly. They shall exercise judgment whether their skills or expertise are sufficient to support demands of the arbitration and, if these skills or expertise are not sufficient, they shall decline to serve or withdraw from the arbitration, with the court's approval in court-administered arbitration, and notice to the parties.

D. After accepting appointment and while serving as an arbitrator, a person shall avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For one year after decision of a case, persons who have served as arbitrators shall avoid entering into any such relationship, or acquiring any such interest, in the circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest, unless all parties to the arbitration consent to any such relationship or acquiring any such interest.

E. Arbitrators shall conduct themselves in a way that is fair, in word and action, to all parties and must not be swayed by outside pressure, public clamor, fear of criticism or self-interest. If an arbitrator determines that he or she cannot serve impartially, that arbitrator shall decline appointment or withdraw from serving and shall notify the parties, and the court in court-administered arbitrations.

F. When an arbitrator's authority is derived from the parties' agreement, the arbitrator shall not exceed that authority nor do less than required to exercise that authority completely. Where the parties' agreement sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, the arbitrator must comply with such procedures or rules.

G. An arbitrator shall make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

H. An arbitrator's ethical obligations begin upon acceptance of appointment and continue throughout all stages of the proceeding. In addition, wherever specifically set forth in these Canons, certain ethical obligations begin as soon as a person is asked to serve as an arbitrator and continue for one year after the decision in the case has been given to the parties.

I. An experienced arbitrator should participate in development of new practitioners in the field and should engage in efforts to educate the public about the value and use of arbitration procedures. An arbitrator should provide pro bono services, as appropriate.

Comment

References to "commercial" in American Bar Association & American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon I(1977) (Code), 33 Bus. Law. 311(1977), from which these Canons have been adapted, have been deleted. Excess verbiage has been deleted. The catchline has been changed from "should" to "shall" to underscore the mandatory nature of the principle; "should" has been omitted in Canon I.A in the penultimate sentence, and the language amended, to underscore this. "Should" in the last sentence has been changed to "shall." "Should" has been changed to "shall" or "must" in other parts of the Canon.

Other additions in Canon I.A follow the Preamble to North Carolina Dispute Resolution Commission, Standards of Conduct for Mediators, 344 N.C. 753 (Standards). The addition in Canon I.B gives examples of circumstances in which persons may offer services as arbitrators. It is consistent with N.C. Ct-Ord. Arb. R. 2(a). Unlike the

Code, Canon I.B says it "may be" inconsistent with the integrity of the arbitration process to solicit appointment as an arbitrator. This is because of the difficulty, e.g., in drawing a line between advertisement permitted by law and solicitation that is condemned in some professional standards, e.g., those for lawyers. Arbitrators must be mindful of fairness, neutrality, disclosure and conflict of interest principles stated in these Canons. The last sentence in Canon I.B makes it clear that the Canons should not be read to forbid arbitrator advertising where, e.g., commercial free speech principles under the Constitution allow it. The addition in Canon I.C is taken from Standards I.B-I.C and covers situations of court-appointed arbitrators under, e.g., the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.4, or in court-annexed arbitrations; these arbitrators are subject to court order appointing them, and the court is the final arbiter of these issues. The thrust of Canon I.C is consistent with Revised North Carolina Rules of Professional Conduct 1.1 (Rule), although the latter deals with competence of a lawyer, and the Canon governs competence to serve as an arbitrator. Canon I.D states a one-year rule instead of the "reasonable time" principle of the Code. The one-year rule has been substituted to coincide with the time in the Federal Arbitration Act, 9 U.S.C. §§ 9-11, during which a party can move to set aside an award. The Uniform Act, N.C. Gen. Stat. §§ 1-567.13-1-567.14, requires set-aside applications to be made within 90 days of an award. Fed. R. Civ. P. 60(b) and N.C.R. Civ. P. 60(b) limit certain judgment set-aside motions to one year. One year has been chosen as the time when nearly all conflict issues would arise and be resolved. The addition to Canon I.D, penultimate sentence, follows the consent rule in Rule 1.12(a). Additions in Canon II.E follow Standard II.C, with additions to cover court-annexed arbitration or arbitrations where a court has appointed an arbitrator under, e.g., the Uniform Act. "Asked" replaces "requested" in Canon I.H. The phrase "continues for one year" has been added to coincide with the one-year rule for Canon I.D.

Canon I.I has been adapted from Society of Professionals in Dispute Resolution, Ethical Standards of Professional Conduct, Support of the Profession (1987) (SPIDR Standards), reprinted in Rena A. Gorlin, Codes of Professional Responsibility 327 (2d ed. 1990); unlike standards applicable to arbitrators in proceedings, Canon I.I is hortatory, not mandatory. The Rules do not include the equivalent of ABA, Model Rules of Professional Conduct, Rule 6.1, which says a lawyer should aspire to provide 50 hours of public service a year. See Alice Neece Moseley et al., An Overview of the Revised North Carolina Rules of Professional Conduct: An Examination of the Interests Promoted and Subordinated, 32 Wake Forest L. Rev. 939,

990-91 (1997). Since these Canons would apply to all arbitrators, including non-lawyers, and Canon I.I states aspirations to provide continuing education, there is no inconsistency with the Rules. Canon I.I is consistent with North Carolina attorneys' obligations to take 12 hours of continuing legal education a year. Other lawyers teach this CLE, and these lawyers have the same role as Canon I.I would contemplate for experienced arbitrators.

The Canon's language has been tightened.

Canon I generally parallels North Carolina Code of Judicial Conduct, Canons 1-3 (Code of Judicial Conduct), See also National Academy of Arbitrators et al., Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, ¶¶ 1.A-1.C.2, III.A (May 30, 1996) (Academy Code); International Bar Association, Ethics for International Arbitrators, Arts. 1-2 (1986) (IBA Ethics), 26 Int'l Legal Mat'ls 584 (1987), 6A Benedict on Admiralty, Doc. No. 7-12D (Frank L. Wiswall, Jr. ed., 7th rev. ed. 1999), SPIDR Standards, General Responsibilities & Responsibilities to the Parties § 1, Background and Qualifications.

II. An arbitrator shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.

A. Persons asked to serve as arbitrators shall, before accepting, disclose:

(1) any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons asked to serve as arbitrators shall disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They shall also disclose any such relationships involving their spouses or minor children residing in the household or their current employers, partners or business associates; and

(3) any information required by a court in the case of court-administered arbitrations.

B. Persons asked to accept appointment as arbitrators shall make a reasonable effort to inform themselves of any interests or relationships described in Canon II.A.

C. The obligation to disclose interests or relationships described in Canon II.A is a continuing duty which requires a person accepting appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Disclosure shall be made to all parties unless other disclosure procedures are provided in the rules or practices of an institution or court administering the arbitration. Where more than one arbitrator has been appointed, the other arbitrators shall be informed of interests and relationships which have been disclosed.

E. If an arbitrator is asked by all parties to withdraw, the arbitrator shall do so, provided however, if a court is administering the arbitration, the arbitrator shall inform the court of the request and shall comply with court orders. If an arbitrator is asked to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator shall withdraw unless any of these circumstances exists:

(1) If the parties' agreement, or arbitration rules to which the parties have agreed, establish procedures for determining challenges to arbitrators, those procedures shall be followed;

(2) If the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the interest of justice; or

(3) The court administering the arbitration decides otherwise.

F. The parties may waive disqualification of an arbitrator upon full disclosure of any basis for disqualification, and upon approval of the court in court-administered arbitrations.

Comment

Excess verbiage has been deleted. "Asked" has been substituted for "requested." "Shall" has been substituted for "should" throughout the Canon; see Comment for Canon I.

Canon II.A's provisions have been stated clearly in the conjunctive ("and"). Canon II.A(2) has been amended to follow Code of Judicial Conduct, Canon 3(C)(2) as to spouses and minor children. Canon II.A(3) has been added for court-annexed arbitration or arbi-

tration administered by a court under, e.g., the Uniform Act. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the Code) ethics standards, Canon VIII.B states an exception for Canon II.D's disclosure principles. Canon II.E has been modified to account for situations where a court administers arbitration, e.g., court-annexed arbitration, but also where a court appoints an arbitrator, e.g., pursuant to the Uniform Act, N.C. Gen. Stat. § 1-567.4. Canon II.F has been added; it is taken from N.C. Ct. -Ord. Arb. R. 2(e); however, court approval is required only if a court has appointed an arbitrator in a court-annexed arbitration or pursuant to, e.g., the Uniform Act.

Canon II generally follows Code of Judicial Conduct, Canon 3(C), although Canon II does not specify degrees of kinship as the Code of Judicial Conduct does. See also Academy Code, ¶¶ 2.B, 3.A; IBA Ethics, Arts. 1, 3-4; SPIDR Standards, Responsibilities to the Parties § 4.

III. An arbitrator, in communicating with parties, shall avoid impropriety or the appearance of impropriety.

A. If the parties' agreement or arbitration rules referred to in that agreement establish the manner or content of communications between the arbitrator and the parties, the arbitrator shall follow those procedures notwithstanding any contrary provision in Canons III.B and III.C.

B. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, arbitrators shall not discuss a case with any party in the absence of other parties, except in these circumstances:

(1) Discussions may be had with a party concerning such matters as setting the time and place of hearings or making other arrangements for conducting proceedings. The arbitrator shall promptly inform other parties of the discussion and shall not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

(2) If all parties request or consent to it, such discussion may take place.

C. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, whenever an arbitrator communicates in writing with one party, the arbitrator shall send a copy of the communication to other parties at the same time. Whenever the arbitrator receives a written communication concerning the case from a party

which has not already been sent to other parties, the arbitrator shall send that communication to other parties.

Comment

"Shall" has been substituted for "should" throughout Canon III; see Comment to Canon I. Code III.B(2), stating "If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party present," has been deleted as redundant with Canon IV.F. Revisions have also tightened the text; the last phrase clarifies "to do so." See also Code of Judicial Conduct, Canon 2, for which Canon III is a rough parallel in some respects; Academy Code. ¶ 2.D; IBA Ethics, Art. 5.

IV. An arbitrator shall conduct proceedings fairly and diligently.

A. An arbitrator shall conduct proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

B. An arbitrator shall perform duties diligently and conclude the case as promptly as circumstances reasonably permit.

C. An arbitrator shall be patient, dignified and courteous to parties, their lawyers, witnesses, and all others with whom the arbitrator deals in that capacity and shall encourage similar conduct by all participants in the proceedings. This does not preclude an arbitrator's imposing sanctions if permitted by law or by the parties' agreement.

D. Unless otherwise agreed by the parties or provided in arbitration rules to which the parties have agreed, an arbitrator shall accord to all parties the right to appear in person and to be heard after due notice of the time and place of hearing.

E. An arbitrator shall not deny a party the opportunity to be represented by counsel.

F. If a party fails to appear after due notice, an arbitrator may proceed with the arbitration when authorized to do so by the parties or by law. An arbitrator may do so only after receiving assurance that notice has been given to the absent party.

G. When an arbitrator determines that more information than has been presented by the parties is required to decide a case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence.

H. It is not improper for an arbitrator to suggest to the parties that they discuss settling the case. An arbitrator may not be present or otherwise participate in settlement discussions unless asked to do so by all parties. An arbitrator may not pressure a party to settle.

I. Nothing in these Canons is intended to prevent a person from acting as a mediator, conciliator or other neutral in a dispute in which he or she has been appointed as an arbitrator, if asked to do so by all parties or where authorized or required to do so by applicable law or rules.

J. Where there is more than one arbitrator, the arbitrators shall afford each other full opportunity to participate in all aspects of the proceedings.

K. In court-annexed arbitrations where one or more of the parties is proceeding without counsel, at the hearing the arbitrator shall discuss the nature of the arbitration process with all parties and counsel present, including the arbitrator's role, time allotted for each party's case, order of proceedings, and the right to trial de novo (if applicable) if a party not in default is dissatisfied with the arbitrator's award, unless parties waive these explanations.

Comment

Language has been tightened, and excess verbiage has been deleted. "Shall" or "may" has been substituted for "should" throughout Canon IV; see Comment to Canon I.

Canon IV.C has been amended to follow Code of Judicial Conduct, Canon 3(A)(3). The final sentence recognizes that arbitrators may be empowered to impose sanctions in, e.g., court-annexed arbitration or by the parties' agreement, in addition to the arbitrator's ethical obligation to encourage proper conduct. Canon IV.H is consistent with Standard IV.B. Canon IV.I has been modified to take into account procedures other than mediation or conciliation, e.g., early neutral evaluation, etc. Canon IV.K has been added; it only applies to court-annexed arbitration. Where there has been an agreement to arbitrate governed by, e.g., the Uniform Act, but parties have not appointed an arbitrator pursuant to the Act and the court does so under, e.g., N.C. Gen. Stat. § 1-567.4, there is no reason to require that arbitrator to explain the nature of arbitration. Many court-annexed arbitrations involve small claims where parties may appear without counsel; fairness and efficiency suggest that an explanation at the beginning of the hearing, unless waived, will expedite the proceeding. Parties in court-annexed arbitration may agree to binding arbitration

with no trial de novo; if this is the case, there is no need to explain a right to trial de novo. Canon IV.K was suggested by Standard IV.A

See also Academy Code, ¶¶ 1.A, 2.J, 4-5; IRA Ethics Arts. 7-8, SPIDR Standards, Responsibilities to the Parties §§ 2, 5-6. The Uniform Act and the International Commercial Arbitration and Conciliation Act provide for representation by counsel. N.C. Gen. Stat. §§ 1-567.7, 1-567.48(b).

V. An arbitrator shall make decisions in a just, independent and deliberate manner.

A. An arbitrator shall, after careful deliberation, decide all issues submitted for determination. An arbitrator may decide no other issues.

B. An arbitrator shall decide all issues justly, exercising independent judgment, and shall not permit outside pressure to affect the decision.

C. An arbitrator shall not delegate the duty to decide to any other person, unless the parties agree to such delegation.

D. If all parties agree to settle issues in dispute and ask an arbitrator to embody that agreement in an award, an arbitrator may do so but is not required to do so unless satisfied with the propriety of the settlement terms. Whenever an arbitrator embodies the parties' settlement in an award, the arbitrator shall state in the award that it is based on the parties' agreement.

Comment

Revisions tighten the text and omit excess verbiage. "Shall" has been substituted for "should" throughout Canon V; see Comment to Canon I. The new material in Canon V.C makes it clear that parties can agree that an arbitrator may delegate decisionmaking in whole or in part, e.g., to conciliators as provided in the North Carolina International Commercial Arbitration and Conciliation Act. See also Academy Code, ¶¶ 2.G-2.I, 6.

VI. An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and shall not at any time use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others or to affect adversely the interest of another.

B. Unless the parties agree otherwise, or the law or applicable rules require, an arbitrator shall keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision before it is given to all parties. Where there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the arbitrators' deliberations. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as required by law, or as agreed by the parties.

D. In many types of arbitrations it is customary for arbitrators to serve without pay. In some types of cases it is customary for arbitrators to receive compensation for services and reimbursement for expenses. Where such payments are to be made, all persons asked to serve, or who serve as arbitrators, shall be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons shall scrupulously avoid bargaining with parties over the amount of payments, or engaging in communications concerning payments, which would create an appearance of coercion or other impropriety. Absent provisions in the parties' agreement, in rules to which the parties have agreed, or in applicable law, certain practices relating to payments are generally recognized as preferable to preserve the integrity and fairness of the arbitration process. These practices include:

(1) It is preferable that before the arbitrator finally accepts appointment, the basis of payment be established and that all parties be informed in writing.

(2) In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, payments shall be arranged by the institution to avoid the necessity for arbitrators communicating directly with parties concerning the subject.

(3) Where no institution is available to assist in making arrangements for payments, it is preferable that any discussions with arbitrators concerning payments take place in the presence of all parties.

(4) In cases where arbitration is court-administered, court rules, orders and practices shall be followed.

Comment

Excess verbiage has been deleted, and language has been tightened. "Shall" replaces "should" throughout Canon VI, except in

Canon VI.D(3), where "should" has been omitted. Canon VI.C has been modified to allow parties to agree to use the arbitrator in other neutral roles, e.g., as a post-award mediator. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the Code) ethics standards, Canon VIII.B states an exception for Canon VI.D(2)'s payment principles Canon VI.D(4) has been added to take into account, e.g, court annexed arbitration. See also Academy Code, ¶¶ 2.C, 2.K, 3.A; IBA Ethics, Arts. 6, 9, SPIDR Standards, Responsibilities to the Parties § 3, Disclosure of Fees.

VII. Ethical considerations relating to arbitrators appointed by one party.

A. *Obligations under Canon I.* Non-neutral party-appointed arbitrators shall observe Canon I obligations to uphold the integrity and fairness of the arbitration process, subject to these provisions:

(1) Non-neutral arbitrators may be predisposed to the party appointing them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators shall not engage in delaying tactics or harassment of a party or witness and shall not knowingly make untrue or misleading statements to other arbitrators.

(2) Provisions of Canon I.D relating to relationships and interests do not apply to non-neutral arbitrators.

B. *Obligations under Canon II.* Non-neutral party-appointed arbitrators shall disclose to all parties, and to other arbitrators, interests and relationships which Canon II requires to be disclosed. Disclosure required by Canon II is for the benefit of the party appointing the non-neutral arbitrator and for the benefit of other parties and arbitrators so that they may know of bias which may exist or appear to exist. This obligation is subject to these provisions:

(1) Disclosure by non-neutral arbitrators must be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.

(2) Non-neutral arbitrators are not obliged to withdraw if asked to do so by a party who did not appoint them, notwithstanding Canon II.E.

C. *Obligations under Canon III.* Non-neutral party-appointed arbitrators shall observe Canon III's obligations concerning communications with parties, subject to these provisions:

(1) In an arbitration in which two party-appointed arbitrators are expected to appoint the third arbitrator, non-neutral arbitrators may consult with the party who appointed them concerning acceptability of persons under consideration for appointment as the third arbitrator.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred before the person was appointed as arbitrator, or before the first hearing or other meeting of parties with the arbitrators, the non-neutral arbitrator shall, at the first hearing or meeting, disclose that such communication has taken place. In complying with Canon VII.C(2), it is sufficient that there be disclosure that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future, and there is no requirement thereafter that there be disclosure before each separate occasion when such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with a party that appointed them concerning any matter as to which communication is permitted under these Canons, they are not required to send copies of such writing to other parties or arbitrators.

D. *Obligations under Canon IV.* Non-neutral party-appointed arbitrators shall observe Canon IV's obligations to conduct proceedings fairly and diligently.

E. *Obligations under Canon V.* Non-neutral party-appointed arbitrators shall observe Canon V's obligations concerning making decisions, but such arbitrators may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI.* Non-neutral party-appointed arbitrators shall observe Canon VI's obligations to be faithful to the relationship of trust inherent in the office of arbitrator, but such arbitrators are not subject to Canon VI.D's provisions with respect to payments by the party appointing them.

Comment

"Shall" or "must" has been substituted for "should" in Canon VII; see Comment to Canon I. Excess verbiage has been deleted; sen-

tences have been tightened; Canons VII.E and VII.F have been rewritten to convey the same sense as the Code. Nothing in Rule 1.12(d) conflicts with Canon VII.

VIII. Canons are subject to laws and professional responsibility principles; choice or law.

A. These Canons are subject to applicable constitutional, statutory, decisional or administrative rules, State or federal, and when these conflict with these Canons, the Canon provision shall be deemed superseded if it is not possible to give effect to the rule and these Canons.

B. These Canons and other ethics or similar rules which may apply to an arbitrator in any other capacity, e.g., as a professional, shall be read in pari materia, giving effect to these Canons and the ethics rules if possible. If an arbitrator is subject to other arbitrator ethics rules, e.g., the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, and these Canons, these Canons shall govern if there is a conflict of standards; provided however, that the principle of primacy in Canon VIII.B shall not apply to disclosure principles in Canon II.D and payment principles in Canon VI.D(2).

C. These Canons apply to arbitrations in North Carolina, or arbitrations administered by a court in North Carolina, to arbitrations where the parties choose North Carolina law exclusive of conflict of laws principles in the contract or other agreement, or where it is determined that North Carolina law exclusive of conflict of laws principles applies, regardless of where the arbitration is conducted.

Comment

Canon VIII is not part of the Code. However, given the possibility of conflicting rules of court, professional responsibility rules, legislation or constitutional principles, statement of the obvious in Canon VIII.A-B seems appropriate. Canon VIII.B provides that if an arbitrator is subject to professional or other ethics rules because of that arbitrator's status as, e.g., a lawyer, these Canons and the professional ethics rules shall be read in pari materia, giving effect to both if possible.

Rule 8.5 suggested Canon VIII.C, which is intended to cover court-annexed arbitrations, arbitrations where a court has appointed an arbitrator pursuant to, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4, and arbitrations where parties have chosen North Carolina law or where North Carolina law, exclusive of conflict of laws principles, applies. This means that parties and the arbitrator cannot step across a state line and escape these principles.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on 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, Section .0100, be amended as follows (additions underlined, deletions interlined):

Discipline and Disability of Attorneys
27 N.C.A.C. 1B, Section .0100

.0125 Reinstatement

• • •

(b) After suspension

• • • •

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement, and will set forth facts demonstrating the following in the petition:

• • •

(I) [effective for petitioners suspended on or after January 1997] if two or more years have elapsed between the effective date of the suspension order and the date on which the reinstatement petition is filed with the secretary, the petitioner must within one year prior to filing the petition, complete 15 hours of CLE approved by the Board of Continuing Legal Education pursuant to Subchapter 1D, Rule .1519 of these rules. ~~Twelve of the 15 hours must be earned by attending practical skills courses and t~~Three hours of the 15 hours must be earned by attending a three-hour block course of instruction devoted exclusively to professional responsibility and/or professionalism. These requirements shall be in addition to

any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

• • •

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 16th day of June, 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 22nd day of July, 1999.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 22nd day of July, 1999.

s/Wainwright, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATION OF THE JUDICIAL DISTRICT BARS

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 April 23, 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 organization of the North Carolina State Bar and, particularly, the organization of the judicial district bars, set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (deletions interlined):

Model Bylaws For Use by Judicial District Bars
27 N.C.A.C. 1A, Section .1000

Section .1008 District Bar Finances

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(d) District bar checks: All checks written on district bar accounts (arising from the collection of mandatory dues) that exceed $500 ~~(or such larger amount as may be approved, in writing, by the staff auditor of the North Carolina State Bar)~~ must be signed by two of the following: (1) the treasurer, (2) any other officer, (3) another member of the board of directors, or (4) the executive secretary/director, of any.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 23, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of June, 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 22nd day of July, 1999.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 22nd day of July, 1999.

s/Wainwright, J.
For the Court

AMENDMENTS TO THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 23, 1999.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 1.9, be amended as follows (new language in bold type):

Revised Rules of Professional Conduct
27 N.C.A.C. 2

Rule 1.9 Conflict of Interest: Former Client

• • •

(c) A lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

(1) Use confidential information protected from disclosure by Rule 1.6 to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known; or

(2) reveal confidential information protected from disclosure by Rule 1.6 except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Comment

• • •

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. **Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become**

known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law Governing Lawyers, §111 cmt. d (Proposed Final Draft No. 1, 1996).

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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 Revised Rules of Professional Conduct in the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 23, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of September, 1999.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of October, 1999.

s/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of October, 1999.

s/Franklin Freeman Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATION OF THE JUDICIAL DISTRICT BARS

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 October 22, 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 organization of the North Carolina State Bar and, particularly, the election and appointment of State Bar Councilors from the judicial district bars, as set forth in 27 N.C.A.C. 1A, Rules .0802, .0803, .0804 and in Rule .1005 be amended as follows (deletions interlined; additions underlined):

Election and Appointment of State Bar Councilors
27 N.C.A.C. 1A, Section .0800

.0802 Election – When Held; Notice; Nominations

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held ~~at a meeting~~ during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States Mail, postage prepaid, at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, mail these notices.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, ~~name a person or committee named by the local bar to which nominations may be made prior to the meeting, advise that additional~~

~~nominations may be made from the floor at the meeting itself,~~ and advise that all elections must be by a majority of the votes cast, ~~by those present and voting.~~ If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself. In judicial districts that permit elections by mail, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

.0803 Election ~~Same~~—Voting Procedures

(a) All nominations made either before or at the meeting shall be voted on ~~at the meeting~~ by secret ballot ~~of those present and voting~~.

(b) Cumulative voting shall not be permitted.

(c) Nominees receiving a majority of the votes cast shall be declared elected.

.0804 Procedures Governing Elections by Mail

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by mail.

(c) In districts which permit elections by mail, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by mail.

(d) The judicial district bar shall mail a ballot to each active member of the judicial district bar at the member's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions and shall state when and where the ballot should be returned.

(e) Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The judicial district bar shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election, as well as how many ballots are returned.

(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted. Voting by computer or electronic mail will not be permitted.

~~.0804~~.0805 Vacancies

The unexpired term of any councilor whose office has become vacant because of resignation, death, or any cause other than the expiration of a term, shall be filled within 90 days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

~~.0805~~.0806 Bylaws Providing for Geographical Rotation of Division of Representation

Nothing contained herein shall prohibit the district bar of any judicial district from adopting bylaws providing for the geographical rotation or division of its councilor representation.

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Section .1000 Model Bylaws for Use by Judicial District Bars

.1005 Councilor

The district bar shall be represented in the State Bar council by one or more duly elected councilors, the number of councilors being determined pursuant to G.S. 84-17. Any councilor serving at the time of the adoption of these bylaws shall complete the term of office to which he or she was previously elected. Thereafter, elections shall be held as necessary. ~~at the annual (or a special meeting) of the district bar immediately preceding the expiration of a councilor's term.~~ Nominations shall be made by the Nominating Committee and the election held as provided in ~~North Carolina General Statutes Section~~ G.S. 84-18 and in Section .0800 et seq. of ~~this~~ Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0800 et seq.). If more than one council seat is to be filled, separate elections shall be held for each vacant seat. A vacancy in the office of councilor shall be filled as provided by Rule .0804 of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0804).

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 October 22, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of October, 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 5th day of November, 1999.

s/Henry E. Frye
Henry E. Frye
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 5th day of November 1999.

s/Franklin Freeman Jr.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

IN RE CLIENT SECURITY FUND OF) ORDER
THE NORTH CAROLINA STATE BAR)

This matter coming on to be considered before the North Carolina Supreme Court in conference duly assembled on 4 November, 1999, upon request of the North Carolina State Bar, and it appearing from information submitted by the Board of the Client Security Fund and the officers of the North Carolina State Bar that a $20.00 assessment of the active members of the North Carolina State Bar will be needed in the year 2000 and each year thereafter in order to properly support and maintain the Client Security Fund;

Now, therefore, it is hereby ordered that there be a $20.00 assessment of the active members of the North Carolina State Bar to support the Client Security Fund in the year 2000 and each year thereafter until further order of this Court.

This the 5th day of November, 1999.

Freeman, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING COMMITTEES

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 October 22, 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 committees of the council, as set forth in 27 N.C.A.C. Subchapters 1A, 1B, 1D, and 1F, be amended as follows (additions underlined, deletions interlined):

SUBCHAPTER 1A
Organization of the North Carolina State Bar

Section .0100 Functions
.0106 Reports Made to Annual Meeting

The annual reports of the several ~~sections and~~ committees~~, with their recommendations,~~ and boards shall be delivered to the secretary of the North Carolina State Bar ~~at least 30 days~~ before the annual meeting. ~~Such reports, together with any reports from special committees that the council desires to present to the annual meeting, may be printed and sent to each member of the North Carolina State Bar at least 20 days before such meeting. Nothing herein shall preclude any section, committee or the council from presenting a report of recommendation that has not been so printed and mailed.~~

Section .0300 Election and Succession of Officers
.0307 Removal from Office

The council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the council to have ~~engaged in misconduct~~ a disability or to have ~~a disability,~~ engaged in misconduct including misconduct not related to the office. ~~but so infamous as to render the offender unfit for the office, misconduct amounting to noncriminal misconduct in office and misconduct which is both criminal and misconduct in office.~~

Section .0700 Standing Committees of the Council
.0701 Standing Committees and Boards

[Replacing the entire text of the existing rule.]

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. It shall be the duty of the Executive Committee to examine the books and financial records of the State Bar at each regular meeting of the council; to make recommendations to the council on the budget, finances, and annual audit of the State Bar; to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

(2) Ethics Committee. It shall be the duty of the Ethics Committee to study the rules of professional responsibility currently in effect; to make recommendations to the council for such amendments to the rules as the committee deems necessary or appropriate; to study and respond to questions that arise concerning the meaning and application of the rules of professional conduct; to issue opinions in response to questions of legal ethics in accordance with the provisions of Section .0100 of Subchapter 1D of these rules; to consider issues concerning the regulation of lawyers' trust accounts; and to perform such other duties and consider such other matters as the council or the president may designate.

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in panels as assigned by the president. Each panel shall have at least ten members. Two members of each panel shall be non-lawyers and the remaining members of each panel shall be councilors of the North Carolina State Bar. A quorum of a panel shall be five

members serving at a particular time. Each panel shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances and other matters referred to it by the chairperson of the Grievance Committee. Each panel member shall be furnished a brief description of all matters referred to other panels (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other panels. Each panel's decision respecting the grievances and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a panel decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another panel. The president shall designate a vice-chairperson to preside over, and oversee the functions of, each panel. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) Authorized Practice Committee. It shall be the duty of the Authorized Practice Committee to respond to or investigate inquiries and complaints about conduct that may constitute the unauthorized practice of law in accordance with the provisions of Section .0200 of Subchapter 1D of these rules; to study and advise the council on the appropriate and lawful use and regulation of legal assistants, paralegals and other lay persons in connection with the provision of law-related services; to study and advise the council on the regulation of professional organizations; and to perform such other duties and consider such other matters as the council or the president may designate.

(5) Administrative Committee. It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, publications, and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the council

or the president may designate. The committee may establish a Publications Board to oversee the regular publications of the State Bar.

(6) Justice System Committee. It shall be the duty of the Justice System Committee to assist the council in identifying and advancing the appropriate role of the State Bar in connection with initiatives, programs, legislation and other actions intended to improve access to justice, simplify the law and judicial procedures, and enhance the justice system and the public's confidence in that system; to assist the judicial district bars of the State Bar in establishing plans for the representation of indigents in criminal cases in accordance with the provisions of Sections .0400 and .0500 of Subchapter 1D of these rules; to provide assistance and advice concerning the operation of such plans; to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of the lawyers of this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(7) Client Assistance Committee. It shall be the duty of the Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate.

(8) Legal Assistance for Military Personnel (LAMP) Committee. It shall be the duty of the LAMP Committee to serve as liaison for lawyers in the military service in this State; to improve legal services to military personnel and dependents stationed in this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(b) Boards. The council of the State Bar shall make appointments to the following boards upon the recommendation of the Executive Committee. The boards are constituents of the North Carolina State Bar and, as standing committees of the State Bar, are subject to the authority of the council.

(1) Interest on Lawyers' Trust Accounts (IOLTA) Board of Trustees. The IOLTA Board shall be constituted in accordance

with and shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts set forth in Section .1300 of Subchapter 1D of these rules.

(2) Board of Legal Specialization. The Board of Legal Specialization shall be constituted in accordance with and shall carry out the provisions of the Plan of Legal Specialization set forth in Section .1700 of Subchapter 1D of these rules.

(3) Client Security Fund Board of Trustees. The Client Security Fund Board of Trustees shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar set forth in Section .1400 of Subchapter 1D of these rules.

(4) Board of Continuing Legal Education (CLE). The Board of Continuing Legal Education shall be constituted in accordance with and shall carry out the provisions of the Continuing Legal Education Rules and Regulations of the North Carolina State Bar set forth in Sections .1500 and .1600 of Subchapter 1D of these rules.

(5) Lawyer Assistance Program Board. The Lawyer Assistance Program Board shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Lawyer Assistance Program of the North Carolina State Bar set forth in Section .0600 of Subchapter 1D of these rules.

SUBCHAPTER 1B
Discipline and Disability Rules

Section .0100 Discipline and Disability of Attorneys
.0103 Definitions

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(21) Grievance Committee—the Grievance Committee of the North Carolina State Bar or any of its panels acting as the Grievance Committee respecting the grievances and other matters referred to it by the chairperson of the Grievance Committee.

• • •

(27) Lawyer Assistance Program Board—the Lawyer Assistance Program Board of the North Carolina State Bar.

[Renumber remaining subparagraphs.]

~~(33) PALS Committee—Positive Action for Lawyers Committee of the North Carolina State Bar.~~

• • •

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty . . .

(21) to appoint a subcommittee to make recommendations to the council for such amendments to the Discipline and Disability Rules as the subcommittee deems necessary or appropriate.

(b) The president, vice-chairperson, or a member of the Grievance Committee ~~may perform the functions of the~~ designated by the president or the chairperson or vice-chairperson of the committee may perform the functions, exercise the power, and discharge the duties of the chairperson ~~of the Grievance Committee in any matter~~ or any vice-chairperson when the chairperson or a vice-chairperson is absent or disqualified.

.0113 Proceedings before Before the Grievance Committee

(a) The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

• • •

.0130 Disciplinary Amnesty in Illicit Drug Use Cases

(a) The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs

except as provided in Rules .0130(c), (d) and (e) below. The information will be provided to the ~~chairperson of the Positive Action for Lawyers Committee (PALS).~~ director of the lawyer assistance program of the North Carolina State Bar.

(b) ~~If the PALS Committee~~ If the director of the lawyer assistance program concludes after investigation that a member has used or is using an illicit drug and the member participates ~~with the PALS Committee~~ and successfully complies with any ~~prescribed~~ course of treatment~~, whether or not the initial referral to the PALS Committee came from the North Carolina State Bar~~ prescribed by the lawyer assistance program, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

(c) If a member under Rule .0130(b) above fails to cooperate with the ~~PALS Committee~~ Lawyer Assistance Program Board or fails to successfully complete any treatment prescribed for the member's illicit drug use, the ~~chairperson~~ director of the ~~PALS Committee~~ lawyer assistance program will report such failure to participate in or complete the ~~PALS program~~ prescribed treatment to the chairperson of the Grievance Committee. The chairperson of the Grievance Committee will then treat the information originally received as a grievance.

• • •

(e) If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Revised Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the ~~chairperson~~ director of the ~~PALS Committee~~ lawyer assistance program pursuant to Rule .0130(a) above. The information regarding the member's alleged additional misconduct will be reported to the chairperson of the Grievance Committee.

SUBCHAPTER 1D
Rules of the Standing Committees of the North Carolina State Bar

Section .0200 Procedures for the Consumer Protection Authorized Practice Committee

.0201 General Provisions

The purpose ~~for establishing~~ a of the committee on the ~~unauthorized~~ authorized practice of law ~~(the Consumer Protection Com-~~

~~mittee) and the reason for the prohibition against the practice of law by those who have not been examined, found qualified to practice law, and licensed to practice law~~ is to protect the public from being unlawfully advised and represented in legal matters by unqualified persons ~~over whom the judicial department can exercise little, if any, control in the matter of infractions of the Rules of Professional Conduct, which in the public interest, lawyers are bound to observe.~~

• • •

.0203 Definitions

Subject to additional definitions contained in other provisions of this ~~chapter~~ subchapter, the following words and phrases, when used in this ~~article, shall have~~ subchapter, have the meanings set forth in this rule, unless the context clearly indicates otherwise~~, the meanings given to them in this rule~~.

• • •

(2) Chairperson of the ~~Consumer Protection~~ Authorized Practice Committee—the councilor appointed to serve as chairperson of the ~~Consumer Protection~~ Authorized Practice Committee of the ~~North Carolina~~ State Bar.

• • •

(12) Letter of caution—a communication from the ~~Consumer Protection~~ Authorized Practice Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

• • •

(18) Preliminary Hearing—hearing by the ~~Consumer Protection~~ Authorized Practice Committee to determine whether probable cause exists.

(19) Cause—a finding by the ~~Consumer Protection~~ Authorized Practice Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

• • •

.0204 State Bar Council—Powers and Duties

The Council of the North Carolina State Bar shall have the power and duty

(1) to supervise the administration of ~~Consumer Protection~~ the Authorized Practice Committee in accordance with the provisions ~~hereinafter set forth;~~ of this subchapter;

• • •

.0205 Chairperson of the ~~Consumer Protection~~ Authorized Practice Committee—Powers and Duties

(a) The chairperson of the ~~Consumer Protection~~ Authorized Practice Committee shall have the power and duty

• • •

(2) to recommend to the ~~Consumer Protection~~ Authorized Practice Committee that an investigation be initiated;

(3) to recommend to the ~~Consumer Protection~~ Authorized Practice Committee that a complaint be dismissed;

(4) to direct a letter of notice to an accused person or corporation or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;

• • •

(6) to call meetings of the ~~Consumer Protection~~ Authorized Practice Committee for the purpose of holding preliminary hearings;

• • •

(b) The president, vice-chairperson or senior council member of the ~~Consumer Protection~~ Authorized Practice Committee shall perform the functions of the chairperson of the ~~Consumer Protection Committee~~ committee in any matter when the chairperson or vice-chairperson is absent or disqualified.

.0206 Consumer Protection Authorized Practice Committee—Powers and Duties

The ~~Consumer Protection~~ Authorized Practice Committee shall have the power and duty

(1) to direct to the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in ~~the State of North Carolina;~~ this State;

(2) to hold preliminary hearings, find probable cause, and ~~direct~~ recommend to the Executive Committee that complaints be filed;

• • •

(4) to issue a letter of caution to an ~~accused~~ respondent in cases wherein ~~unauthorized practice of law~~ probable cause is not established but the activities of the ~~accused~~ respondent are deemed to be improper or may become the basis for injunctive relief if continued or repeated;

• • •

.0207 Counsel—Powers and Duties

The counsel shall have the power and duty

(1) to initiate an investigation concerning the alleged unauthorized practice of law;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Authorized Practice Committee;

~~(1)~~(3) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of a complaint or otherwise;

~~(2)~~(4) to recommend to the chairperson of the ~~Consumer Protection~~ Authorized Practice Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be ~~passed upon~~ considered by the ~~Consumer Protection~~ Authorized Practice Committee to determine whether probable cause exists;

~~(3)~~(5) to prosecute all unauthorized practice of law proceedings before the ~~Consumer Protection~~ Authorized Practice Committee and the courts;

~~(4)~~(6) to represent the ~~North Carolina~~ State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law.

~~(5) to appear on behalf of the North Carolina State Bar at hearings conducted by the Consumer Protection Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding;~~

[Renumber remaining subparagraphs.]

• • •

.0208 Suing for Injunctive Relief

(a) Upon receiving a recommendation from the Authorized Practice Committee that a complaint seeking injunctive relief be filed, the Executive Committee shall review the matter at the same quarterly meeting and determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(b) If the Executive Committee decides to follow the Authorized Practice Committee's recommendation, it shall direct the counsel to prepare the necessary pleadings as soon as practical for signature by the chairperson and filing with the appropriate tribunal.

(c) If the Executive Committee decides not to follow the Authorized Practice Committee's recommendation, the matter shall go before the council at the same quarterly meeting to determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(d) If the council decides not to follow the Authorized Practice Committee's recommendation, the matter shall be referred back to the Authorized Practice Committee for alternative disposition.

(e) If probable cause exists to believe that a respondent is engaged in the unauthorized practice of law and action is needed to protect the public interest before the next quarterly meeting of the Authorized Practice Committee, the chairperson, with the approval of the president, may file and verify a complaint or petition in the name of the North Carolina State Bar.

Section .0300 Disaster Response Plan
.0301 The Disaster Response Team

(a) The disaster response team should be ~~made up~~ composed of the following:

(1) the president of the ~~North Carolina~~ State Bar, or ~~in the event~~ if the president is unavailable, ~~the president elect;~~ another officer of the State Bar;

• • •

(5) the chairperson of the Client Assistance Committee; and

~~(5)~~(6) other persons, such as the applicable local bar president(s), appointed by the president as necessary or appropriate and ~~necessary~~ for response in each individual situation.

(b) Implementation of the disaster response plan shall be the decision of the president or, if he or she is unavailable, the president-elect, vice-president or immediate past-president.

(c) The counsel, or his or her designee, shall be the coordinator of the disaster response team ("coordinator"). If the president or ~~president-elect~~ other officer is unavailable to decide whether to implement the disaster response plan for a particular event, then and only then shall the coordinator be authorized to make the decision to implement the disaster response plan.

(d) It shall be the responsibility of the coordinator to conduct ~~annual~~ periodic educational programs regarding the disaster response plan and to report regularly to the Client Assistance Committee.

.0303 Report on Results

(a) The coordinator will promptly convene a meeting ~~as soon as possible to be attended by~~ of ~~as many~~ groups ~~as were~~ involved in the disaster ~~to obtain input regarding~~ to review the effectiveness of the plan in that particular disaster.

(b) The coordinator shall prepare a written report concerning significant matters relating to ~~of all that occurred at the site of~~ the disaster.

(c) The written report shall be submitted to the Client Assistance Committee ~~of the council of the State Bar~~ as well as other involved organizations.

Section .0600 Rules Governing the Lawyer Assistance Program Procedures for the Positive Action for Lawyers (PALS) Committee

.0601 Purpose ~~Investigation of Alleged Substance Abuse~~

[Replacing the entire text of the existing rule]

The purpose of the lawyer assistance program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

.0602 Authority ~~Investigation of Cases Referred by Disciplinary Bodies~~

[Replacing the entire text of the existing rule]

The council of the North Carolina State Bar hereby establishes the Lawyer Assistance Program Board (the board) as a standing committee of the council. The board has the authority to establish policies governing the State Bar's lawyer assistance program as needed to implement the purposes of this program. The authority conveyed is not limited by, but is fully coextensive with, the authority previously vested in State Bar's predecessor program, the Positive Action for Lawyers (PALS) program.

.0603 Operational Responsibility

[Rules .0603-.0612 are entirely new provisions]

The board shall be responsible for operating the lawyer assistance program subject to the statutes governing the practice of law, the authority of the council, and the rules of the board.

.0604 Size of Board

The board shall have nine members. Three of the members shall be councilors of the North Carolina State Bar at the time of appointment; three of the members shall be non-lawyers or lawyers with experience and training in the fields of mental health, substance abuse or addiction; and three of the members shall be lawyers who are currently volunteers to the lawyer assistance program. No member of the Grievance Committee shall be a member of the board.

.0605 Appointment of Members; When; Removal

The initial members of the board shall be appointed at the next meeting of the council following the creation of the board. Thereafter, members shall be appointed or reappointed, as the case may be, at the first quarterly meeting of the council each calendar year, provided that a vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

.0606 Term of Office and Succession

The members of the board shall be divided into three classes of equal size to serve in the first instance for terms expiring one,

two and three years, respectively, after the first quarterly meeting of the council following creation of the board. Of the initial board, three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer to the lawyer assistance program) shall be appointed to terms of one year; three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of two years; and three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of three years. Thereafter, the successors in each class of board members shall be appointed to serve for terms of three years. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

.0607 Appointment of Chairperson

The chairperson of the board shall be appointed by the council annually at the time of its appointment of board members. The chairperson may be re-appointed for an unlimited number of one-year terms. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and shall represent the board in its dealings with the public. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

.0608 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed by the council annually at the time of its appointment of board members. The vice-chairperson may be re-appointed for an unlimited number of one-year terms. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

.0609 Source of Funds

Funding for the program shall be provided from the general and appropriate special funds of the North Carolina State Bar and such other funds as may become available by grant or otherwise.

.0610 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, electronic mail or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

.0611 Annual Report

The board shall prepare at least annually a report of its activities and shall present the same at the annual meeting of the council.

.0612 Powers and Duties of the Board

In addition to the powers and duties set forth elsewhere in these rules, the board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of the lawyer assistance program consistent with these rules;

(2) to implement programs to investigate and evaluate reports that a lawyer's ability to practice law is impaired because of substance abuse, depression, or other debilitating mental condition; to confer with any lawyer who is the subject of such a report; and, if the report is verified, to provide referrals and assistance to the impaired lawyer;

(3) to adopt and amend regulations consistent with these rules with the approval of the council;

(4) to delegate authority to the staff of the lawyer assistance program subject to the review of the council;

(5) to delegate authority to investigate, evaluate, and intervene with impaired lawyers to committees composed of qualified volunteer lawyers and non-lawyers;

(6) to submit an annual budget for the lawyer assistance program to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(7) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the lawyer assistance program;

(8) to implement programs to investigate, evaluate, and intervene in cases referred to it by a disciplinary body, and to report the results of the investigation and evaluation to the referring body;

(9) to promote programs of education and awareness for lawyers, law students, and judges about the causes and remedies of lawyer impairment;

(10) to train volunteer lawyers to provide peer support, assistance and monitoring for impaired lawyers; and

(11) to administer the PALS revolving loan fund or other similar fund that may be established for the board's program to assist lawyers who are impaired because of a debilitating mental condition.

~~.0603~~ .0613 Confidentiality

The lawyer assistance program is an approved lawyers' assistance program in accordance with the requirements of Rule 1.6(b) of the Revised Rules of Professional Conduct. Except as noted herein and otherwise required by law, ~~results of investigations, conferences and the like~~ information received during the course of investigating, evaluating, and assisting an impaired lawyer shall be privileged and held in the strictest confidence ~~between the lawyer involved and the committee~~ by the staff of the lawyer assistance program, the members of the board and the members of any committee of the board. ~~For good cause shown where the allegation of substance abuse~~ If a report of impaired condition is made by the lawyer's members of a lawyer's family, ~~the committee~~ and there is good cause shown, the board may, in its discretion, release ~~such~~ information to ~~such person or persons as in its judgment will be~~ appropriate members of the lawyer's family if the board or its duly authorized committee determines that such disclosure is in the best interest of the impaired lawyer ~~involved~~.

~~.0604 Reference~~.0614 Referral to the Grievance Committee

~~Should~~ If an investigation and evaluation clearly indicate that ~~the lawyer involved is engaging in conduct~~ a lawyer's impairment due to substance abuse or mental condition is detrimental to the public, the courts, or the legal profession, the ~~committee~~ board shall take ~~such action as may appear~~ appropriate ~~to the committee~~ action, including, if warranted, the filing of a grievance. Notwithstanding the foregoing, no grievance shall be filed by the board or any member thereof against a lawyer using information received by the board or one of its committees if the lawyer, or a member of the lawyer's family, initially sought the assistance of a program administered by the board or the lawyer is cooperating in good faith with a program administered by the board.

~~.0605 District Committees~~ .0615 Regional Chapters

~~The~~ A committee may, under appropriate rules and regulations promulgated by the ~~council~~, board, establish ~~district committees, which may exercise~~ regional chapters, composed of qualified volunteer lawyers and non-lawyers. A regional chapter may perform any or all of the duties and functions set forth ~~herein~~ in Section .0600 of this subchapter to the extent provided ~~in any such~~ by the rules ~~and regulations.~~ of the board.

~~.0606~~.0616 Suspension for Impairment, Reinstatement

If it appears that ~~an attorney's~~ a lawyer's ability to practice law ~~has been~~ is impaired by ~~drug or alcohol use, the~~ substance abuse and/or chemical addiction, the board, or its duly authorized committee, may petition any superior court judge to issue an order ~~in~~, pursuant to the court's inherent authority, suspending the ~~attorney's~~ lawyer's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the ~~attorney's~~ lawyer's impairment.

(b) The petition shall be signed by the executive director of the ~~committee~~ lawyer assistance program and the executive director of the ~~North Carolina~~ State Bar.

• • •

(f) At the show cause hearing, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the

lawyer's ~~attorney's~~ ability to practice law is ~~has been~~ impaired ~~by drug or alcohol use~~.

• • •

(i) A hearing on the reinstatement petition will be held no later than 10 days from the filing of the petition, unless the suspended lawyer ~~attorney~~ agrees to a continuance. At the hearing, the suspended lawyer ~~attorney~~ will have the burden of establishing by clear, cogent, and convincing evidence the following: (1) the lawyer's ability to practice law is no longer impaired; (2) the lawyer's debilitating condition is being treated and/or managed; (3) it is unlikely that the inability to practice law due to the impairment will recur; and (4) it is unlikely that the interest of the public will be unduly threatened by the reinstatement of the lawyer ~~that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being treated and/or managed to minimize the danger to the public from a reoccurrence of drug or alcohol impairment.~~

• • •

~~.0607~~.0617 Consensual Suspension

Notwithstanding the provisions of Rule ~~.0606~~.0616 of this subchapter, the court may enter an order suspending an ~~attorney's~~ a lawyer's license ~~where~~ if the ~~attorney~~ lawyer consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public

~~.0608 Committee Members As~~.0618 Agents of the State Bar

All members of the board and its duly appointed committees shall be deemed to be acting as agents of the ~~North Carolina~~ State Bar ~~and within the course and scope of the agency relationship.~~ when performing the functions and duties set forth in this subchapter.

~~.0609~~.0619 Judicial ~~Subcommittee~~ Committee

~~A subcommittee to the~~ The Judicial Committee of the Lawyer Assistance Program Board shall implement a program of intervention for members of the judiciary with substance abuse problems affecting their professional conduct. The committee ~~shall be formed which~~ shall consist of at least two members of the state's judiciary. ~~of this state. The purpose of this subcommittee~~

~~will be to implement a program for intervention for members of the judiciary with substance abuse problems which affect their conduct as judges or justices. The subcommittee.~~ The committee will be governed by the rules of the ~~Positive Action for Lawyers Committee~~ Lawyer Assistance Program Board where applicable. Rules ~~.0606~~.0616 and ~~.0607~~.0617 of this subchapter ~~will have no application to this rule.~~ are not applicable to the committee.

~~.0610~~.0620 Rehabilitation Contracts for Lawyers Impaired by Substance Abuse

The board, or its duly authorized ~~The~~ committee ~~shall have~~, has the authority to enter into rehabilitation contracts with lawyers suffering from ~~chemical dependency~~ substance abuse including contracts that provide for alcohol and/or drug testing. Such contracts may include ~~any provisions necessary to further the purposes of this section including, but without limitation:~~ the following conditions among others:

(a) ~~a provision~~ that upon ~~PALS receiving~~ receipt of a report of a positive alcohol or drug test for a substance prohibited under the contract, the contract may be amended to include additional provisions considered ~~by PALS~~ to be in the best rehabilitative interest of the lawyer and the public; and

(b) ~~a provision~~ that the lawyer ~~being contracted with~~ stipulates to the admission of any alcohol and/or drug-testing results into evidence in any *in camera* proceeding brought under this section without the necessity of further authentication.

.0621 Evaluations for Substance Abuse, Alcoholism and/or other Chemical Addictions

(a) Notice of Need for Evaluation. The Lawyer Assistance Program Board, or its duly authorized committee, may demand that a lawyer obtain a comprehensive evaluation of his or her condition by an approved addiction specialist if the lawyer's ability to practice law is apparently being impaired by substance abuse, alcoholism and/or other chemical addictions. This authority may be exercised upon recommendation of the director of the lawyer assistance program and the approval of at least three members of the board or appropriate committee, which shall include at least one person with professional expertise in chemical addiction. Written notice shall be provided to the lawyer informing the lawyer that the board has determined that an evaluation is nec-

essary and demanding that the lawyer obtain the evaluation by a date set forth in the written notice.

(b) Failure to Comply. If the lawyer does not obtain an evaluation, the director of the lawyer assistance program shall obtain the approval of the chairperson of the board, or the chairperson of the appropriate committee of the board, to file a motion to compel an evaluation pursuant to the authority set forth in G.S. § 84-28(i) and (j) and in accordance with the procedure set forth in Rule 35 of the North Carolina Rules of Civil Procedure. All pleadings in such a proceeding shall be filed under seal and all hearings shall be held in camera. Written notice of the motion to compel an examination shall be served upon the lawyer in accordance with the North Carolina Rules of Civil Procedure at least ten days before the hearing on the matter.

.0622 Grounds for Compelling an Evaluation

An order compelling the lawyer to obtain a comprehensive evaluation by an addiction specialist may be issued if the board establishes that the evaluation will assist the lawyer and the lawyer assistance program to assess the lawyer's condition and any risk that the condition may present to the public, and to determine an appropriate treatment for the lawyer.

.0623 Failure to Comply with an Order Compelling an Evaluation

If a lawyer fails to comply with an order compelling a comprehensive evaluation by an addiction specialist, the board, or its duly authorized committee, may file a contempt proceeding to be held in camera. If the lawyer fails to comply with a contempt order, the lawyer shall be deemed to have waived confidentiality respecting communications made by the lawyer to the board or its committee. The board, or its duly authorized committee, may seek further relief and may file motions or proceedings in open court.

Section .0700 Procedures for ~~the~~ Fee Dispute Arbitration ~~Committee~~

.0701 Implementation of a Model Plan

The ~~Fee Arbitration~~ Client Assistance Committee (the committee) shall ~~implement~~ develop and the council shall adopt a model plan for fee arbitration ~~approved by the council and~~. The committee shall ensure that a plan of fee arbitration not ~~substantively~~ inconsistent with the model plan is adopted by each district

bar not later than January 1, 1994. It is contemplated that fee arbitration plans will differ somewhat from district to district as a function of local conditions and that some district bars may wish to ~~jointly~~ administer fee arbitration programs jointly. All district bar fee arbitration plans must be approved by the committee on behalf of the council.

• • •

Section .0900 Procedures ~~for~~ concerning ~~the~~ Membership and Fees ~~Committee~~

.0902 Reinstatement from Inactive Status

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(c) Service of Reinstatement Petition

The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to ~~each member~~ the members of the ~~Membership and Fees~~ Administrative Committee and to the counsel.

(d) Investigation by Counsel

The counsel ~~will~~ may conduct any necessary investigation regarding the petition and shall advise the members of the ~~Membership and Fees~~ Administrative Committee of any findings from such investigation.

(e) Response by ~~Membership and Fees~~ Administrative Committee

After ~~the~~ any investigation of the petition by the counsel is complete, the ~~Membership and Fees~~ Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

• • •

.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs

• • •

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by ~~Membership and Fees~~ Administrative Committee

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the ~~Membership and Fees~~ Administrative Committee shall consider the matter at its next regularly scheduled meeting. . . .

(2) Recommendation of ~~Membership and Fees~~ Administrative Committee

The ~~Membership and Fees~~ Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall ~~make a written~~ recommend~~ation~~ to the council that the member be suspended.

(3) Order of Suspension

Upon the recommendation of the ~~Membership and Fees~~ Administrative Committee, the council may enter an order suspending the member from the practice of law. . . .

Section .1000 Rules Governing Reinstatement Hearings Before the ~~Membership and Fees~~ Administrative Committee

.1001 Reinstatement Hearings ~~Before Panel of Membership and Fees Committee~~

(a) Notice; Time and Place of Hearing

(1) Time and Place of Hearing

The chairperson of the ~~Membership and Fees~~ Administrative Committee (the committee) shall fix the time and place of the hearing within 30 days after the member's request for hearing is filed with the secretary. The hearing shall be held as soon as practicable after the request for hearing is filed but in no event more than 90 days after such request is filed unless otherwise agreed by the member and the chairperson of the ~~Membership and Fees Committee.~~ committee.

• • •

(b) Hearing Panel

(1) Appointment

The chairperson of the ~~Membership and Fees Committee~~ committee shall appoint a hearing panel consisting of three members of the committee to consider the petition and make a recommendation to the council.

• • •

(4) Panel Recommendation

Following the hearing on a contested reinstatement petition, the panel will make a written recommendation to the council on behalf of the ~~Membership and Fees Committee~~ committee regarding whether the member's license should be reinstated. . . .

Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1523 Noncompliance

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(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state....

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Ninety-three days after mailing such notice, if no written response is filed with the board by the member attempting to show good cause or attempting to show that the member has complied with the requirements of these rules, upon the recommendation of the board and the ~~Membership and Fees~~ Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in ~~the procedures of the Membership and Fees Committee,~~ Rule .0903(c) of this subchapter.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

• • •

(2) Recommendation of the Board

The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has not been shown and that the member has not shown compliance with these rules within the 90-day period after receipt of the notice to show cause, then the board shall refer the matter to the ~~Membership and Fees~~ Administrative Committee for hearing together with a written recommendation to the ~~Membership and Fees~~ Administrative Committee that the member be suspended.

(3) Consideration by and Recommendation of the ~~Membership and Fees~~ Administrative Committee

The ~~Membership and Fees~~ Administrative Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, ~~cogent~~ cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. Except as set forth above, the procedure for such hearing shall be as set forth in ~~the Procedures of the Membership and Fees Committee,~~ Rule .0903(d)(1) and (2) of this subchapter.

(4) Order of Suspension

Upon the recommendation of the ~~Membership and Fees~~ Administrative Committee, the council may determine that the member has not complied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in ~~the procedures of the Membership and Fees Committee,~~ Rule .0903(d)(3) of this subchapter.

• • •

.1524 Reinstatement

• • •

(b) Procedure for Reinstatement More that 30 Days After Service of the Order of Suspension

Except as noted below, the procedure for reinstatement more than 30 days after service of the order of suspension shall be as set forth in ~~the procedures for the Membership and Fees Committee,~~ Rule .0904(c) and (d) of this subchapter, and shall be administered by the ~~Membership and Fees~~ Administrative Committee.

• • •

(e) Determination of Board; Transmission to Membership and Fees Administrative Committee

Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. The board's written determination and the reinstatement petition shall be transmitted to the secretary within

five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the ~~Membership and Fees~~ Administrative Committee.

(f) Consideration by ~~Membership and Fees~~ Administrative Committee

The ~~Membership and Fees~~ Administrative Committee shall consider the reinstatement petition, together with the board's determination, pursuant to the requirements of Rule .0902(c)-(f) of this subchapter.

(g) Hearing Upon Denial of Petition for Reinstatement

The procedure for hearing upon the denial by the ~~Membership and Fees~~ Administrative Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.

SUBCHAPTER 1F
Foreign Legal Consultants

Section .0100 Foreign Legal Consultants
.0106 Investigation by Counsel

The counsel will conduct any necessary investigation regarding the application and will advise the ~~Membership & Fees~~ Administrative Committee of the North Carolina State Bar (the committee) of the findings of any such investigation.

.0107 Recommendation of Membership & Fees Administrative Committee

(a) Upon receipt of all completed application forms, attachments, filing fees and information required by the Bar, and completion of the Bar's investigation, the ~~Membership & Fees Committee~~ committee shall make a written recommendation to the council respecting whether an applicant for certification as a foreign legal consultant has met the requirements of G.S. § 84A-1 and these rules. . . .

.0108 Appeal from Committee Decision

(a) The applicant will have 30 days from the date of service of the ~~Committee's~~ committee's recommendation in which to serve a written request for a hearing upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(b) If the applicant does not request a hearing in a timely fashion, the ~~Membership & Fees Committee~~ committee will forward

its recommendation to the council. The council will consider the application and the recommendation of the ~~Membership & Fees Committee~~ committee and will make a final written recommendation to the N.C. Supreme Court, as set out in Section .0110(f) below.

.0109 Hearing Procedure

(a) Notice, Time & Place of Hearing

(1) The chair of the ~~Membership & Fees Committee~~ committee shall fix the time and place of hearing within 30 days after the applicant's request for a hearing is served upon the secretary. The hearing shall be held as soon as practicable after the request is filed.

• • •

(b) Hearing Panel

(1) The chair of the ~~Membership & Fees Committee~~ committee shall appoint a hearing panel composed of three members of the committee to consider the application and make a written recommendation to the council.

• • •

(c) Proceedings before ~~Before~~ the Hearing Panel

• • •

(2) Following the hearing on the contested application, the panel will make a written recommendation to the council on behalf of the ~~Membership & Fees Committee~~ committee regarding whether the application should be granted. The recommendation shall include appropriate findings of fact and conclusions of law.

• • • •

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 October 22, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of December, 1999.

s/L. Thomas Lunsford, II
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 February, 2000.

s/Henry E. Frye
Henry E. Frye
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 February, 2000.

s/Freeman, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 22, 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 (deletions interlined, additions underlined):

Procedures for the ~~Membership and Fees~~ Adminstrative Committee
27 N.C.A.C. 1D, Section 0900

.0901 Transfer to Inactive Status

(a) Petition for Transfer to Inactive Status

Any member who desires to be transferred to inactive status shall file a ~~duly verified~~ petition with the secretary addressed to the council setting forth fully

(1) the member's name and current address;

• • •

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 October 22, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 1st day of December, 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 February, 2000.

s/Henry E. Frye
Henry E. Frye
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 February 2000.

s/Franklin Freeman Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 22, 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, Section .0100, be amended as follows (additions underlined, deletions interlined):

Discipline and Disability of Attorneys
27 N.C.A.C. 1B, Section .0100

.0115 Effect of a Finding of Guilt in Any Criminal Case

(a) Any member who has been found guilty ~~convicted~~ of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.

(b) A certificate of the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(c) Upon the receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member ~~of a serious crime of a criminal offense showing professional unfitness,~~ or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, ~~will~~ may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or ~~judgement~~ judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding

against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d) Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension.

(e) Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of the judgment ~~entered~~ against ~~an attorney~~ a member ~~where~~ upon a plea of ~~nolo contendere or~~ no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, ~~has been accepted by a court for a crime not constituting a serious crime,~~the Grievance Committee will take whatever action, including authorizing the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Discipline and Disability of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 22, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of December, 1999.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules of Discipline and Disability 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 February, 2000.

s/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of Discipline and Disability 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 February 2000.

s/Franklin Freeman Jr.
For the Court

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Preservation of issues—constitutionality of statute—lack of oath at voir dire—Defendant failed to preserve for appeal the issue of the constitutionality of the jury selection process set forth in N.C.G.S. § 15A-1214(d) through (f) where he did not raise this constitutional issue at trial. **State v. Fleming, 109.**

Preservation of issues—denial of motion in limine—Defendant in a capital sentencing proceeding waived an assignment of error to testimony regarding autopsy findings where defendant's previous motion in limine had been denied and defendant did not object at the time the State questioned the witness. The denial of defendant's motion in limine is insufficient to preserve for appeal the question of the admissibility of the challenged evidence. **State v. McNeil, 657.**

Preservation of issues—denial of motion in limine—no objection at trial—Defendant failed to preserve for appeal the question of the admissibility

APPEAL AND ERROR—Continued

of evidence that had been the subject of a motion in limine where he objected to the denial of the motion but failed to object to that evidence at the time it was offered at trial. **State v. Hayes, 79.**

Preservation of issues—failure to object or allege plain error—Defendant waived appellate review of the issue of the admission of allegedly hearsay testimony where defendant did not object on the ground of hearsay and has not alleged plain error. **State v. Nobels, 483.**

Preservation of issues—objection after answer—absence of motion to strike—waiver—Defendant waived his objection to testimony where the objection was lodged after the witness had answered and defendant made no motion to strike the answer. **State v. Nobels, 483.**

Preservation of issues—objection to relevancy—hearsay issue not presented—Defendant's objection to the reading to the jury of a summons and warrants charging domestic crimes on the ground of relevancy was insufficient to preserve for appellate review the issue of whether the contents of the summons and warrants were inadmissible hearsay. **State v. Nobels, 483.**

Preservation of issues—objections to testimony sustained—answers not in record—Defendant could not show that a trial court ruling in a capital first-degree murder prosecution excluding testimony was prejudicial where the record failed to demonstrate what the answers would have been had the witnesses been permitted to respond to defendant's questions. **State v. Anderson, 152.**

Preservation of issues—submission of aggravating circumstance—failure to object or contend plain error—Defendant waived appellate review of the issue as to whether the trial court erred by submitting to the jury the aggravating circumstance that the murder of one victim was committed while defendant was engaged in flight after committing another homicide where defendant failed to object to the trial court's instructions and contend that the trial court's submission of the (e)(5) aggravating circumstance was plain error. **State v. Parker, 411.**

Preservation of issues—witness not ordered to testify under immunity—no request for immunity—The trial court did not err in a capital sentencing hearing arising from the death of a two and one-half year old child by not granting immunity to defendant's boyfriend and asking him to testify where defendant never asked the court to order the boyfriend to testify under a grant of immunity and thus failed to preserve the argument for appellate review. **State v. Anderson, 152.**

Submission of transcript—admission of evidence—absence of appendix or reproduction in brief—waiver of appellate review—Assignments of error to the admission of testimony regarding defendant's alleged threats and violent conduct directed to members of the victim's family are deemed waived for failure to comply with the Rules of Appellate Procedure where the transcript of the proceedings was filed pursuant to Rule 9(c)(2), and defendant cited only various transcript pages but failed either to attach the pertinent portions of the transcript or to include a verbatim reproduction in his brief of the specific questions and answers which he wants the appellate court to review for error. **State v. Nobels, 483.**

ARREST

Probable cause for warrantless arrest—Officers had probable cause to arrest defendant where an officer observed three black males at the scene of two murders before they fled; defendant's clothing fit the description of that worn by one person who fled; and when defendant returned to the scene, defendant identified himself as the brother of a man found with one victim's wallet on his person and had bloodstains on his clothing and shoes. **State v. Goode, 247.**

ATTORNEYS

Appearance as counsel—no contact with client—The trial court erred by denying plaintiff's motion for removal of defense counsel where a law firm was retained to represent the UNC Liability Insurance Trust Fund in an action arising from defendant falsely representing himself as a psychiatrist, the firm filed a motion seeking permission to appear as counsel for defendant on a limited basis in order to defend him in his absence, to protect the interest of UNC-LITF, and to respond to discovery requests to the extent possible, the motion was granted, and plaintiff filed this motion. The law firm has had no contact with defendant and has not been authorized by him to undertake his representation in this or any other matter; no attorney-client relationship exists between defendant and the attorneys seeking to represent him. **Dunkley v. Shoemate, 573.**

BAIL AND PRETRIAL RELEASE

Domestic violence—pretrial detention and release—due process, double jeopardy rights of defendant—The statute setting forth the conditions of bail and pretrial release for individuals accused of crimes of domestic violence did not violate due process or double jeopardy as applied to defendant where defendant was arrested and taken before a magistrate who ordered that he be brought before a judge pursuant to the statute on the very next day; defendant was in fact brought before a district court judge the following day; and she set a secured bond of $10,000, which was subsequently reduced to $1,000. **State v. Malette, 52.**

BURGLARY

Constructive breaking—modus operandi—sufficiency of evidence—Sufficient evidence was presented of a constructive breaking accomplished by deception or trick to support defendant's conviction of first-degree burglary where the State relied on the testimony of a witness who had been assaulted and robbed by defendant after he tricked his way into her house to establish defendant's modus operandi; and defendant's palm print was found on the stove in the victim's kitchen. **State v. Thomas, 315.**

Felony murder—underlying felony—felonious intent—assault as felony—instructions not plain error—The trial court did not commit plain error in a prosecution for felony murder in its instructions on the felonious intent element of the underlying felony of burglary where the court ultimately set forth the required elements that the jury needed to find to properly determine whether the assault defendant intended to commit at the time he broke and entered the victim's apartment was in fact a felony. **State v. Parker, 411.**

First-degree burglary—constructive breaking—intent to commit felonious assault—sufficiency of evidence—The evidence was sufficient to sup-

BURGLARY—Continued

port submission of a charge of first-degree burglary to the jury where the trial court instructed the jury that the felonious intent alleged was "felonious assault with a deadly weapon inflicting serious injury," and the jury could draw inferences from the evidence that the victim could testify about defendant's involvement in a burglary and murder in a downstairs apartment, that the victim was forced through violence and the threat of violence back into his upstairs apartment before being killed by defendant, and that defendant intended at the time he entered the victim's apartment to commit a felonious assault on the victim. **State v. Parker, 411.**

First-degree burglary—occupancy—failure to instruct on second-degree burglary—not plain error—The trial court did not commit plain error in a first-degree burglary prosecution by failing to instruct the jury on the lesser included offense of second-degree burglary where the State presented evidence tending to show that the victim had returned to and was occupying his home when defendant broke into the victim's home and entered it to rob and murder him. **State v. Thomas, 315.**

Indictment—intended felony—An indictment for first-degree burglary was not required to specify the felony which defendant intended to commit at the time of the breaking or entering. **State v. Parker, 411.**

Possession of recently stolen property—inference of guilt—instructions—The trial court's instructions in a burglary case did not imply that defendant's mere physical proximity or the mere fact that an article is found in a place under the dominion and control of the defendant would be sufficient to trigger the inference of guilt from the doctrine of the possession of recently stolen property. **State v. Thomas, 315.**

CITIES AND TOWNS

Public duty doctrine—inapplicability to school crossing guard—The public duty doctrine did not shield a city and a school crossing guard, in her official capacity, from liability for alleged negligence of the crossing guard in the death of an elementary school student who was struck by an automobile after the guard directed him to cross the street. **Isenhour v. Hutto, 601.**

Stormwater drainage—rate scheme—impervious areas—The impervious area rate scheme enacted by the City of Durham pursuant to a stormwater utility (SWU) ordinance was rationally related to the amount of runoff from each lot and was not an arbitrary exercise of the City's statutory authority. **Smith Chapel Baptist Church v. City of Durham, 805.**

Stormwater Quality Management Program—funded by utility fees—statutory authority exceeded—The City of Durham, 805.'s stormwater utility (SWU) ordinance and the fees charged thereunder were invalid as a matter of law because they exceeded the authority granted to the City through N.C.G.S. §§ 160A-311 and -314(a)(1). The City choose not to fund the expenditures through the general fund and its SWU ordinance went well beyond the scope of authority granted under N.C.G.S. § 160-311 to construct and operate a structural and natural stormwater and drainage system. The rates, fees, and charges imposed far exceed the costs of providing a structural and natural stormwater drainage system as contemplated by the General Assembly in N.C.G.S. § 160A-314. **Smith Chapel Baptist Church v. City of Durham, 805.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Effect of cocaine binge—prior to arrest—statement admissible—The trial court did not err in a first-degree murder prosecution by admitting defendant's confession where defendant contended that he did not knowingly waive his Fifth and Sixth Amendment rights as a result of a cocaine binge prior to his arrest. There is no evidence in the record that defendant's confession was not voluntary and no evidence to indicate that he was intoxicated or otherwise impaired at the time he made the statements. **State v. Morganherring, 701.**

Statements not made under influence of drugs—statements not result of interrogation—Incriminating statements made by defendant to law officers after his arrest at a detox center were not made while defendant was under the influence of drugs and were properly admitted into evidence at defendant's murder trial where the evidence supported findings by the trial court that defendant was not handcuffed, spoke clearly and coherently, understood questions, made appropriate responses, and that the incriminating statements were not made in response to interrogation by the officers but were entirely voluntary. **State v. Parker, 411.**

CONSTITUTIONAL LAW, FEDERAL

Double jeopardy—first-degree kidnapping—felony murder—failure to release in safe place—not murder element—Defendant's convictions and sentencing for both first-degree kidnapping and felony murder did not subject him to double jeopardy where his first-degree kidnapping conviction was based on the element that he did not "release the victim in a safe place" and not on the element of "serious injury." **State v. Thomas, 315.**

Double jeopardy—solicitation to commit murder—first-degree murder as accessory—Defendant's right to be free from double jeopardy was violated when she was convicted and punished for both solicitation to commit murder and first-degree murder under an accessory before the fact theory. **State v. Brown, 193.**

Effective assistance of counsel—denial of motion by counsel to withdraw—The trial court did not abuse its discretion or violate defendant's constitutional right to the effective assistance of counsel by denying the motion of his two attorneys to withdraw prior to the start of his capital trial because defendant had refused to cooperate with defense counsel during trial preparation, became disruptive at the beginning of the trial, was ordered by the trial court to be handcuffed, shackled and gagged, and threatened counsel with physical violence. **State v. Thomas, 315.**

Effective assistance of counsel—failure to object—State's entitlement to report—Defense counsel's failure to object to the prosecutor's alleged misrepresentation of a pretrial order relating to a psychiatrist's report at the time the trial court ordered disclosure of the report to the State did not constitute ineffective assistance of counsel where the State was entitled to discover this report. **State v. Williams, 1.**

Effective assistance of counsel—murder and sexual offense charges—guilty plea to sexual offense and withdrawal of insanity notice—Defendant in a prosecution for first-degree murder and sexual offenses did not demonstrate ineffective assistance of counsel where he withdrew his notice and plea of

CONSTITUTIONAL LAW, FEDERAL—Continued

not guilty by reason of insanity on the first day of trial and announced his intention to plead guilty to the two counts of sexual offense. The evidence as a whole entirely supports the trial court's conclusion that defendant was fully aware of the direct consequences of his plea including the fact that he would in all likelihood be convicted of at least felony murder, that defendant had competent counsel who believed that a defendant who put forth a non-credible defense at the guilt phase would not receive a sympathetic hearing from the jury in the punishment phase, and that defendant had a full opportunity to assess the advantages and disadvantages of pleading guilty to the two counts of second-degree sexual offense. In view of defendant's detailed, tape-recorded confession and other evidence in the case, defendant had no realistic defense to the sexual offense charges and hence no defense to felony murder. **State v. Morganherring, 701.**

Right to counsel—presence at court-ordered psychiatric examination— The trial court did not err in a first-degree murder prosecution by denying defendant's request to have counsel present at a court-ordered psychiatric examination. Two psychiatrists and one psychologist examined defendant at his insistence; while the State raised the possibility of an examination by a State-selected psychiatrist, no court-ordered psychiatric examination occurred because defendant abandoned the insanity defense. **State v. Morganherring, 701.**

CONSTITUTIONAL LAW, NORTH CAROLINA

Presence at capital trial—excusal of prospective juror—private conversation—harmless error—The trial court violated defendant's nonwaivable right to be present at every stage of his capital trial by excusing a prospective juror following an unrecorded private conversation with the prospective juror. However, defendant's absence from the trial court's communication with the prospective juror was harmless beyond a reasonable doubt where the trial transcript reveals that the juror was properly excused because he was over the age of sixty-five. **State v. Nobels, 483.**

Presence at capital trial—unrecorded bench conferences—defendant in courtroom—The trial court did not violate defendant's state constitutional right to be present at every stage of his capital trial by holding unrecorded bench conferences with the prosecutor and defense counsel but without defendant himself before excusing two prospective jurors for hardship reasons where defendant was present in the courtroom at all times. **State v. Goode, 247.**

CRIMES, OTHER

Malicious castration—dead victim—continuous transaction with murder—sufficiency of evidence—There was sufficient evidence to support submission of a charge of malicious castration to the jury, even though the medical examiner testified that the victim was dead at the time of the castration, where the evidence was sufficient to show that the crime of malicious castration was committed in conjunction with the victim's murder as part of a continuous chain of events forming one single transaction. **State v. Parker, 411.**

CRIMINAL LAW

Automatism—failure to instruct—no error—The trial court did not err in a capital prosecution for first-degree murder by failing to instruct the jury on the defense of automatism where the evidence clearly supported the instruction given on voluntary intoxication and the defenses of voluntary intoxication and automatism are fundamentally inconsistent. **State v. Morganherring, 701.**

Capital trial—court's conversation with prospective juror—failure to record—harmless error—While the trial court violated N.C.G.S. § 15A-1241 by failing to record its ex parte communication with a prospective juror in a capital trial before excusing the juror, this error was harmless where the trial transcript reveals that the prospective juror was properly excused because he was over the age of sixty-five. **State v. Nobels, 483.**

Capital trial-defendant's closing arguments—number—The trial court erred in a prosecution for first-degree murder by not permitting defense counsel to make three closing arguments during the guilt phase. Defendant was being tried for multiple capital felonies, did not present evidence during the guilt-innocence phase, made a clear request, and obtained a ruling upon the request, thereby preserving the question for appellate review. There was prejudice per se. **State v. Barrow, 640.**

Capital sentencing—objections sustained—failure to give curative instructions—The trial court did not commit prejudicial error in a capital sentencing proceeding by failing to give curative instructions after sustaining defendant's objections to improper questions about defendant's conduct in jail and improper argumentative questions. **State v. Williams, 1.**

Capital sentencing—prosecutor's closing argument—Biblical references—no gross impropriety—It is not so grossly improper for a prosecutor to argue in a capital sentencing proceeding that the Bible does not prohibit the death penalty as to require intervention ex mero motu by the trial court, but such arguments are discouraged. **State v. Williams, 1.**

Capital sentencing—prosecutor's closing argument—disregard of plea for mercy—The prosecutor's closing argument in a capital sentencing proceeding to the effect that the facts and the law justified the death penalty and that defendant's plea for mercy should be disregarded was not improper. **State v. Williams, 1.**

Capital sentencing—prosecutor's closing argument—future dangerousness—The prosecutor's use of a verbal altercation by defendant with an attendant at Dix Hospital shortly before his return to Central Prison as an example in arguing in this capital sentencing proceeding that defendant treats people with respect only when he needs something from them was a proper argument about the future dangerousness of defendant. **State v. Williams, 1.**

Capital sentencing—prosecutor's closing argument—inability to adapt to prison life—future dangerousness—When read in context, the prosecutor's argument in a capital sentencing proceeding focused on defendant's inability to adapt to prison life if given a life sentence and did not improperly allude to the possibility of parole. **State v. Williams, 1.**

Capital sentencing—prosecutor's closing argument—injection of personal beliefs—absence of prejudice—Although no evidence in the record sup-

ported the prosecutor's characterization of the effects of crack cocaine in his closing argument in a capital sentencing proceeding, defendant is not entitled to a new capital sentencing proceeding because this very brief argument did not so infect the trial with unfairness as to deny defendant due process of law. **State v. Williams, 1.**

Capital sentencing—prosecutor's closing argument—mitigating circumstances—request by defendant—(f)(1) circumstance submitted over objection—Defendant was not prejudiced by the prosecutor's closing argument in a capital sentencing proceeding that the mitigating circumstances had been requested by defendant when defendant had objected to submission of the (f)(1) mitigating circumstance of no significant history of criminal activity. **State v. Williams, 1.**

Capital trial—actions by trial judge—not improper assistance to prosecutor—The trial judge did not express an opinion or show partiality to the prosecution in the guilt-innocence and sentencing phases of a capital trial when he interjected his own questioning during the prosecutor's examination of witnesses, instructed the prosecutor on the proper form of questions, suggested how the prosecutor should rephrase questions, intervened to correct improper questions by the prosecutor, and instructed the prosecutor to ask witnesses certain questions. **State v. Fleming, 109.**

Circumstantial evidence—instructions—The trial court did not err by refusing to instruct the jury that, in order to support a conviction, circumstantial evidence must be inconsistent with innocence; rather, the trial court properly instructed the jury that the law makes no distinction between the weight to be given either circumstantial or direct evidence and that "[a]fter weighing all the evidence if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." **State v. Thomas, 315.**

Court's remarks—reference to killing as murder—not plain error—There was no plain error in a capital prosecution for first-degree murder where the court in its instructions twice referred to the killing as a murder. The remarks did not express any opinion, but merely instructed the jury on the three possible theories on which a first-degree murder conviction can be based and clearly explained that the jurors could find defendant not guilty as to each of the three theories. **State v. Anderson, 152.**

Deadlocked jury—further deliberations—verdict not coerced—mistrial properly denied—The trial court in a prosecution for first-degree murder and discharging a firearm into occupied property did not (1) coerce a verdict by instructing the jury to continue deliberations or (2) err by denying defendant's motion for a mistrial due to the deadlock where the jury had deliberated only ten hours over three days when the motion for mistrial was made and deliberated a total of eleven hours before returning its verdicts. **State v. Nobels, 483.**

Defendant's closing argument—capital sentencing—individual responsibility of each juror—There was no abuse of discretion or prejudice to defendant when the trial court prevented defense counsel from arguing to the jury in a capital sentencing proceeding that the ultimate decision as to the sentence recommendation was the individual responsibility of each juror. **State v. Thomas, 315.**

CRIMINAL LAW—Continued

Joinder—first-degree murders—transactional connection—The trial court did not abuse its discretion by allowing two first-degree murder charges against defendant to be joined for trial, although the murders occurred two months apart, where a transactional connection was established by substantial similarities between the two murders. **State v. Moses, 741.**

Jury request—failure to conduct jurors to courtroom—harmless error—The trial court erred by failing to conduct the jurors to the courtroom following a request by the jury for certain items of evidence as required by N.C.G.S. § 15A-1233(a), but defendant was not prejudiced by the trial court's failure to follow the requirements of the statute where there was unanimous agreement among the State, the defendant, and the trial judge concerning the items requested by the jury, and the prosecution and defendant consented to permitting the jury to have those items. **State v. Nobels, 483.**

Jury selection—actions of trial judge—not partiality to prosecution—The trial judge did not express an opinion or show partiality to the prosecution in this capital trial when he instructed the prosecutor during bench conferences to ask prospective jurors certain questions concerning their death penalty views. **State v. Fleming, 109.**

Jury view—unsecured crime scene—The trial court did not abuse its discretion in allowing the State's motion for a jury view of a murder scene, although defendant argued that the scene was not secured and evidence there could have been tampered with. **State v. Fleming, 109.**

Mistrial—reference to unrelated robbery—denial not abuse of discretion—The trial court did not abuse its discretion in denying defendant's motion for a mistrial when the prosecutor, during cross examination of defendant concerning his convictions for two prior robberies, mistakenly referred to the prior convictions as "two murders." **State v. Thomas, 315.**

Mistrial—remark by victim's father—absence of prejudice—A remark by a murder victim's father from the audience in the presence of the jury that defendant was not being railroaded, made in response to defendant's statements that he was being railroaded into a death sentence, was not so prejudicial to defendant as to render the trial court's denial of his motion for a mistrial a manifest abuse of discretion reversible on appeal. **State v. Nobels, 483.**

Mistrial—selection of jury foreperson—presence of alternate jurors—The trial court did not err by denying defendant's motion for a mistrial because the jury first selected a foreperson before the alternate jurors were excluded from the jury room. **State v. Parker, 411.**

Motion to replace attorney—properly denied—The trial court did not err in a capital first-degree murder prosecution by denying defendant's pro se motion to have her attorney relieved where defendant raised the issue with Judge Rousseau when the original second counsel had to be replaced; Judge Seay subsequently reviewed the file and asked defendant if she intended to pursue the motion; and defendant replied that she had not been aware that her counsel was handling another murder at that time and that Judge Rousseau had disposed of the motions. **State v. Anderson, 152.**

CRIMINAL LAW—Continued

Prosecutor's closing argument—absence of objection—standard of review—Where there has been no objection during the closing argument, the proper standard of review is whether the argument was so grossly improper as to require the trial court to intervene ex mero motu, not whether the argument constitutes plain error. **State v. Thomas, 315.**

Prosecutor's closing argument—aggravating circumstances—existence found by verdicts—no gross impropriety—The prosecutor's closing argument in a capital sentencing proceeding that, with regard to many of the aggravating circumstances, the jurors had already found them to exist by their verdicts did not encourage the jurors to engage in impermissible double counting and was not so grossly improper as to require the trial court to intervene ex mero motu. **State v. Parker, 411.**

Prosecutor's closing argument—capital sentencing—applicable principles—The principles that trial counsel are granted wide latitude in the scope of jury argument and that control of closing arguments is in the discretion of the trial court apply to arguments made in capital sentencing proceedings, and the boundaries for jury argument at the capital sentencing proceeding are more expansive than at the guilt phase. **State v. Thomas, 315.**

Prosecutor's closing argument—capital sentencing—community sentiment—There was no error requiring intervention ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor improperly informed the jury that community sentiment urged the death penalty and that the jury is effectively an arm of the State. It is not improper to remind jurors that they are the voice and conscience of the community. **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—conscience of community—The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the prosecutor's closing argument that the jury was the conscience of the community. The prosecutor did not ask the jurors to render their decision based on community sentiment. **State v. Peterson, 518.**

Prosecutor's closing argument—capital sentencing—death penalty as deterrence—The prosecutor's closing argument in a capital sentencing proceeding that "if you impose life imprisonment . . . the State will do everything they can to make sure he stays in prison for the rest of his life, but . . . nothing is final" and that "the only way you can make sure that . . . this man does not assault, rob, and kill someone else is to impose the death penalty" was not an improper argument addressing parole but was a proper argument that only the death penalty would deter defendant from committing future crimes. **State v. Thomas, 315.**

Prosecutor's closing argument—capital sentencing—defense counsel's reaction to witness—no gross impropriety—The prosecutor's statement in his closing argument in a capital sentencing proceeding that he thought defense counsel "was going to kill" defendant's ex-wife was not meant literally and was not so grossly improper as to require intervention by the trial court ex mero motu. **State v. Fleming, 109.**

Prosecutor's closing argument—capital sentencing—defense witnesses—Alzheimer's disease—The prosecutor's analogy to Alzheimer's disease when

referring to the 180-degree turnaround in the evidence presented by defendant's witnesses was not prejudicial to defendant. **State v. Fleming, 109.**

Prosecutor's closing argument—capital sentencing—discrediting family relationship—no impropriety—The prosecutor's closing argument attempting to discredit defendant's evidence that he had a loving relationship with his family was proper during a capital sentencing proceeding. **State v. Fleming, 109.**

Prosecutor's closing argument—capital sentencing—facts in evidence—There was no gross error requiring intervention ex mero motu in a capital sentencing proceeding for first-degree murder where defendant contended that the prosecutor either materially misstated the evidence or based his argument on facts not in evidence. The argument at issue concerned fingerprints and the record revealed that defendant had stipulated to his guilty plea in a prior voluntary manslaughter. It can be reasonably inferred that defendant was fingerprinted after his arrest for this crime and that law enforcement used defendant's fingerprints from their files in the investigation of these deaths; in any event, the trial court properly instructed the jurors that they were the sole judge of the evidence and should be guided by their own recollection of the evidence rather than counsel's arguments. **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—general deterrence—There was no grossly improper error requiring intervention ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor attempted to defend the death penalty on general deterrence grounds. **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—lack of due process for victims—There was no gross error requiring intervention ex mero motu in a capital sentencing proceeding where the prosecutor argued that defendant took victims' lives without due process. It has been repeatedly held that it is not improper to argue that defendant acted as judge, jury, and executioner to singlehandedly decide the victim's fate. **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—mitigating circumstances—not gross impropriety—The prosecutor's closing argument in a capital sentencing proceeding that in order for the mitigating circumstances to have value to weigh against the aggravating circumstances, they had to "justify," "excuse," or "offset" the first-degree murder did not amount to a gross impropriety requiring intervention by the trial court on it own motion. **State v. Thomas, 315.**

Prosecutor's closing argument—capital sentencing—moral culpability—There was no gross error demanding intervention ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor repeatedly urged the jury to reject proposed mitigating circumstances based on defendant's failure to demonstrate that he lacked moral culpability, thereby improperly implying that the jury could ignore credible mitigating evidence. **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—mother's refusal to testify—implication not supported by record—The prosecutor's jury argument in a capital sentencing proceeding, made in an attempt to rebut defendant's mitigating circumstances related to defendant's home environment, that defend-

CRIMINAL LAW—Continued

ant's own mother would not "come up here to testify" constituted an improper argument not supported by the evidence that testimony by defendant's mother would not have benefitted her son's case. **State v. Nobels, 483.**

Prosecutor's closing argument—capital sentencing—payment of expert—no gross impropriety—Assuming arguendo that the prosecutor's argument in a capital sentencing proceeding that defendant's expert witness was being paid to give favorable testimony was improper, it did not entitle defendant to a new sentencing proceeding. **State v. Fleming, 109.**

Prosecutor's closing argument—capital sentencing—prior violent felony—The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu to prevent the prosecutor from referring to another murder where defendant contended that the argument urged the jury to return a death sentence based on the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), which the court had refused to submit to the jury. The additional death was relevant to the prior violent felony aggravating circumstance, N.C.G.S. § 15A-2000(e)(3). **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—rights given defendant—not due process violation—Assuming arguendo that it was improper for the prosecutor to argue to the jury in a capital sentencing proceeding that defendant "has been given food to eat and a warm place to stay. Health care, lawyers, social workers, psychiatrist," that the victims did not have a five-week trial or two lawyers to plead their cases, and that the victims had a jury of one to decide their fate and didn't get a hearing, these statements did not deny defendant due process. **State v. Parker, 411.**

Prosecutor's closing argument—capital sentencing—statement supported by evidence—The prosecutor's argument in a capital sentencing proceeding that defendant "was making a thousand dollars a week sometimes off of each girl" was supported by testimony of the victim's daughter. **State v. Fleming, 109.**

Prosecutor's closing argument—capital sentencing—sympathy for victims—The prosecutor's argument in a capital sentencing proceeding was not so grossly improper as to require the trial court to intervene ex mero motu where defendant contended that the prosecutor placed undue emphasis upon the personal qualities and future prospects of the victims and sought to improperly invoke sympathy for the victims. The prosecutor's argument about the promising nature of the victim's lives served to inform the jury about the specific harm caused by defendant's crime. **State v. McNeil, 657.**

Prosecutor's closing argument—capital sentencing—victim's character—reason for murder—The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu where the prosecutor argued as to the victim being a fine woman who had been married almost forty-five years; as to the randomness of the killing and that the victim had not provoked defendant; and that murder was defendant's business and that this murder was committed for pecuniary gain. **State v. Peterson, 518.**

Prosecutor's closing argument—capital sentencing—victim's last thoughts—The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the prosecutor's closing argument as to the vic-

CRIMINAL LAW—Continued

tim's last thoughts and that she died because of greed. Considered in context, the argument was not urging jurors to consider facts without an evidentiary basis but was arguing permissible inferences by asking the jurors to consider defendant's apparent motive. **State v. Peterson, 518.**

Prosecutor's closing argument—defendant as cold-bloodied killer—inference from evidence—The prosecutor's closing argument in a capital sentencing proceeding that "[defendant] is a cold-bloodied, arrogant killer, who would take your life and my life" drew reasonable inferences from the evidence and was not improper considering the evidence of the brutality of the premeditated and deliberate murder committed by defendant. **State v. Thomas, 315.**

Prosecutor's closing argument—disparagement of opposing counsel—impropriety—In a prosecution for two first-degree murders in which testimony by the obstetrician of defendant's girlfriend that he examined her on the afternoon of the murders conflicted with her testimony that defendant spent the entire day of the murders at her home and that she and defendant never left the house, the prosecutor's statement during closing argument that defense counsel "displayed one of the best poker faces as we introduced [the obstetrician] in the history of this courthouse" was an improper comment that disparaged opposing counsel in violation of the standard of "dignity and propriety" required of all trial counsel by Rule 12 of the General Rules of Practice for the Superior and District Courts. **State v. Rivera, 285.**

Prosecutor's closing argument—inferences supported by evidence—The prosecutor's jury argument that if defendant has "a mail box key, he's probably got a house key" was a reasonable inference based on the evidence; also, the prosecutor's argument that defendant used a hammer to assault the victim was a reasonable inference to be drawn from evidence that an autopsy revealed both round and claw-shaped marks on the victim's head. **State v. Fleming, 109.**

Prosecutor's closing argument—inferences supported by evidence—The prosecutor's closing argument that defendant called the victim to inform him that a coconspirator, the actual gunman, was coming to visit was based on a reasonable inference supported by the evidence. Also, the prosecutor's statements about defendant's financial motivations for the murder were supported by testimony at trial concerning what defendant was expected to receive upon her husband's death. **State v. Brown, 193.**

Prosecutor's closing argument—not shifting of burden of proof—The prosecutor's argument to the jury in a prosecution for two first-degree murders, "Get him to show you the evidence says those weren't his fingerprints. And, that he wasn't at 203 Northeast Street in the early morning hours of the 2nd of October, 1994," and "Get them to show the evidence that he didn't have anything [sic] with the murders" did not shift the burden of proof to defendant but constituted comments on the strength of the State's evidence and the absence of any contradictory evidence. **State v. Parker, 411.**

Prosecutor's closing argument—reading excerpt from appellate opinion—The trial court did not err by allowing the prosecutor to read an excerpt from a North Carolina Supreme Court opinion in another case during closing argument where this argument accurately stated the law of North Carolina and related to principles of law which were relevant to the evidence and issues of the case. **State v. Thomas, 315.**

CRIMINAL LAW—Continued

Recesses during voir dire and sentencing—no abuse of discretion—The trial court did not improperly allow the prosecutor an opportunity to prompt his witness by allowing a recess during a voir dire hearing or by taking a recess when the prosecutor objected to defendant's cross-examination of a witness, and the trial court informed the prosecutor that defense counsel's line of questioning was proper, told the prosecutor to instruct the witness to answer, and assured the prosecutor that the witness could clarify her testimony on redirect examination. **State v. Fleming, 109.**

Ruling on evidence—facetious statement by trial judge—not pressure on defendant to testify or showing of partiality—The trial judge's facetious statement, made when considering whether defendant's statement that he agreed to submit to a polygraph test was hearsay, "Fine. Call him. And let him say that he agreed to take the polygraph test," did not exert pressure on defendant to testify or show partiality by the trial judge against defendant. **State v. Fleming, 109.**

Shackling of defendant—defendant as witness—refusal to unshackle—The trial court did not abuse its discretion in refusing to unshackle defendant before he took the witness stand so that defendant could step in front of the jury with photographs illustrating his testomony. **State v. Thomas, 315.**

Shackling of defendant—findings by trial court—The reasons given by the trial court for ordering defendant shackled during his first-degree murder trial were sufficient to permit appellate review of the trial court's ruling and complied with the requirements of N.C.G.S. § 15A-1031. **State v. Thomas, 315.**

DAMAGES AND REMEDIES

Stormwater utility fees—invalid—full refund plus interest—The trial court correctly held that plaintiffs in an action challenging stormwater utility (SWU) fees were entitled to a full refund plus interest where plaintiffs paid the fees under protest and the ordinance and fees were found invalid as a matter of law. A refund of the invalid fees in this action is similar to the common law doctrine of an action for money had and received. **Smith Chapel Baptist Church v. City of Durham, 805.**

DEEDS

Statement of purpose—no language of reversion or termination—fee simple absolute—An 1897 deed conveying land to the United States for a life-saving station conveyed a fee simple absolute rather than a fee simple determinable where the deed contained no express and unambiguous language of reversion or termination upon condition broken and does not indicate that the interest of the United States in the property would automatically expire or revert to the grantor upon the discontinued use of the property as a life-saving station. **Station Assoc., Inc. v. Dare County, 367.**

DISCOVERY

Capital case—discovery of State's file—effective date of statute—prior denial of motion for appropriate relief—Defendant was not entitled to dis-

DISCOVERY—Continued

covery of the State's complete files pursuant to N.C.G.S. § 15A-1415(f) where, at the time subsection (f) became effective on 21 June 1996, defendant had no motion for appropriate relief pending as the trial court had previously entered a final order denying his motion for appropriate relief, no petition for writ of certiorari to review that order had been allowed by the N.C. Supreme Court, and no petition for writ of certiorari was before the Court. **State v. Green, 400.**

Capital cases—motions for appropriate relief—The trial court erred in a capital first-degree murder prosecution by denying defendant discovery pursuant to N.C.G.S. § 15A-1415(f) where defendant's motion to vacate the order denying his motion for appropriate relief after sentencing was essentially a motion to reconsider the denial of his motion for appropriate relief and the trial court resurrected defendant's motion for appropriate relief by allowing defendant time to respond to the State's motion for summary denial of defendant's motion to vacate. A motion for appropriate relief was thereby pending before the trial court when N.C.G.S. § 15A-1415(f) became effective. **State v. Basden, 579.**

Capital cases—post-conviction motion for appropriate relief—retroactivity of discovery statute—The discovery provisions of N.C.G.S. § 15A-1415(f) apply retroactively to post-conviction motions for appropriate relief in capital cases, but only when such motions were filed before the effective date of that statute, 21 June 1996, and had been allowed or were still pending on that date. **State v. Green, 400.**

Crime records of witnesses—provision by State not required—Defendant was not denied due process when the trial court denied his motion to require he State to provide him with the criminal records of all of the prosecution witnesses in his first-degree murder trial. **State v. Thomas, 315.**

Discovery of report—intent to call psychiatrist—psychiatrist not called—Where counsel for defendant had indicated that they intended to call a psychiatrist to testify at defendant's capital sentencing proceeding at the time the trial court ordered defendant to provide a copy of the psychiatrist's report to the State, the State had a right to discover the report under N.C.G.S. § 15A-905(b) even though defense counsel ultimately decided not to call the psychiatrist to testify or to introduce his report into evidence. **State v. Williams, 1.**

Pathologist as witness—requirement of written report—provision to defendant—discretion of trial court—Although there was no statutory requirement that a written report be prepared by a forensic pathologist who testified for the State in a capital sentencing proceeding, the trial court did not err when, in its discretion, it ordered the State to instruct this witness to prepare a written report and to provide defendant with a copy of that report. **State v. Fleming, 109.**

Request for admissions—plaintiff's failure to respond—admission established—summary judgment for defendants—Where the pro se plaintiff failed to respond to defendants' request for admissions in this medical malpractice action, including an admission that all health care provided by defendants was in conformity with the applicable standard of care, and plaintiff did not move the court, expressly or impliedly, to withdraw or amend her admissions, the admissions became conclusively established facts in the case and constituted a valid basis for summary judgment. **Goins v. Puleo, 277.**

DISCOVERY—Continued

Written report of expert—not prepared—voir dire prior to testimony— The trial court did not err in a first-degree murder prosecution by ordering that the State could conduct a voir dire of defendant's mental health expert prior to his testimony if the expert failed to provide the State with a report of his findings prior to testifying. Although defendant argued that his expert had not prepared a written report, the court did not order the production of a document that did not exist but ordered that the State would be able to conduct a voir dire if a written report was not produced. Moreover, N.C.G.S. § 15A-905 has been construed as providing for reciprocity when defendant has obtained discovery under N.C.G.S. § 15A-903. **State v. Morganherring, 701.**

EASEMENTS

Public easement—sanitary sewer line—A "public easement" on the recorded plat of defendant's property included use of the easement for a sanitary sewer line to serve plaintiff's adjacent property. **Beechridge Dev. Co. v. Dahners, 583.**

EMPLOYER AND EMPLOYEE

Wrongful discharge—drug testing—failure to utilize laboratory—The trial court properly granted summary judgment for defendant in a wrongful discharge action arising from a failed drug test where plaintiff alleged that the discharge was wrongful because the test was not performed by an approved laboratory pursuant to N.C.G.S. § 95-232. While N.C.G.S. § 95-230 is an expression of the public policy of North Carolina, the public policy exception to the employment-at-will doctrine is not automatically triggered because defendant violated the statute by failing to use an approved laboratory. **Garner v. Rentenbach Constructors, Inc., 567.**

EVIDENCE

Accomplice testimony—plea arrangements—parole eligibility—The trial court properly allowed two accomplices to testify in this murder trial that they were witnesses for the State because of their plea arrangements and correctly precluded them from testifying with regard to their understanding of when they might be eligible for parole. **State v. Brown, 193.**

Admission by defendant—not vague and uncertain—relevancy—Testimony by a witness about defendant's admission to him that he killed a murder victim was not so vague and uncertain as to be inadmissible where the witness was certain defendant made a statement to him admitting the killing but was uncertain about the exact words defendant used, and this testimony was relevant to the issue of the identification of defendant as the perpetrator of the murder. **State v. Moses, 741.**

Admission of testimony—error cured by court's actions—Any error in the admission of testimony in this capital sentencing proceeding by the mortician who prepared the victim's body for burial to show that the victim had been forcibly gagged in order to establish the especially heinous, atrocious, or cruel aggravating circumstance was cured when the trial court properly addressed defense counsel's objections to the testimony by requiring the prosecutor to provide additional evidence to establish the probative value of the mortician's testi-

EVIDENCE—Continued

mony, granted defendant's motion to strike the testimony because the prosecutor failed to do so, and instructed the jury to disregard the testimony. **State v. Thomas, 315.**

Affirmative answers to questions—questions not unfounded—The prosecutor did not ask unfounded questions based on hearsay rumors about the reasons why defendant's day-care center was closed down when the witnesses responded affirmatively to those questions. **State v. Fleming, 109.**

Ballistics expert—opinion testimony—same conclusion by any other expert—absence of prejudice—Defendant was not prejudiced by the testimony of an SBI ballistics expert on cross-examination that any other competent expert would have reached the same conclusion that bullets and cartridge cases were fired by defendant's gun. **State v. Moses, 741.**

Capital sentencing—crime scene, autopsy and other photographs—The trial court did not err in a capital sentencing proceeding by its admission of photographs of the murder victim's house and neighborhood to illustrate the testimony of the victim's neighbor and her nephew regarding what they saw on the night of the crime; a photograph of the victim on the night of the killing to illustrate testimony of the victim's nephew and brother-in-law about the injuries they observed following the killing; and five photographs of the victim taken by the forensic pathologist to illustrate his testimony about the injuries to the victim's head and vaginal area that he observed during his autopsy. **State v. Williams, 1.**

Capital sentencing—crime scene photograph—crucifix—photograph of victim when alive—The fact that a crime scene photograph depicted a crucifix over the murder victim's bed did not so infect the capital sentencing proceeding with unfairness as to violate defendant's due process rights. Furthermore, it was not error for the trial court to admit a photograph of the victim as she appeared when alive. **State v. Williams, 1.**

Capital sentencing—cross-examination—impeachment—good faith questions—rebuttal of mitigating circumstances—The prosecutor's cross-examination of defendant's sister in a capital sentencing proceeding concerning whether she talked to others about defendant being violent was properly permitted to impeach the witness's direct testimony that defendant was not violent. Furthermore, the prosecutor's question as to whether this witness had heard that defendant inappropriately touched her niece's minor daughter was asked in good faith and was proper to rebut one or more of the submitted mitigating circumstances. **State v. Fleming, 109.**

Capital sentencing—defendant's state of mind—entries in defendant's notebook—cross-examination of expert witness—The prosecutor was properly permitted to cross-examine defendant's mental health expert in this capital sentencing proceeding for two first-degree murders about entries in a notebook possessed by defendant near the time of the murders, including a handwritten list of serial killers, to determine to what extent these entries entered into the expert's opinion regarding defendant's state of mind at the time of the murders. **State v. Moses, 741.**

Capital sentencing—embezzlement, false pretenses, prostitution—foundation for questions—The prosecutor was not improperly permitted to ask unfounded questions to a witness in a capital sentencing proceeding concerning

EVIDENCE—Continued

whether he had knowledge of defendant's involvement in an embezzlement scheme, defendant's receipt of money for uncompleted construction jobs, or defendant's prostituting women at his residence. **State v. Fleming, 109.**

Capital sentencing—expert witness—bias—fees in this and other cases—The prosecutor was properly permitted to cross-examine defendant's sentencing expert in this capital sentencing proceeding about his fee in the instant case and previous cases and the number of times he had testified for defendants in the last two years for the purpose of showing bias. **State v. Moses, 741.**

Capital sentencing—mental health testimony—exclusion on redirect—same as direct evidence—harmless error—Any error by the trial court in excluding in this capital sentencing proceeding redirect testimony by defendant's mental health expert that linked defendant's personality disorder and brain damage to his killing of the victim was not prejudicial to defendant. **State v. Hedgepeth, 776.**

Capital sentencing—prior murder—hearsay—other evidence—no prejudice—There was no prejudicial error in a capital sentencing proceeding for a first-degree murder in the admission of testimony from a retired police officer that defendant had drowned his wife. Even assuming that the testimony was barred by the Confrontation Clause, the parties had stipulated that defendant had pled guilty to voluntary manslaughter for his wife's death, had received an active prison term for the offense, and a certified copy of the plea and judgment were introduced. Competent evidence was before the jury which supported the submission of the prior violent felony aggravating circumstance. **State v. McNeil, 657.**

Capital sentencing—prior violent outbursts and assaults—rebuttal of character and mitigating evidence—The trial court did not err by permitting the State to rebut evidence of defendant's good character in a capital sentencing proceeding by evidence of defendant's prior violent outbursts and assaultive behavior. Furthermore, testimony by the victims regarding the circumstances of these incidents, which occurred prior to the time defendant received a brain injury in a 1976 fall, was admissible to rebut defendant's mitigating evidence that a personality disorder he had prior to 1976 was exacerbated by the 1976 fall and brain injury and that defendant's lack of control of his emotions resulting from the fall contributed to his shooting of the victim. **State v. Hedgepeth, 776.**

Capital sentencing—psychiatrist—opinion as to defendant's responsibility—There was no error in a capital sentencing proceeding in admitting the testimony of a forensic psychiatrist that defendant "does not have a disorder that would relieve her of her responsibility for her actions." The term "responsibility" is not a precise legal term with a definition that is not readily apparent; in this context, it is a medical term used appropriately by an expert in the field of psychiatry to describe the effect of defendant's mental conditions on her actions. **State v. Anderson, 152.**

Capital sentencing—witness's prior convictions—There was no prejudicial error during a capital sentencing proceeding for first-degree murder where defendant contended that the Confrontation Clause had been violated by the Court's refusal to allow cross-examination of a State's witness concerning unserved warrants which defendant contended had given the police leverage

EVIDENCE—Continued

over the witness during questioning. The court afforded defendant wide latitude to expose the witness's alleged bias and motive by allowing cross-examination regarding all prior convictions, regardless of age; instructed the jury that the witness was testifying under an agreement with the prosecutor for a charge reduction and that the witness was an accomplice considered to have an interest in the outcome of the case; and further cross-examination to show bias or motive would have been repetitive and cumulative. **State v. McNeil, 657.**

Capital sentencing—written transcript of plea to other crimes—There was no error in a capital sentencing proceeding where defendant contended that the jury was prevented from considering a guilty plea to sexual offense charges as a nonstatutory mitigating circumstance by the court's denial of his motion to admit the written transcript of the plea. The court had instructed the jury that defendant had changed his plea to guilty on the two charges of second-degree sexual offense and submitted the nonstatutory mitigating circumstance that defendant accepted responsibility for the sex offenses. **State v. Morganherring, 701.**

Chain of custody—watch found at crime scene—The trial court did not commit plain error by admitting into evidence a watch found at a murder scene, although the watch was not discovered until three days after the murder, the murder scene had not been secured, and a buckle which was initially on the watch was not on the watch at trial. **State v. Fleming, 109.**

Competency evaluation—communications not privileged—access to complete Dix Hospital file—interviews with psychiatrist—Where there was no indication in the record that a psychiatrist at Dix Hospital and his case analyst examined or communicated with defendant for any purpose other than determining defendant's competency, defendant's communications with the psychiatrist and his case analyst were not protected by physician-patient, psychologist-client, or attorney work product privileges, and the trial court did not err by granting the State access to defendant's complete Dix Hospital file and by allowing the prosecutor to conduct unrestricted interviews with the psychiatrist and his case analyst. **State v. Williams, 1.**

Competency evaluation—improper discovery of complete file—altercation by defendant at Dix Hospital—use for rebuttal—proper administration of justice—Assuming arguendo that the prosecutor had no right to discover a copy of defendant's complete Dix Hospital file and learned of a verbal altercation defendant had with an attendant in the cafeteria at Dix Hospital by reading that file, the trial court properly allowed a health care technician at Dix Hospital to testify about his observation of the altercation to rebut testimony by a jail minister that defendant always treated her with respect and honor and to insure the proper administration of justice. **State v. Williams, 1.**

Corroboration—conversations with other witnesses—testimony not identical—Testimony by witnesses about their prior conversations with other witnesses, although not precisely identical to the original testimony, was properly admitted for corroborative purposes since it tended to strengthen, supplement and confirm the testimony of the other witnesses. **State v. Brown, 193.**

Expert—cross-examination—defendant's memory—The trial court did not err in a capital prosecution for first-degree murder in its cross-examination of

EVIDENCE—Continued

defendant's expert where defendant contended that the prosecutor improperly stated her opinion that defendant's confession indicated that defendant had a good memory and a cognitive thought pattern. The prosecutor's questions were well within the bounds of a proper cross-examination; defendant's expert had stated that defendant's mental state was so afflicted that he could not coherently remember what occurred during the murders and it was proper for the State to attack this conclusion. **State v. Morganherring, 701.**

Expert—cross-examination—defendant's statements—The trial court did not err in a capital prosecution for first-degree murder by allowing the State to challenge the validity of a defense expert's opinion by reminding the jury that defendant had a choice with respect to what he told the expert. Since a mental health expert would have to weigh, assess, and analyze his conversations with a client such as defendant in forming his opinion and then either accept or reject in whole or in part the information received, it was proper for the State to examine the reliability or truth of defendant's statements and the degree of reliance placed upon them by the expert in forming his opinions. **State v. Morganherring, 701.**

Expert—cross-examination—psychiatrist—familiarity with sources—The trial court did not err in a capital prosecution for first-degree murder in the cross-examination questions the State was allowed to ask the defendant's expert in addictive medicine. Although defendant asserted that the prosecutor improperly injected her own knowledge as to the importance of the treatises relied upon by the witness, the degree of the witness's familiarity with the sources upon which he based his opinion is certainly relevant to the weight and credibility the jury should give the testimony. **State v. Morganherring, 701.**

Fingerprint or palm print—probative value—instructions—In this murder, burglary, armed robbery and kidnapping prosecution in which the State presented evidence that defendant's palm print was found on a stove in the victim's kitchen and defendant testified that he had been inside the victim's house to get a drink of water on the night of the crimes but left while the victim was still alive, the trial court's instruction that if the jury found "substantial evidence of circumstances that the fingerprints were impressed at or about the time these crimes were committed, then it would be evidence which logically tends to show that the accused was present and participated in the commission of these crimes" was correct based on the evidence presented. **State v. Thomas, 315.**

Hearsay—embezzlement scheme—admission for nonhearsay purpose—Testimony elicited from a witness concerning an alleged embezzlement scheme was not hearsay since it was not admitted for the truth of the matter asserted but was admitted to explain the discrepancy between the witness's earlier statements to the police and his trial testimony. **State v. Fleming, 109.**

Hearsay—state of mind exception—Statements made by a murder victim to her brother about domestic violence incidents reflected the victim's state of mind and were admissible under N.C.G.S. § 8C-1, Rule 803(3). **State v. Nobels, 483.**

Hearsay—state of mind exception—conversation with codefendant—plan to frame defendant—In a prosecution of defendant for two first-degree murders, testimony by a prison inmate about a conversation he had with a codefendant in jail in which the codefendant claimed to have "two dudes" who were going

EVIDENCE—Continued

to say it was defendant who committed the murders was admissible under the state-of-mind exception to the hearsay rule. **State v. Rivera, 285.**

Hearsay—state of mind exception—victim's statements—marital problems—relevancy—In a prosecution of defendant for the first-degree murder of her husband, statements made by the husband to five colleagues about his financial problems within the marriage, the couple's disagreements, deterioration and incompatibility within the marriage, and the husband's concern for his safety due to the ill will within the marriage were admissible under the existing state of mind exception to the hearsay rule. **State v. Brown, 193.**

Hearsay—statements by witness's attorney—admission for limited purpose—attorney-client privilege not violated—In a prosecution for first-degree murder in which a witness testified that defendant threatened him and coerced him into signing a note indicating that another person had threatened him, further testimony by the witness that his attorney told him that defendant's attorneys wanted him to find out what the witness would say if he was called by the State to testify in defendant's murder trial and asked his permission to reveal any information the witness gave him to defendant's attorneys was proper nonhearsay evidence when admitted for the limited purpose of explaining why the witness reacted to the note as he did and his subsequent conduct in testifying for the State rather than for defendant; furthermore, there was no evidence that the witness's attorney violated the attorney-client privilege. **State v. Thomas, 315.**

Hearsay—statements to murder victim—not proof of matter asserted—Testimony by a witness that she told the victim that "you can always get a divorce" and by a second witness that he told the victim that "he might consider divorce" did not constitute inadmissible hearsay. **State v. Brown, 193.**

Identification of defendant—brief opportunity for observation—The trial court properly permitted identification of defendant by a witness who observed defendant during the day from a short distance for a period of a few seconds to a minute and was able to remark about defendant's unseasonable clothing. **State v. Parker, 411.**

Impeachment of coconspirator—statements and letters to wife-coconspirator—The trial court did not improperly prohibit a defendant on trial for the murder of her husband from impeaching a coconspirator with statements contained in letters he wrote to his wife, also a coconspirator, while both coconspirators were incarcerated. **State v. Brown, 193.**

Irrelevancy—murder trial—weakness of Virginia uttering charges—In a first-degree murder prosecution in which the victim was the prosecuting witness on charges against defendant in Virginia of uttering forged checks belonging to the victim, testimony by the Virginia prosecutor that he thought the case against defendant on the uttering charges was weak was irrelevant and properly excluded by the trial court. **State v. Fleming, 109.**

Lay opinion—victim alive after shooting—A lay opinion by a restaurant customer that he thought the victim was alive when he was wheeled out of the restaurant after being shot by defendant was properly admitted in this capital sentencing proceeding. **State v. Hedgepeth, 776.**

EVIDENCE—Continued

Murder of wife—quarrels and ill-treatment—relevancy—When a husband is charged with the murder of his wife, the State is permitted to present evidence of frequent quarrels and ill-treatment as bearing on intent, malice, motive, premeditation and deliberation. **State v. Nobels, 483.**

Murder trial—condom in victim's dresser—irrelevancy—Evidence that defendant's mother found a condom in the victim's dresser drawer after his murder was irrelevant and properly excluded in this prosecution of defendant for the first-degree murder of her husband. **State v. Brown, 193.**

Other crimes—similar modus operandi—admissibility to show identity—Evidence of defendant's murder of Griffin was properly admitted under Rule 404(b) to show defendant's identity as the perpetrator of the Dunkley murder, and vice versa, where the modus operandi of the two murders was similar enough to make it likely that the same person committed the two murders. **State v. Moses, 741.**

Photographs—homicide victims before and after death—The trial court did not err in a first-degree murder prosecution by admitting into evidence photographs of the victims before and after their deaths. It is apparent that the court gave due consideration to the objection and arguments of counsel and made findings that the photographs were relevant, were not repetitive, and were no more gruesome than would be the case in other murders of the same nature. Additionally, the court found that the probative value of the photographs outweighed the danger of any prejudice to defendant. **State v. Morganherring, 701.**

Photographs—murder victims while alive—crime scene—victims' bodies at scene and autopsies—The trial court did not err by admitting photographs of two murder victims while alive. Nor did the trial court abuse its discretion in the admission of color photographs of the crime scene, the victims' bodies at the crime scene, and the victims' bodies during the autopsies. **State v. Goode, 247.**

Photographs—not victim impact evidence—The publication to the jury of portrait-style photographs of defendant's three children who were in a vehicle when defendant fired into the vehicle and killed his wife did not constitute impermissible victim impact evidence. **State v. Nobels, 483.**

Polygraph test—inadmissibility—Evidence concerning defendant's polygraph test was irrelevant and not admissible to show his cooperation with law officers or to show a consciousness of innocence. **State v. Fleming, 109.**

Prior abuse of children—murder of a child—admissible—The trial court did not err in a capital first-degree murder prosecution for the death a child by admitting evidence that defendant had previously punished her children through use of a belt and biting. The evidence tended to establish the identity of the person who committed the crime, a plan, and the absence of accident, which are permissible purposes under N.C.G.S. § 8C-1, Rule 404(b) and which are relevant in determining whether defendant committed felonious child abuse and first-degree murder by herself or acting together with someone else. **State v. Anderson, 152.**

Prior crime or act—modus operandi—proof of relevant facts—Testimony by a witness that defendant had previously tricked his way into her house and assaulted her with a kitchen knife was properly admitted into evidence where the trial court found that the similarities between the assault on the witness and the

EVIDENCE—Continued

crimes for which defendant was being tried had probative value and tended to prove relevant facts. **State v. Thomas, 315.**

Prior crime or act—stipulation—description of manner—prior violent felony aggravating circumstance—Testimony of a robbery victim's description of the manner in which the robbery took place was properly admitted in this capital sentencing proceeding to support the (e)(3) aggravating circumstance that defendant had been convicted of a prior violent felony even though defendant stipulated to the conviction and judgment for the robbery. **State v. Thomas, 315.**

Prior misconduct with gun—identification of gun—credibility of witness—In a prosecution for two first-degree murders in which a former drug associate of defendant testified he had seen defendant on several occasions in possession of a gun similar to the 9-mm Ruger which was used in both murders, testimony by the witness that after he told defendant he had been robbed of defendant's drugs and money, defendant pulled out his 9-mm Ruger, put it to the witness's head, and threatened him was relevant and probative of the witness's identification of the gun. **State v. Moses, 741.**

Prison reports elicited on cross-examination—no plain error—There was no plain error in a capital sentencing proceeding where the testimony of defendant's mental health expert on direct examination focused on defendant's inability to control his emotional impulses in and out of prison and confirmed that the source of defendant's temper and aggression was a combination of cocaine and alcohol, and the State on cross-examination read defendant's prison writeups concerning details of his disciplinary reports, medical requests, and special religious requests. It was permissible for the State to ask questions regarding defendant's behavior and temperament in a setting when he was not consuming drugs. **State v. Morganherring, 701.**

Redirect examination—affidavits not fraudulent—evidence not improperly excluded—The trial court did not err by excluding evidence on redirect examination that defendant did not fraudulently complete sworn affidavits disclosing her financial resources and assets after the prosecutor used the affidavits to impeach defendant on cross-examination where the trial court allowed defendant to explain on redirect examination that she was not trying to mislead anyone. **State v. Brown, 193.**

Reference to trial of codefendant—prohibited—no error—The trial court did not err in a capital first-degree murder prosecution for the killing of a two and a half year old child by ruling that the defense could not refer to the trial of defendant's boyfriend, the victim's uncle, where the trial court ruled only that defendant could not refer to the results of the boyfriend's trial and did not prohibit defendant from impeaching adverse witnesses whose testimony differed between the trials. **State v. Anderson, 152.**

Refreshing recollection—use of letter—knowledge of roles in murder—relevancy—The trial court did not err by allowing the prosecutor to use during cross-examination a letter a witness wrote to her daughter, a coconspirator in the murder of defendant's husband, to refresh the recollection of the witness about a statement in the letter that she understood her daughter's part in the murder and "everyone else that had a part in it." **State v. Brown, 193.**

EVIDENCE—Continued

Opinion testimony by lay persons—personal observations—shorthand statements of facts—Testimony by a colleague of the victim that he sensed that the victim was unhappy in his marriage relationship, testimony by a witness that she "had suspected [defendant] all the time," testimony by an officer that defendant "appeared to be trying to be emotional" during an interview, and testimony by another witness that there "seemed to be tension" between the victim and defendant were based on the personal observations of the witnesses and were admissible under Rule 701 as shorthand statements of facts. **State v. Brown, 193.**

Statements to murder victim—consideration of divorce—relevancy to show motive—In a prosecution of defendant for the first-degree murder of her husband, testimony by three witnesses that defendant and the victim were having marital problems and that they had suggested that the victim might consider divorce was relevant to establish a motive for the murder. **State v. Brown, 193.**

Victim character evidence—defendant's tactical decision to allow—waiver of issue on appeal—In a prosecution of defendant for the murder of her husband, defendant may not complain on appeal that the trial court erred in admitting victim character evidence when she made a tactical decision to allow and support the introduction of the victim's character to bolster her defense that she had no reason to murder such a loving and caring husband. **State v. Brown, 193.**

FIREARMS AND OTHER WEAPONS

Discharging firearm into occupied vehicle—consolidation of counts not required—The trial court did not err by denying defendant's motion to consolidate seven counts charging defendant with discharging a firearm into an occupied vehicle where the evidence tended to show that defendant's actions were seven distinct and separate events and that each bullet hit the vehicle in a different place. **State v. Nobels, 483.**

Discharging firearm into occupied vehicle—seven counts—sufficient evidence—The State presented sufficient evidence to support defendant's conviction of seven distinct charges of discharging a firearm into an occupied vehicle, although witnesses testified that they heard only four gunshots and that only four shell casings were recovered at the crime scene, where the State's evidence tended to show the existence of seven bullet holes in various parts of the victim's vehicle. **State v. Nobels, 483.**

HOMICIDE

Acting in concert—instructions—In a capital first-degree murder prosecution reversed upon other grounds, the trial court at the new trial must charge the jurors that they are required to find that defendant himself possessed the requisite intent before rendering a verdict of guilty on the basis of defendant's acting in concert with respect to specific-intent crimes where the murders were committed after *State v. Blankenship*, 337 N.C. 543, and before *State v. Barnes*, 345 N.C. 184. **State v. Barrow, 640.**

Felony murder—robbery—continuous transaction—The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant could be found guilty of felony murder if his intent to rob was formed after the

HOMICIDE—Continued

murder where the evidence did not tend to establish that robbery was defendant's primary motivation for the killing, but defendant's account of the murder and his actions following the murder indicate that the murder and robbery were part of a continuous transaction. **State v. Morganherring, 701.**

Felony murder—specific intent for underlying felonies—Blankenship rule applicable—Because two murders with which defendant was charged occurred after the decision of *State v. Blankenship*, 337 N.C. 543 (1994), but before the nonretroactive decision of *State v. Barnes*, 345 N.C. 184 (1997), the acting-in-concert rule applied in *Blankenship* applies to defendant's trial. Therefore, before the jury can render a verdict of guilty of felony murder on the basis of defendant's acting in concert with regard to the underlying specific intent felonies of armed robbery and kidnapping, it must first find that defendant himself possessed the requisite specific intent. **State v. Rivera, 285.**

First-degree murder—acting in concert—instructions—There was no plain error in a capital prosecution for first-degree murder in the court's instruction on acting in concert. **State v. Anderson, 152.**

First-degree murder—defendant as perpetrator—sufficient evidence—The State's evidence was sufficient to prove that defendant was the perpetrator of a first-degree murder. **State v. Fleming, 109.**

First-degree murder—instruction on second-degree not warranted—The trial court did not err by refusing to instruct the jury on second-degree murder as a lesser included offense of first-degree murder because the jury could not have reasonably concluded that defendant killed the victim without premeditation and deliberation where the evidence tended to show that defendant entered the victim's home by trick and attacked him without provocation; the victim was bound and helpless during the murder; and the victim suffered thirty-six stab wounds to his body inflicted with a butcher knife. **State v. Thomas, 315.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—The trial court did not err by submitting to the jury charges of first-degree murder on the basis of premeditation and deliberation where defendant contended that there was insufficient evidence for the jury to find that defendant had the capacity to form a specific intent to kill. **State v. Morganherring, 701.**

First-degree murder—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss where there was sufficient evidence for a rational jury to find that defendant committed first-degree murder under each of the theories presented. **State v. Anderson, 152.**

HOSPITALS

State Medical Facilities Plan—amendment by Governor—The Governor's power to "approve" the State Medical Facilities Plan (SMFP) is not limited to acceptance or rejection of the SMFP submitted by the Department of Human Resources and the State Health Coordinating Council but includes the power to make substantive amendments to the plan. **Frye Reg'l Med. Ctr. v. Hunt, 39.**

INDIGENT DEFENDANTS

Capital case—statutory right to two attorneys—jury deferments and excuses—absence of lead attorney—Defendant's statutory right to representation by two attorneys in a capital trial was not violated when the trial court proceeded with limited jury orientation, jury excuses, and jury deferments without the presence of his lead counsel, who was ill, where the court proceeded with the consent of defendant and his second court-appointed attorney. **State v. Parker, 411.**

Capital case—two appointed attorneys—absence of one attorney from courtroom—no statutory or constitutional violation—The absence of one of an indigent defendant's court-appointed defense attorneys several times during his capital trial did not violate defendant's right under N.C.G.S. § 7A-450(b1) to be represented by two attorneys in a capital case or prevent defendant's two appointed attorneys from effectively defending him. **State v. Thomas, 315.**

Expert psychiatric assistance—no showing of specific need—The trial court did not abuse its discretion in a capital first-degree murder prosecution by denying defendant's motion for expert psychiatric assistance where defense counsel conceded that defendant was not going to raise an insanity defense and the request for assistance was based on mere speculation of the trial tactic the State would employ rather than the requisite showing of specific need. **State v. Anderson, 152.**

INSURANCE

Automobile—excess liability policy—UIM coverage not required—An excess personal liability policy is not required by N.C.G.S. § 20-279.21(b)(4) to provide underinsured motorist (UIM) coverage where such coverage is expressly excluded by the terms of the policy. **Piazza v. Little, 585.**

Automobile rates—dividends and deviations—due consideration—The Insurance Commissioner, in the exercise of sound discretion and expertise, properly gave due consideration to dividends and deviations in an automobile ratemaking case. The established rate level is not inadequate, excessive, or unfairly discriminatory and the proposed rate will provide a fair and reasonable profit and no more. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 539.**

Automobile rates—income on invested capital—The Commissioner of Insurance cannot order automobile rates based on underwriting profit provisions that require the consideration of investment income on capital and surplus. A fair and reasonable profit must be calculated without considering investment income from capital and surplus while considering the returns of businesses of comparable risk; if the Legislature believes income on invested capital should be considered in insurance ratemaking cases, it should so provide. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 539.**

Business automobile policy—UIM coverage per accident—reduction for workers' compensation and tortfeasor's liability payment—A business automobile policy's UIM coverage limit of $1,000,000 applied per accident rather than per claimant. Further, the insurer's maximum UIM liability under the policy was properly reduced by the aggregate of workers' compensation benefits paid or payable to all claimants for the accident and by the amount paid to claimants by the tortfeasor's liability carrier. **Progressive American Ins. Co. v. Vasquez, 386.**

INSURANCE—Continued

Excess liability policy—UIM coverage not required—The Financial Responsibility Act does not require a commercial excess liability policy to offer separate uninsured and underinsured motorist coverage pursuant to N.C.G.S. § 20-279.21(b)(3) and (b)(4) in addition to what is offered in the underlying business automobile policy. **Progressive American Ins. Co. v. Vasquez, 386.**

Automobile—UIM coverage—amount—An insured's UIM coverage was $100,000 per person and $300,000 per accident where the version of N.C.G.S. § 20-279.21(b)(4) in effect on the date of the last renewal of the policy and on the date of the accident provided that, if the insured did not reject underinsured coverage or select different limits, the amount of underinsured motorist coverage would be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy; the limits on the dates of the last renewal and the accident were $100,000 per person and $300,000 per accident; and there was neither a valid rejection of UIM coverage nor a selection of different coverage limits. **State Farm Mut. Auto. Ins. Co. v. Fortin, 264.**

Automobile—UIM coverage—rejection invalid—A rejection of UIM coverage was no longer effective following the 1991 amendment of N.C.G.S. § 20-279.21(b)(4). Consistent with the language and intent of that statute, an insurer is required to offer its insureds the opportunity to select UIM coverage limits in an amount between $25,000 and $1,000,000 and to obtain a valid rejection or selection of different UIM coverage limits under this new option, notwithstanding that the policy is a renewal policy. **State Farm Mut. Auto. Ins. Co. v. Fortin, 264.**

Automobile—UIM coverage—renewal form—Plaintiff-insurer did not satisfy the requirements of N.C.G.S. § 20-279.21(b)(4) by providing defendants with its version of a renewal form which defendant Bruce Fortin executed and which purportedly rejected UIM coverage. Defendant's version of renewal form NC0186 was not the form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance, and did not require the rejection to be made in writing, as the statute specifically provides, but by contacting a State Farm agent. The language of the statute is mandatory and the rejection was not in accord with the statute. **State Farm Mut. Auto. Ins. Co. v. Fortin, 264.**

JUDGES

Bench conference—refusal to accept guilty plea—not guilty verdict—absence of sworn testimony—conduct prejudicial to administration of justice—censure—A district court judge is censured for a violation of Canon 3A(4) of the N.C. Judicial Code which constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute for finding a defendant not guilty of DWI in a commercial vehicle after a bench conference with the arresting officer and defendant based on the officer's inability to confirm the weight of the vehicle or whether it was in fact a commercial vehicle where the case had been presented on a guilty plea, and respondent did not hear any sworn testimony or give the State an opportunity to present evidence. **In re Tucker, 649.**

Bench conference—refusal to accept guilty plea—not guilty verdict—absence of sworn testimony—not willful misconduct—A district court judge

JUDGES—*Continued*

was not guilty of willful misconduct in office when he refused to accept a defendant's guilty plea to DWI in a commercial vehicle and entered a not guilty verdict after a bench conference with defendant and the arresting officer based on the officer's inability to confirm the weight of the vehicle or that it was in fact a commercial vehicle, without hearing any sworn testimony and without giving the State the opportunity to present evidence, where the prosecutor had called the DWI case for trial and was in the courtroom and within hearing of the bench at all times while the judge was acting on the case. **In re Tucker, 649.**

JURY

Capital case—jury selection—death penalty views—excusal for cause— The trial court did not abuse its discretion in excusing four prospective jurors for cause based upon their answers to death-qualifying questions. **State v. Nobels, 483.**

Capital case—jury selection—death penalty views—excusal for cause— The trial court did not err in a capital case by allowing the State's challenge for cause of a prospective juror because of his death penalty views where the juror responded affirmatively to the trial court's initial inquiry concerning his inability to impose the death penalty, and the juror repeatedly stated during examination by defense counsel that it would be hard for him to sentence defendant to death because of his death penalty views. **State v. Moses, 741.**

Capital case—jury selection—death penalty views—life qualifying standard—excusal for cause—The trial court did not violate the "life qualifying" standard of *Morgan v. Illinois*, 504 U.S. 719 (1992), by denying defendant's challenge for cause of a prospective juror based upon her death penalty views where the juror admitted to defense counsel that she had a tendency to "lean more strongly towards the death penalty" for a premeditated murder, but the juror thereafter stated she could put her personal views aside and follow the trial court's instructions and consider a sentence of life imprisonment rather than the death penalty. **State v. Moses, 741.**

Capital sentencing—excusal for cause—The trial court did not abuse its discretion in a capital sentencing proceeding by concluding that a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath and excusing him for cause. **State v. Peterson, 518.**

Capital sentencing—instructions regarding parole—The trial court did not err in a capital sentencing hearing by not instructing the jury that life imprisonment meant life imprisonment without parole at the beginning of the jury selection process as well as on each and every other occasion in which the issue of life imprisonment arose. The trial court complied with the provisions of the capital sentencing statute which provide for such an instruction, nothing in the record demonstrates that the jury did not believe the trial court or did not follow the instructions, and the trial court did not permit the prosecutor to inject inaccurate and misleading information in to the sentencing proceeding which defendant was not permitted to rebut. N.C.G.S. § 15A-2002. **State v. Peterson, 518.**

Capital sentencing—jury selection—brain tumor—memory loss—denial of challenge for cause—The trial court did not abuse its discretion in denying

JURY—Continued

defendant's challenge for cause of a prospective juror in a capital resentencing proceeding who suffered from short-term memory loss as a result of an inoperable brain tumor. **State v. Hedgepeth, 776.**

Capital sentencing—jury selection—difficulty finding mitigating circumstance—denial of challenge for cause—The trial court did not abuse its discretion in denying defendant's challenge for cause of a prospective juror in a capital resentencing proceeding who stated on voir dire that he would find it difficult to find a mitigating circumstance for a premeditated first-degree murder where, upon further questioning by the trial court, the juror indicated that he could fairly render a recommendation based on the evidence presented and the law as instructed by the trial court. **State v. Hedgepeth, 776.**

Capital sentencing—jury selection—inability to return death penalty—excusal for cause—The trial court in a capital resentencing proceeding did not abuse its discretion by allowing the prosecutor's challenges for cause of two prospective jurors where the first juror's responses during voir dire strongly indicated his potential inability to consider the death penalty, and the second juror's responses revealed a complete unwillingness to impose the death penalty. **State v. Hedgepeth, 776.**

Capital sentencing—jury selection—preference for death penalty—ability to follow law—denial of challenge for cause—The trial court did not abuse its discretion in denying defendant's challenge for cause of a prospective juror in a capital resentencing proceeding whose questionnaire responses and some of her responses on voir dire indicated that she preferred the death penalty for those convicted of murder where the trial court was able upon further questioning to discern that she was capable of putting aside her personal preference for the death penalty and of following the law. **State v. Hedgepeth, 776.**

Capital sentencing—selection—instructions—failure to request—During jury selection for a capital first-degree murder sentencing proceeding, defendant waived his contention that refusing to instruct prospective jurors to disregard parole-related considerations was error by not requesting the Conner instruction at any point during the questioning of the prospective jurors. Defendant's argument that his tender of modified jury instructions prior to voir dire was sufficient to constitute a request for the Conner instruction regarding two particular prospective jurors was rejected. Plain error analysis does not apply to situations in which the trial court has failed to give an unrequested instruction regarding jury voir dire. **State v. McNeil, 657.**

Capital sentencing—selection—parole eligibility—ability to follow instructions—There was no error during jury selection for a capital sentencing proceeding for first-degree murder where defendant contended that the court erred by not allowing defendant to question prospective jurors as to whether they could follow the trial court's instructions regarding parole eligibility. Upon reviewing the record, the Court concluded that defendant was allowed to ask prospective jurors whether they could follow the court's instruction. **State v. McNeil, 657.**

Capital case—excusal of juror after guilty verdict—medical reason—exercise of discretion—The trial judge did not fail to exercise his discretion in

JURY—Continued

excusing a juror for medical reasons following a guilty verdict in the guilt-innocence phase of a capital trial because he stated that he did not have "much choice" or "a whole lot of choice." **State v. Nobels, 483.**

Capital case—excusal of juror after guilty verdict—medical reason—no abuse of discretion—The trial court did not abuse its discretion in excusing a juror for medical reasons following a guilty verdict in the guilt-innocence phase of a capital trial where the juror gave the trial court a note from her physician that stress from jury duty could cause problems with her pregnancy. **State v. Nobels, 483.**

Capital case—jury selection—church membership—questions inappropriate—The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by sustaining objections to defendant's questions concerning church membership and whether church members ever expressed opinions about the death penalty. **State v. Anderson, 152.**

Capital case—jury selection—female defendant—questions not inappropriate—The trial court did not err in a capital prosecution for first-degree murder by allowing the prosecutor to ask prospective jurors, "Would the fact that the defendant is a female in any way affect your deliberations with regard to the death penalty?" **State v. Anderson, 152.**

Capital case—jury selection—opposition to death penalty—challenge for cause—denial of rehabilitation attempt—The trial court did not abuse its discretion in denying defendant's request to attempt to rehabilitate two prospective jurors challenged by the State for cause based upon their opposition to the death penalty. **State v. Fleming, 109.**

Capital case—jury selection—strong enough to impose death penalty—not improper stake-out question—The prosecutor's questions to prospective jurors in a capital trial as to whether they were "strong enough" to recommend and impose the death penalty was not an improper "stake-out" question. **State v. Fleming, 109.**

Challenge for cause—death penalty views—life imprisonment sentence—Defendant was not prejudiced by the trial court's excusal of a prospective juror for cause because of her death penalty views where the jury recommended life imprisonment. **State v. Goode, 247.**

Denial of challenge for cause—prerequisites for appeal—In order to preserve the right to appeal a denial of a challenge for cause, a defendant must have exhausted his peremptory challenges, renewed his challenge for cause, and had his renewed motion denied. **State v. Goode, 247.**

Denial of motion for individual voir dire and sequestration—The trial court did not abuse its discretion in the denial of defendant's motion for individual voir dire and sequestration of jurors during voir dire in a capital trial where the record did not support defendant's contention that prospective jurors who were unwilling to serve as jurors did not truthfully answer questions during voir dire. **State v. Fleming, 109.**

Excusal for cause—capital punishment views—rehabilitation denied—The trial court did not abuse its discretion in disallowing rehabilitation questions

JURY—Continued

of several prospective jurors who were excused for cause because of their capital punishment views. **State v. Thomas, 315.**

First-degree murder—jurors' understanding of life imprisonment—The trial court correctly denied defendant's pretrial motion to question jurors about their understanding of life imprisonment where defense counsel admitted at the pretrial hearing that the statute allowing in capital cases an instruction that a sentence of life imprisonment means life without parole took effect after the crimes in the instant case. **State v. Morganherring, 701.**

Individual poll of jurors—showing in record—Contrary to defendant's contention that the trial court failed to individually poll all twelve members of the jury concerning their assent to verdicts finding defendant guilty of two first-degree murders, the record reflects that each juror was individually polled and that each assented to the guilty verdicts. **State v. Goode, 247.**

Parole eligibility—particular juror with family experience—no plain error in seating—There was no plain error in a capital prosecution for first-degree murder where a prospective juror stated during voir dire that a man who had shot her uncle was sentenced to life, got out on parole, killed someone else, and after going back to court killed a jailer, but when asked also stated that she could set that experience aside. Defendant neither challenged the juror for cause nor exercised one of his remaining peremptory challenges, did not request any instruction or admonition regarding parole following her selection as a juror, and there is no evidence which in any way suggests or infers that any juror erroneously considered the issue of parole eligibility. **State v. Morganherring, 701.**

Peremptory challenges—race-neutral reasons—The prosecutor in a first-degree murder trial stated sufficient race-neutral reasons for his peremptory challenge of a black prospective juror where he stated that the juror was challenged because she was the only juror who had read anything about the case, the juror had lived in the community for only a short period of time, and he was looking for jurors who were solid, stable members of the community and who had a stake in the community. **State v. Thomas, 315.**

Rehabilitation—views on capital punishment—The trial court did not err in allowing the State's motions to excuse prospective jurors for cause based on their opposition to capital punishment without giving defendant the opportunity to rehabilitate them. **State v. Williams, 1.**

Repolling of jury—motion after jury dispersed—waiver—Defendant waived his right to repoll the entire jury in a first-degree murder prosecution by failing to make a timely motion before the jury was dispersed where the jury returned its guilty verdict and was polled, court was recessed for the weekend, and defendant did not make his motion until Monday morning. **State v. Nobels, 483.**

Selection—capital punishment—The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excusing for cause a juror who stated that she felt her personal beliefs might affect her consideration of the death penalty. **State v. Morganherring, 701.**

Statutory selection process—prospective juror called to occupied seat—nonmember polled—absence of prejudice—The defendant in a capital trial

JURY—Continued

was not prejudiced by the jury selection process set forth in N.C.G.S. § 15A-1214(d) through (f) because a prospective juror was called to juror seat number ten which was already occupied by another juror or because a person who was not a jury member was polled as a juror. **State v. Fleming, 109.**

Voir dire—knowledge of case—question not improper stake-out—In a prosecution for first-degree murder and discharging a firearm into occupied property, the prosecutor's question to prospective jurors as to whether they knew or had read anything about the case which informed the jurors that the vehicle into which defendant fired was occupied by defendant's wife and three small children was not an improper stake-out question. **State v. Nobels, 483.**

Voir dire—outline of felony murder—not inadequate statement of law—The prosecutor's questions to prospective jurors in which he defined felony murder as a killing which occurs during the commission of a violent felony, such as discharging a firearm into an occupied vehicle, did not constitute inaccurate or inadequate statements of the law because they failed to inform the jurors of the State's burden of proving that defendant knew the vehicle was occupied. **State v. Nobels, 483.**

KIDNAPPING

First-degree kidnapping—restraint of victim—failure to release in safe place—The element of failure to release the victim in a safe place was supported by evidence that the kidnapping was accomplished by restraint of the victim in his own house, and that the victim was found in his house stabbed to death with his hands tied behind his back. **State v. Thomas, 315.**

Restraint separate from armed robbery—There was sufficient evidence of restraint not inherent in the armed robbery of the victim to support defendant's conviction of kidnapping where the evidence showed that the victim was bound and gagged and repeatedly stabbed and cut while he was restrained. **State v. Thomas, 315.**

LANDLORD AND TENANT

Common law—no duty by landlord to repair—Under the common law, a landlord is under no duty to make repairs and is not liable for personal injury caused by the failure to repair. **Conley v. Emerald Isle Realty, Inc., 293.**

Residential Rental Agreements Act—inapplicability to vacation rental—The North Carolina Residential Rental Agreements Act does not apply to a rented beach cottage that is not the primary residence of the tenants. **Conley v. Emerald Isle Realty, Inc., 293.**

Vacation rental—suitable for occupancy—no implied warranty in North Carolina—North Carolina will not impose an implied warrant of suitability for occupancy on landlords and their agents who lease a furnished residence for a short term. Therefore, a landlord and its rental agent were not liable for injuries received by tenants and their guests when a deck collapsed at a beach cottage rented by the tenants for a two-week period. **Conley v. Emerald Isle Realty, Inc., 293.**

NEGLIGENCE

Sudden incapacitation—Alzheimer's—The trial court did not err in an action arising from an automobile accident where plaintiff contended that the court improperly extended the sudden incapacitation defense by submitting sudden incapacitation based upon Alzheimer's. **Word v. Jones, 557.**

Sudden incapacitation—disjunctive instruction—new trial—A plaintiff in an action arising from an automobile accident was entitled to a new trial where the jury charge given by the court on sudden incapacitation allowed the jury to find for defendant if defendant was either unable to control her vehicle or not capable of sense perception or judgment necessary for proper operation of her vehicle. Because the judge used the disjunctive, it cannot be said that the jury found that defendant was unable to control her vehicle because of sudden incapacitation. **Word v. Jones, 557.**

Sudden incapacitation—elements—The North Carolina Supreme Court, in a case of first impression before it, adopted the following as the elements of the defense of sudden incapacitation: The defendant was stricken by sudden incapacitation; this incapacitation was unforeseeable to the defendant; the defendant was unable to control the vehicle as a result of this incapacitation; and this sudden incapacitation caused the accident. The defendant has the burden of proving each of these elements by a preponderance of the evidence. **Word v. Jones, 557.**

Sudden incapacitation—unconsciousness—The Court of Appeals erred in an action arising from an automobile accident by holding that jury instructions on sudden incapacitation should have included an instruction on unconsciousness. While unconsciousness may be more easily understood and applied to measure sudden medical incapacitation, the crux of the defense is that a defendant by reason of sudden incapacitation becomes unable to control the vehicle. The resolution of disputed facts has historically been left to the jury upon proper instructions. **Word v. Jones, 557.**

PARTIES

Intervention as of right—sealed records and closed courtroom—newspaper—no direct interest in action—The Charlotte Observer was not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A-1, Rule 24 in an action in which plaintiff challenged the revocation of his medical privileges at defendant-hospital and which involved sealed records and a closed courtroom due to use of medical peer review records. The Observer has no direct interest in plaintiff's action and its indirect interest may be adequately asserted in a timely manner by other means. **Virmani v. Presbyterian Health Services Corp., 449.**

Motion to intervene—no required findings and conclusions—The trial court did not err by denying The Charlotte Observer's motion to intervene in an action in which plaintiff challenged the revocation of his medical privileges at defendant-hospital and which involved sealed records and a closed courtroom due to use of peer review records. Contrary to the holding of the Court of Appeals, there is no authority which indicates that a trial court must record specific factual findings and conclusions of law prior to denying a motion to intervene. **Virmani v. Presbyterian Health Services Corp., 449.**

Permissive intervention—sealed records and closed courtroom—newspaper—indirect or contingent interest—The trial court did not abuse its dis-

PARTIES—Continued

cretion by denying The Charlotte Observer permissive intervention under N.C.G.S. § 1A-1, Rule 24 in an action in which plaintiff challenged the revocation of his medical privileges at defendant-hospital and which involved sealed records and a closed courtroom due to use of peer review records. The Observer's interest is only indirect or contingent and there was every reason to believe that permitting the Observer to intervene would unduly delay the adjudication of the rights of the original parties. Moreover, the Observer had alternative means of obtaining a full and timely review of the issue it sought to raise. **Virmani v. Presbyterian Health Services Corp., 449.**

POLICE OFFICERS

High speed chase—gross negligence—summary judgment—The trial court properly granted summary judgment for two officers in their official capacities on gross negligence claims in a wrongful death action where the officers were involved in a high speed chase which ended with a one car accident in which the passenger in the fleeing car was killed. Plaintiff failed to demonstrate any negligence by the officers, and certainly not the degree of gross negligence required to hold the officers liable for decedent's death. **Parish v. Hill, 231.**

PUBLIC OFFICERS AND EMPLOYEES

Employment termination case—evenly divided Court—decision affirmed without precedential value—An evenly divided Supreme Court affirmed without precendential value the unpublished decision of the Court of Appeals in a case involving termination of petitioner's employment as an animal control officer with a county health department that there was substantial evidence to support the conclusion of the final agency decision that petitioner voluntarily resigned and that the final agency decision by the county health director was reached in accordance with petitioner's due process rights. **Hearne v. Sherman, 612.**

School crossing guard—negligence—individual capacity—statement of claim—Plaintiffs' complaint sufficiently pled a claim against defendant school crossing guard in her individual capacity for negligently directing an elementary school student across the street. **Isenhour v. Hutto, 601.**

School crossing guard—public employee—liability for negligence—Plaintiffs sufficiently alleged that the duties of defendant school crossing guard are ministerial in nature so that the crossing guard is a public employee, rather than a public official, and is thus liable in her individual capacity for ordinary negligence in the performance of her duties. **Isenhour v. Hutto, 601.**

PUBLIC RECORDS

Court records—inherent power to ensure fairness and impartiality—retained by courts—Notwithstanding the broad scope of the public records statute and the specific grant of authority in N.C.G.S. § 7A-109(a), North Carolina trial courts always retain the necessary inherent power granted by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order to ensure that each side has a fair and impartial trial. Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a

PUBLIC RECORDS—Continued

trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government and the General Assembly has no power to diminish it in any manner. **Virmani v. Presbyterian Health Services Corp., 449.**

Federal common law—no greater than First Amendment access—Any possible federal common law right of public access to state court proceedings and records is no greater than the First Amendment right assumed to exist and discussed below. **Virmani v. Presbyterian Health Services Corp., 449.**

Medical peer review documents—attached to complaint—public domain—The trial court erred by sealing medical peer review documents which were attached to a complaint arising from the revocation of hospital medical privileges. While the documents might otherwise have been protected by N.C.G.S. § 131E-95, once they were filed in the public records of the court by the plaintiff as part of his complaint they were thrust into the public domain de facto and became subject to the Public Records Act. However, it was improper for those documents to be attached to the complaint and they continue to be inadmissible as evidence or as a forecast of evidence. **Virmani v. Presbyterian Health Services Corp., 449.**

Medical peer review documents—court proceedings—excluded from Act—The plain language of N.C.G.S. § 131E-95 excludes information and records pertaining to medical review committee proceedings from the public records law and there is nothing in the plain language of the statute to support the contention that it applies only to third party malpractice plaintiffs. Furthermore, the argument that any document or record which a judge considers in determining litigants' rights is part of the public records of the courts was rejected because there must be a way for a court to review documents alleged to be inadmissible without making them public records. **Virmani v. Presbyterian Health Services Corp., 449.**

Medical peer review documents—sealed—no federal constitutional violation—The trial court did not violate any federal constitutional right to attend court proceedings and view records in an action arising from the revocation of hospital medical privileges by closing hearings and sealing materials and transcripts involving medical peer review records. Assuming that the United States Supreme Court would hold that the qualified First Amendment right to public access applies to civil cases, the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and there is no alternative which will adequately protect that interest. **Virmani v. Presbyterian Health Services Corp., 449.**

Medical peer review documents—sealed—open courts provision not violated—The trial courts did not violate the North Carolina constitutional open courts provision in an action arising from the revocation of hospital medical privileges by excluding the public from the court hearings and by sealing peer review records. The public's interest in access to these court proceedings, records, and documents is outweighed by the compelling public interest in protecting the confidentiality of medical records in order to foster effective exchange among medical peer review members, there was no reasonable alternative, and the judges

PUBLIC RECORDS—Continued

provided a sufficient record for appellate review. **Virmani v. Presbyterian Health Services Corp., 449.**

Medical peer review documents—submitted directly to judge—properly sealed—The trial court did not err in an action arising from the revocation of medical privileges at a hospital by sealing medical peer review documents which were never filed with the clerk and which were submitted directly to the presiding judge in support of arguments on various pretrial motions. Defendant-hospital took painstaking steps to preserve any confidentiality afforded by law to the records and information submitted to the judge. **Virmani v. Presbyterian Health Services Corp., 449.**

North Carolina Constitution—open courts—civil proceedings—qualified right of public access—The open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings. This qualified public right of access is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review. **Virmani v. Presbyterian Health Services Corp., 449.**

State common law—supplanted by Act—N.C.G.S. § 131E-95 supplants any North Carolina common law right of public access to information regarding medical review committee proceedings and related materials and The Charlotte Observer in this case has no right under the common law of North Carolina to the information. **Virmani v. Presbyterian Health Services Corp., 449.**

ROBBERY

Armed robbery—sufficiency of evidence—The State's evidence was sufficient to support defendant's conviction of armed robbery and felony murder based upon the felony of armed robbery where it tended to show that the victim was bound, gagged and stabbed to death in his own home; defendant's palm print was found on the stove in the victim's home; defendant was seen driving the victim's car and using the victim's automatic-teller machine card shortly before the victim's body was discovered; and the victim's clothing and other items stolen from the victim were seized from defendant's room. **State v. Thomas, 315.**

Instructions—taking by violence or putting in fear—supporting evidence—In a felony murder prosecution based upon the underlying felony of armed robbery, the trial court's instruction that taking of property in an armed robbery could be accomplished "by violence or by putting [the victim] in fear" did not erroneously allow the jury to convict defendant upon a theory not supported by the evidence where the evidence showed not only that the taking of property was accomplished by violence but also that the victim was awake with his eyes open when a gun was pointed at his face and fired below his right eye. **State v. Parker, 411.**

SEARCHES AND SEIZURES

Bloodstained clothing—item from victim—seizure incident to lawful arrest—Bloodstained clothing and shoes taken from defendant at the sheriff's

SEARCHES AND SEIZURES—Continued

office and the murder victim's partial dental plate removed from defendant's pocket were seized incident to a lawful arrest and were admissible in defendant's murder trial. **State v. Goode, 247.**

Traffic stop—detention beyond initial investigation—reasonable duration—In a marijuana prosecution, the detention of defendant for fifteen to twenty minutes between the issuance of a warning ticket and the arrival of a canine unit was reasonable. The officers acted quickly and diligently to obtain the canine unit and promptly put the drug detection dog to work upon its arrival. **State v. McClendon, 630.**

Traffic stop—detention beyond warning ticket—reasonable suspicion—In a prosecution for possession of marijuana, the detention of defendant from the time a warning ticket was issued until the time a canine unit arrived was reasonable under the totality of the circumstances. Language in *State v Pearson*, 348 N.C. 272, regarding nervousness was not meant to imply that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot. Nervousness must be taken in light of the totality of circumstances and is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists. **State v. McClendon, 630.**

Traffic stop—probable cause—objective standard—For situations arising under the North Carolina Constitution, an objective rather than subjective standard must be applied to determine the reasonableness of police action related to probable cause. The reasoning of *Whren v. United States*, 517 U.S. 806, is compelling and is adopted. Whren conclusively establishes that the inquiry is no longer what a reasonable officer would do but what a reasonable officer could do and puts an end to issues involving whether the existence of probable cause for a traffic stop has been used as a pretext for stopping defendant for other reasons. **State v. McClendon, 630.**

Traffic stop—probable cause—pretext—Officers were justified in stopping defendant's vehicle in what became a narcotics prosecution where defendant's vehicle and another vehicle were exceeding the posted speed limit and defendant's vehicle was following too closely. Although defendant contended that the stated purpose of a speeding violation was a mere pretext for investigating him for possession of illegal drugs, the officer's subjective motive for the stop is immaterial. **State v. McClendon, 630.**

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Capital sentencing—aggravating circumstances—course of conduct—castration of second victim—single transaction—The trial court did not err in submitting the (e)(11) aggravating circumstance that the murder of Buchanan was part of a course of conduct which included the commission by defendant of another crime of violence (castration of Dowdy) where there was sufficient evidence that the crime of malicious castration was committed in conjunction with Dowdy's murder as part of a continuous chain of events which included Buchanan's murder. **State v. Parker, 411.**

Capital sentencing—aggravating circumstances—course of conduct—common modus operandi and motivation—The trial court did not err by sub-

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mitting the (e)(11) course of conduct aggravating circumstance for each of two first-degree murders where a common modus operandi and similar motivation exists between the two murders. **State v. Moses, 741.**

Capital sentencing—aggravating circumstances—course of conduct—prior plea agreement—There was no error in a first-degree murder capital sentencing hearing where defendant contended that a plea agreement in a prior trial for the same offenses resulted in the State being precluded from submitting evidence of another murder in support of the course of conduct aggravating circumstance, in violation of *State v. Case*, 330 N.C. 161. The unavailability of the evidence relating to the third murder was not the result of a voluntary plea agreement executed between defendant and the State as in *Case* and the principles enunciated in *Case* are not applicable. **State v. McNeil, 657.**

Capital sentencing—aggravating circumstances—felony murder—underlying felony—conviction also based on premeditation—The felony underlying a conviction for felony murder may be submitted as an aggravating circumstance if the defendant is also convicted of first-degree murder on the basis of premeditation and deliberation. **State v. Thomas, 315.**

Capital sentencing—aggravating circumstances—heinous, atrocious, or cruel—constitutionality—sufficiency of evidence—The (e)(9) especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague and overbroad. Furthermore, the evidence was sufficient to support submission of this aggravating circumstance to the jury where the victim was repeatedly assaulted with a blunt object and the victim suffered great physical pain and torture as, already bloodied and bruised from the beatings, he was strangled forcefully. **State v. Fleming, 109.**

Capital sentencing—aggravating circumstances—heinous, atrocious, or cruel—evidence sufficient—The trial court did not err in a capital sentencing proceeding by submitting to the jury the aggravating circumstance that the killing was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); the victim's age and the existence of a parental relationship may be considered in determining the existence of this factor. **State v. Anderson, 152.**

Capital sentencing—aggravating circumstances—heinous, atrocious or cruel—instructions—The trial court did not err in a capital sentencing proceeding by giving almost verbatim the North Carolina Pattern Jury Instruction on the especially heinous, atrocious or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9). Although defendant contended that the instructions impermissibly allowed the jury to find the existence of this aggravating circumstance based upon the combined actions of defendant and an accomplice, defendant admitted that he planned to kill one victim so that there would be no witnesses, further admitted shooting that victim, and pled guilty to her murder. **State v. McNeil, 657.**

Capital sentencing—aggravating circumstances—heinous, atrocious or cruel—sufficiency of evidence—There was sufficient evidence in a capital sentencing proceeding to warrant submission of the especially heinous, atrocious, or cruel aggravating circumstance despite defendant's contention that the instructions allowed the jury to find the circumstance based on an accomplice's behavior. The detailed evidence clearly showed that defendant murdered a victim

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and was an active participant in severely beating and strangling her prior to her death. **State v. McNeil, 657.**

Capital sentencing—aggravating circumstances—murder while engaged in arson—continuous transaction—The trial court did not err by submitting to the jury as an aggravating circumstance that the murder of Dowdy was committed by defendant while defendant was engaged in the commission of arson, although there was no evidence that there was any burning of Dowdy's upstairs apartment, where defendant killed both Buchanan in his downstairs apartment and Dowdy and set fire to the downstairs apartment, and the murder of Dowdy and the arson occurred under a short span of time and were parts of a continuous transaction. **State v. Parker, 411.**

Capital sentencing—aggravating circumstances—murder while engaged in second murder—course of conduct—separate evidence—instructions—In this capital sentencing proceeding for two first-degree murders, there was substantial separate evidence to support the (e)(5) aggravating circumstance that the first victim's murder was committed while defendant was engaged in the commission of the second victim's murder and the (e)(11) aggravating circumstance that the first victim's murder was committed while defendant was engaged in a course of conduct which included the commission of the crime of malicious castration of the second victim. Furthermore, there was no reasonable likelihood that the trial court's instructions would have caused jurors to consider the murder of the second victim to support both aggravating circumstances. **State v. Parker, 411.**

Capital sentencing—aggravating circumstances—pecuniary gain—sufficient evidence—The trial court properly submitted the pecuniary gain aggravating circumstance to the jury in this capital sentencing proceeding, although there was evidence that defendant told his cousin that he broke into the victim's apartment to steal a gun for his own protection. **State v. Parker, 411.**

Capital sentencing—aggravating circumstances—prior violent felony—instructions—There was no plain error in a capital sentencing proceeding where defendant contended that the court improperly charged the jury in connection with the prior violent felony aggravating circumstance that defendant had engaged in some acts of violence against his wife at or prior to her death (not the subject of this sentencing proceeding). The record shows within the meaning and intent of N.C.G.S. § 15A-2000(e)(3) that defendant used violence or the threat of violence to throw his wife over a bridge into a lake while she was still alive. **State v. McNeil, 657.**

Capital sentencing—aggravating circumstances—risk of death to more than one person—instruction on weapon—plain error—The trial court's instruction on the (e)(10) aggravating circumstance that "a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person" relieved the State of the burden to prove an element of the (e)(10) aggravating circumstance since it effectively took from the jury's consideration whether the weapon used by defendant in this case is normally hazardous to the lives of more than one person. **State v. Nobels, 483.**

Capital sentencing—aggravating circumstances—voluntary manslaughter as prior violent felony—instructions—There was no error in a capital sen-

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tencing proceeding for first-degree murder where the trial court instructed the jury with respect to the prior violent felony aggravating circumstance that voluntary manslaughter is by definition a felony involving the use or threat of violence to the person. **State v. McNeil, 657.**

Capital sentencing—death penalty not disproportionate—A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the evidence showed multiple blunt-force injuries to the head of the victim, multiple defensive wounds to the victim's arms and leg, and manual strangulation to death. **State v. Fleming, 109.**

Capital sentencing—death penalty not disproportionate—A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant repeatedly stabbed the victim in his own home while he was bound and helpless, and while he was still conscious. **State v. Thomas, 315.**

Capital sentencing—death penalty not disproportionate—Imposition of the death penalty on defendant for first-degree murder was not excessive or disproportionate where defendant was convicted on the theory of premeditation and deliberation; the jury found the course of conduct aggravating circumstance; defendant intended to kill both the victim and his estranged wife; and a statement made by defendant at the police station indicated that his only regret was that he did not succeed in killing his estranged wife. **State v. Hedgepeth, 776.**

Capital sentencing—death penalty—proportionate—A death penalty for a first-degree murder was proportionate where defendant, using an assault rifle, gunned down a totally defenseless elderly woman after she had already given him all the money from the cash register in the family-run grocery store. This case is not substantially similar to any of the cases in which the death sentence was found disproportionate and is more similar to cases in which the death sentence was found proportionate. **State v. Peterson, 518.**

Capital sentencing—death sentence not arbitrary—The record fully supports the aggravating circumstance submitted and found by the jury in a capital sentencing proceeding 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. Anderson, 152.**

Capital sentencing—death sentence—not arbitrary—The evidence in a capital sentencing proceeding in which the jury returned a death penalty fully supported the aggravating circumstances found by the jury and there was no indication that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration. **State v. McNeil, 657.**

Capital sentencing—death sentence—not arbitrary—The record in a capital sentencing proceeding fully supported the aggravating circumstances found by the jury, and there was no indication that the sentences of death in this case were imposed under the influence of passion, prejudice or any other arbitrary factor. **State v. Morganherring, 701.**

Capital sentencing—death sentence not disproportionate—A sentence of death for the killing of a two and one-half year old child was not disproportionate where defendant was convicted on the basis of premeditation and delibera-

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tion as well as felony murder, indicating a more calculated and cold-blooded crime, and the case is most analogous to cases in which the court has held the death penalty not to be disproportionate, as in *State v. Perkins*, 345 N.C. 254, where the defendant had assumed a parental role. The fact that a codefendant was sentenced to life is not determinative. **State v. Anderson, 152.**

Capital sentencing—death sentence— not disproportionate—Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where defendant murdered both victims in their homes. **State v. Parker, 411.**

Capital sentencing—death sentence—not disproportionate—A sentence of death in a first-degree murder prosecution was not disproportionate where the case was not substantially similar to any case in which the court has found the death penalty disproportionate and was more similar to cases in which the sentence was found proportionate. A sentence of death has never been found disproportionate where the court found defendant guilty of murdering more than one victim, the finding of premeditation and deliberation indicates a more cold-bloodied and calculated crime, the death penalty has not been found disproportionate in any case where the jury has found three aggravating circumstances, and the death penalty has not been found disproportionate in any case in which the prior violent felony aggravating circumstance was included. **State v. Morganherring, 701.**

Capital sentencing—death sentence—not disproportionate—Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where the conviction for one murder was based upon both premeditation and deliberation and the felony murder rule; the conviction for the second murder was based only upon the felony murder rule; and the jury found the course of conduct aggravating circumstance for both murders. **State v. Moses, 741.**

Capital sentencing—death sentence—not disproportionate—Imposition of the death penalty on defendant for first-degree murder was not excessive or disproportionate where defendant was convicted on the theory of premeditation and deliberation; the jury found the course of conduct aggravating circumstance; defendant intended to kill both the victim and his estranged wife; and a statement made by defendant at the police station indicated that his only regret was that he did not succeed in killing his estranged wife. **State v. Hedgepeth, 776.**

Capital sentencing—history of criminal activity—cross-examination of defendant—The State's cross-examination of defendant regarding the details of his criminal history was not limited to the name of each crime, the time and place of conviction, and the punishment imposed. **State v. Williams, 1.**

Capital sentencing—instructions—consideration of mitigating evidence—There was no error in a capital sentencing proceeding in the court's use of "may" instead of "must," which defendant contended made the consideration of mitigating evidence discretionary. **State v. Anderson, 152.**

Capital sentencing—instructions—distinction between statutory and nonstatutory mitigating circumstances—The trial court's instructions in a capital sentencing proceeding properly distinguished between statutory and non-

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statutory mitigating circumstances, although the court did not specifically instruct that the jurors must give weight to statutory mitigating circumstances. **State v. Hedgepeth, 776.**

Capital sentencing—instructions—mitigating circumstances—The pattern jury instruction used by the trial court to define the term "mitigating circumstance" in capital sentencing is internally consistent and meaningful and does not confuse jurors to such a degree that it violates principles of due process and fundamental fairness. **State v. Peterson, 518.**

Capital sentencing—instructions—no conflict with issues and recommendation form—The trial court did not err in a capital sentencing proceeding where defendant contended that the court's oral instructions concerning the issues and recommendation as to punishment form conflicted with the information on the form. The oral instructions reflect nothing more than that the trial court, as promised, took up the four issues on the form in greater detail in explaining the form to them. No conflict exists between the issue as stated on the form and the trial court's instructions. **State v. Peterson, 518.**

Capital sentencing—life sentences—consecutive or concurrent—refusal to answer jury's question—The trial court did not err by instructing the jury, in response to the jury's inquiry as to whether two life sentences would be served consecutively or concurrently, that it was the court's job to make that determination. **State v. Parker, 411.**

Capital sentencing—mitigating circumstances—defendant's age—The trial court did not err in a capital sentencing proceeding by not submitting the statutory mitigating circumstance of defendant's age at the time of the crime. **State v. Peterson, 518.**

Capital sentencing—mitigating circumstances—definition—instructions—The trial court's instructions defining the concept of a "mitigating circumstance" did not preclude the jury from considering any aspect of defendant's character or background or any of the circumstances of the killing that defendant may have presented as a basis for a sentence less than death; rather, the instructions were virtually identical to instructions approved by the N. C. Supreme Court in previous decisions. **State v. Williams, 1.**

Capital sentencing—mitigating circumstances—duress or domination—evidence insufficient—The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance that defendant acted under duress or under the domination of another person, N.C.G.S. § 15A-2000(f)(5), where the evidence clearly indicates that defendant disciplined and abused the two and one-half year old victim in the weeks that she lived with defendant and her boyfriend and the State presented evidence from a staff psychologist at Dorothea Dix Hospital that defendant did not display the level of dependency that would be expected from one characterizing herself as so submissive. **State v. Anderson, 152.**

Capital sentencing—mitigating circumstances—history of criminal activity—evidence of extent and significance—Where defendant testified that he had been convicted of misdemeanors for several assaults on his wife and his girlfriends, communicating threats, trespassing, possession of stolen property, and

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traffic offenses, and that he had a history of buying, possessing and selling drugs, the State was properly allowed to question defendant on cross-examination about the details of his criminal history and to question several witnesses, including his ex-wife and former and current girlfriends, about defendant's assaults and other criminal activity. **State v. Williams, 1.**

Capital sentencing—mitigating circumstance—inability to appreciate criminality—peremptory instruction—controverted evidence—The trial court did not err by denying defendant's request for peremptory instructions in a capital sentencing proceeding on the statutory mitigating circumstance concerning his inability to appreciate the criminality of his conduct or to conform his conduct to the law where defendant's own testimony at trial indicated that he understood the wrongfulness of his conduct at the time of the killing. **State v. Williams, 1.**

Capital sentencing—mitigating circumstance—minor participant—evidence insufficient—The trial court did not err in a capital sentencing hearing by not submitting to the jury the mitigating circumstance that defendant was an accomplice or accessory with relatively minor participation pursuant to N.C.G.S. § 15A-2000(f)(4). Although defendant may not have inflicted the closed-head injury the night the child died, defendant significantly abused her throughout her stay and thus cannot be considered to have been a minor participant in such conduct. **State v. Anderson, 152.**

Capital sentencing—mitigating circumstance—no significant criminal history—State's rebuttal evidence—findings not required—While the trial court was obligated to determine that a rational juror could find that defendant had no significant history of criminal activity before submitting the (f)(1) mitigating circumstance to the jury, there is no requirement that the determination be made prior to the admission of the State's evidence rebutting defendant's evidence supporting this mitigator and the trial court was not required to make findings of fact to explain its decision. **State v. Williams, 1.**

Capital sentencing—mitigating circumstance—no significant criminal history—submission over defendant's objection—The trial court did not err by submitting the no significant history of prior criminal activity mitigating circumstance to the jury over defendant's objection where a rational juror could find defendant's history of prior criminal activity, which consisted mostly of misdemeanors, to be insignificant with regard to the jury's capital sentencing recommendation. **State v. Williams, 1.**

Capital sentencing—mitigating circumstance—no significant criminal history—submission over defendant's objection—effective assistance of counsel—The trial court did not violate defendant's Sixth Amendment right to the effective assistance of counsel by submitting the (f)(1) no significant history of criminal activity mitigating circumstance to the jury over defendant's objection. **State v. Williams, 1.**

Capital sentencing—mitigating circumstance—no significant history of criminal activity—submission over objection—prosecutor's argument—instruction by court—In a capital sentencing proceeding in which the trial court submitted the (f)(1) no significant history of prior criminal activity mitigating circumstance to the jury over defendant's objection, the prosecutor's argu-

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ments were not misleading as to whether defendant requested submission of the (f)(1) mitigating circumstance; furthermore, the trial court properly instructed the jury that defendant did not request submission of the (f)(1) mitigating circumstance, and the trial court's failure to inform the jury that submission of this mitigating circumstance was required as a matter of law was harmless. **State v. Parker, 411.**

Capital sentencing—mitigating circumstance—no significant history of criminal activity—supporting evidence—The trial court did not err by submitting over defendant's objection the mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence tended to show that defendant began drinking alcohol as a child and started using marijuana and cocaine when he was thirteen years old; a couple of years later, defendant was committing break-ins to support his drug habit and was hospitalized for treatment of substance abuse; and at age eighteen, defendant was sent to juvenile detention. **State v. Parker, 411.**

Capital sentencing—mitigating circumstances—no significant history of prior criminal activity—The trial court did not err in a capital sentencing proceeding by submitting to the jury the statutory mitigating circumstance that defendant possessed no significant history of prior criminal activity even though defense counsel objected to the submission and believed that the evidence did not support it. **State v. Peterson, 518.**

Capital sentencing—mitigating circumstance—no significant history of prior criminal activity—The trial court did not err in a capital sentencing proceeding for a first-degree murder by not submitting the statutory mitigating circumstance of no significant history of prior criminal activity where the State's evidence revealed a 1959 burglary conviction for which defendant was sentenced to six months probation, defendant later violated his probation, served time in Savannah, Georgia for larceny of a television, was arrested in 1975 for hit and run and property damage, and pled guilty in 1977 to voluntary manslaughter for throwing his wife over a bridge into a lake. None of the cases cited by defendant in which it was held appropriate to submit the circumstance involved a prior criminal history which included a violent felony involving death. **State v. McNeil, 657.**

Capital sentencing—mitigating circumstances—peremptory instructions—The trial court did not err in a capital sentencing proceeding by refusing to give peremptory instructions concerning nonstatutory mitigating circumstances where, despite defendant's contention, he did not make a specific request for any peremptory instructions. **State v. Peterson, 518.**

Capital sentencing—mitigating circumstances—peremptory instructions not required—The trial court did not err in refusing to give defendant's requested peremptory instruction in a capital sentencing proceeding on the (f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturbance or the (f)(6) mitigating circumstance that defendant's ability to conform his conduct to the requirements of the law was impaired. **State v. Hedgepeth, 776.**

Capital sentencing—not vague and overbroad—consideration of mitigating factors—There was no error in a capital sentencing proceeding where

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defendant contended that the death penalty statute is vague and overbroad and that the jury did not give just consideration to undisputed mitigating factors. **State v. Peterson, 518.**

Capital sentencing—prison disciplinary reports—admissible—There was no error in a capital sentencing proceeding where defendant objected to the State asking his mental health expert a question regarding defendant's prison disciplinary reports. The rules of evidence do not apply in sentencing proceedings and any evidence which the court deems relevant to sentence may be introduced. A question as to whether defendant needed to be disciplined while in prison is relevant to the issue of defendant's temper and, since this evidence tends to rebut defendant's theory that he was aggressive only when consuming cocaine and alcohol, it was also relevant to the State's argument. **State v. Morganherring, 701.**

Capital sentencing—proportionality—A death sentence was not substantially similar to any of the cases in which a death penalty was found disproportionate and had the characteristics of first-degree murders for which the death penalty has previously been upheld as proportionate. The defendant in this case admitted murdering two victims, pleading guilty to their premeditated and deliberate first-degree murders. He planned to rob and kill one victim, deceived her to get her alone in a vacant house and then brutally tortured and murdered her; he planned to rob and kill the second victim two days later, luring her to go drinking, driving her to isolated area, shooting her in the head and leaving her body on the side of the road, and then going to her apartment and stealing belongings; and the jury found four statutory aggravating circumstances in the first murder and three in the second. A death sentence has never been found disproportionate where defendant was convicted of murdering more than one victim, three of the four aggravating circumstances found in the first murder have been found sufficient standing alone to sustain a death sentence, two of the three aggravating circumstances found in the second murder have been found sufficient to sustain a death sentence standing alone, and a death sentence has never been found disproportionate in a witness elimination case. **State v. McNeil, 657.**

Conspiracy to murder—aggravating factor—position of leadership or dominance—not element of joined accessory murder conviction—The trial court did not erroneously use the acts that formed the gravamen of a joined accessory murder conviction when it found as an aggravating factor for conspiracy to commit murder that "defendant occupied a position of leadership or dominance of other participants in the commission of the offense." **State v. Brown, 193.**

Death penalty—constitutionality—The North Carolina Death Penalty Statute is constitutional. **State v. Williams, 1.**

Death penalty—not disproportionate—A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant pled guilty to first-degree murder under the theory of premeditation and deliberation as well as the felony murder rule, and the evidence tended to show that defendant repeatedly and brutally beat and raped the eighty-three-old victim during an attempt to steal money to enable him to buy more crack cocaine. **State v. Williams, 1.**

TRIALS

Instructions—request following charge—A defendant in a capital sentencing proceeding waived an objection to the court's exclusion of evidence of organic brain damage from its instructions on the mental or emotional disturbance mitigating circumstance by failing to make a timely request to include evidence of organic brain damage when specifically asked by the court at the charge conference. Once the jury has been charged, a defendant is not permitted to propose new evidentiary matter if he previously had the opportunity to raise any such argument at the charge conference. Rule 21 of the General Rules of Practice for Superior and District Courts. **State v. McNeil, 657.**

Jury's request to review transcripts of testimony—failure to exercise discretion—In a capital first-degree murder prosecution decided upon other grounds, the trial judge was required to exercise his discretion as to whether to have the court reporter read to the jury the testimony requested by the jury along with other evidence relating to the same factual issue. The court's statement that it "doesn't have the ability to now present to you the transcription of what was said during the course of the trial" suggests a failure to exercise discretion. **State v. Barrow, 640.**

Motion for new trial for insufficient evidence—standard of review—In a caveat proceeding, the Court of Appeals correctly concluded that the trial court did not abuse its discretion in its order granting a new trial on the issue of undue influence. The trial court's decision to exercise its discretion to grant or deny a motion for a new trial for insufficient evidence under N.C.G.S. § 1A-1, Rule 59(a)(7) must be based on the greater weight of the evidence as observed firsthand by the trial court; the test for appellate review continues to be simply whether or not the record affirmatively demonstrates an abuse of discretion by the trial court in doing so. *Lassiter v. English*, 126 N.C. 489 is overruled to the extent that it is inconsistent with this decision. **In re Buck, 621.**

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