NORTH CAROLINA REPORTS

VOLUME 352

SUPREME COURT OF NORTH CAROLINA

16 JUNE 2000

6 OCTOBER 2000

RALEIGH
2001

CITE THIS VOLUME
352 N.C.

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
I. BEVERLY LAKE, JR.[1]

Associate Justices
SARAH PARKER
ROBERT F. ORR
MARK D. MARTIN
GEORGE L. WAINWRIGHT, JR.
ROBERT H. EDMUNDS, JR.[2]
G. K. BUTTERFIELD[3]

Former Chief Justices
RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE

Former Justices
DAVID M. BRITT
ROBERT R. BROWNING
J. PHIL CARLTON
FRANCIS I. PARKER
HARRY C. MARTIN
JOHN WEBB
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.

Clerk
CHRISTIE SPEIR CAMERON

Librarian
THOMAS P. DAVIS

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JUDGE ROBERT H. HOBGOOD[4]

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RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTERS
H. JAMES HUTCHESON
KIMBERLY WOODELL SIEREDZKI

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1. Elected and sworn in 1 January 2001.
2. Elected and sworn in 4 January 2001.
3. Appointed by Governor Michael F. Easley and sworn in 8 February 2001.
4. Assigned by Chief Justice I. Beverly Lake, Jr. effective 8 January 2001.
5. Appointed by Chief Justice I. Beverly Lake, Jr. effective 14 February 2001.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Dwight L. Cranford	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	G. K. Butterfield, Jr.[1]	Wilson
7BC	Frank R. Brown	Tarboro
	Second Division	
3B	James E. Ragan III	Oriental
	Benjamin G. Alford	Morehead City
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	Ernest B. Fullwood	Wilmington
	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
8A	Paul L. Jones	Kinston
8B	Jerry Braswell[2]	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Henry V. Barnette, Jr.[3]	Raleigh
	Donald W. Stephens	Raleigh
	Narley L. Cashwell	Raleigh
	Stafford G. Bullock	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Evelyn W. Hill[4]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	David Q. LaBarre	Durham

DISTRICT	JUDGES	ADDRESS
15A	J. B. Allen, Jr.	Burlington
	James Clifford Spencer, Jr.	Burlington
15B	Wade Barber	Chapel Hill
	Fourth Division	
11A	Wiley F. Bowen	Dunn
11B	Knox V. Jenkins, Jr.	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	William C. Gore, Jr.	Whiteville
	D. Jack Hooks, Jr.	Whiteville
16A	B. Craig Ellis	Laurinburg
16B	Dexter Brooks	Pembroke
	Robert F. Floyd, Jr.	Lumberton
	Fifth Division	
17A	Melzer A. Morgan, Jr.	Wentworth
	Peter M. McHugh	Reidsville
17B	Clarence W. Carter	King
	A. Moses Massey	King
18	W. Douglas Albright	Greensboro
	Howard R. Greeson, Jr.	High Point
	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.[5]	Greensboro
19B	Russell G. Walker, Jr.	Asheboro
	James M. Webb	Whispering Pines
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey[6]	Winston-Salem
23	Michael E. Helms	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Larry G. Ford	Salisbury
20A	Michael Earle Beale	Wadesboro
20B	William H. Helms[7]	Monroe
	Sanford L. Steelman, Jr.	Weddington
22	C. Preston Cornelius	Mooresville
	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite

DISTRICT	JUDGES	ADDRESS
	Seventh Division	
25A	CLAUDE S. SITTON	Morganton
	BEVERLY T. BEAL	Lenoir
25B	L. OLIVER NOBLE, JR.	Hickory
	TIMOTHY S. KINCAID	Hickory
26	SHIRLEY L. FULTON	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	MARCUS L. JOHNSON	Charlotte
	RAYMOND A. WARREN	Charlotte
	W. ROBERT BELL	Charlotte
	RICHARD D. BONER	Charlotte
	J. GENTRY CAUDILL[8]	Charlotte
27A	JESSE B. CALDWELL III	Gastonia
	TIMOTHY L. PATTI	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby
	Eighth Division	
24	JAMES L. BAKER, JR.	Marshall
28	DENNIS JAY WINNER	Asheville
	RONALD K. PAYNE	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	LOTO GREENLEE CAVINESS	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

STEVE A. BALOG	Burlington
DAVID H. BEARD[9]	Murfreesboro
RICHARD L. DOUGHTON	Sparta
THOMAS D. HAIGWOOD	Greenville
CLARENCE E. HORTON, JR.[10]	Kannapolis
JACK W. JENKINS[11]	Raleigh
JOHN R. JOLLY, JR.[12]	Raleigh
CHARLES C. LAMM, JR.	Boone
OLA M. LEWIS	Southport
BEN F. TENNILLE	Greensboro
CARL L. TILGHMAN	Beaufort
GARY TRAWICK, JR.	Burgaw
JAMES R. VOSBURGH	Washington

EMERGENCY JUDGES

NAPOLEON BAREFOOT, SR.	Wilmington
HENRY V. BARNETTE, JR.[13]	Raleigh
RONALD E. BOGLE[14]	Raleigh

DISTRICT	JUDGES	ADDRESS
	ANTHONY M. BRANNON	Durham
	ROBERT M. BURROUGHS	Charlotte
	GILES R. CLARK	Elizabethtown
	JAMES C. DAVIS	Concord
	ROBERT L. FARMER	Raleigh
	WILLIAM H. FREEMAN[15]	Winston-Salem
	D. B. HERRING, JR.[16]	Fayetteville
	DONALD M. JACOBS	Goldsboro
	ROBERT W. KIRBY	Cherryville
	JAMES E. LANNING	Charlotte
	ROBERT D. LEWIS	Asheville
	JAMES D. LLEWELLYN	Kinston
	JERRY CASH MARTIN	King
	F. FETZER MILLS	Wadesboro
	HERBERT O. PHILLIPS III	Morehead City
	J. MILTON READ, JR.	Durham
	JULIUS ROUSSEAU, JR.	North Wilkesboro
	THOMAS W. SEAY JR.	Spencer

RETIRED/RECALLED JUDGES

C. WALTER ALLEN	Fairview
HARVEY A. LUPTON	Winston-Salem
LESTER P. MARTIN, JR.	Mocksville
HOLLIS M. OWENS, JR.	Rutherfordton

SPECIAL EMERGENCY JUDGES

MARVIN K. GRAY[17]	Charlotte
JOHN B. LEWIS, JR.[18]	Farmville
DONALD L. SMITH[19]	Raleigh

1. Appointed to the Supreme Court and sworn in 8 February 2001.
2. Elected and sworn in 8 December 2000.
3. Retired 31 December 2000.
4. Elected and sworn in 2 January 2001.
5. Appointed and sworn in 16 February 2001 to fill vacancy left by Thomas W. Ross who resigned 30 November 2000.
6. Appointed and sworn in 8 February 2001 to replace William H. Freeman who retired 31 December 2000.
7. Retired 31 July 2001.
8. Appointed to a new position and sworn in 16 February 2001.
9. Position ended 30 September 2000.
10. Appointed and sworn in 9 February 2001.
11. Appointed and sworn in 26 January 2001.
12. Appointed and sworn in 23 January 2001.
13. Appointed and sworn in 8 January 2001.
14. Resigned 26 January 2001.
15. Appointed and sworn in as Emergency Judge 12 January 2001.
16. Resigned 30 November 2000.
17. Appointed and sworn in 4 January 2001.
18. Appointed and sworn in 2 January 2001.
19. Currently assigned to Court of Appeals.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
	C. CHRISTOPHER BEAN	Edenton
	J. CARLTON COLE	Hertford
	EDGAR L. BARNES	Manteo
	AMBER MALARNEY[1]	Wanchese
2	JAMES W. HARDISON (Chief)	Williamston
	SAMUEL G. GRIMES	Washington
	MICHAEL A. PAUL	Washington
	REGINA ROGERS PARKER[2]	Washington
3A	DAVID A. LEECH (Chief)	Greenville
	JAMES E. MARTIN[3]	Greenville
	PATRICIA GWYNETT HILBURN	Greenville
	JOSEPH A. BLICK, JR.	Greenville
	G. GALEN BRADDY	Greenville
	CHARLES M. VINCENT[4]	Greenville
3B	JERRY F. WADDELL (Chief)	New Bern
	CHERYL LYNN SPENCER	New Bern
	KENNETH F. CROW	New Bern
	PAUL M. QUINN	New Bern
	KAREN A. ALEXANDER	New Bern
4	WAYNE G. KIMBLE, JR. (Chief)	Jacksonville
	LEONARD W. THAGARD	Clinton
	PAUL A. HARDISON	Jacksonville
	WILLIAM M. CAMERON III	Richlands
	LOUIS F. FOY, JR.	Pollocksville
	SARAH COWEN SEATON	Jacksonville
	CAROL A. JONES[5]	Kenansville
	HENRY L. STEVENS IV[6]	Kenansville
5	JOHN J. CARROLL III (Chief)[7]	Wilmington
	JOHN W. SMITH	Wilmington
	ELTON G. TUCKER	Wilmington
	J. H. CORPENING II	Wilmington
	SHELLY S. HOLT	Wilmington
	REBECCA W. BLACKMORE	Wilmington
	JAMES H. FAISON III	Wilmington
6A	HAROLD PAUL MCCOY, JR. (Chief)	Halifax
	ALMA L. HINTON[8]	Halifax
6B	ALFRED W. KWASIKPUI (Chief)	Jackson
	THOMAS R. J. NEWBERN	Aulander
	WILLIAM ROBERT LEWIS II	Winton
7	JOHN L. WHITLEY (Chief)[9]	Wilson
	JOSEPH JOHN HARPER, JR.	Tarboro
	JOHN M. BRITT	Tarboro

DISTRICT	JUDGES	ADDRESS
	PELL C. COOPER	Nashville
	ROBERT A. EVANS	Rocky Mount
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	WILLIAM CHARLES FARRIS[11]	Wilson
8	JOSEPH E. SETZER, JR. (Chief)[12]	Goldsboro
	DAVID B. BRANTLEY	Goldsboro
	JAMES W. COPELAND, JR.	Goldsboro
	LONNIE W. CARRAWAY	Goldsboro
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	H. WELDON LLOYD, JR.	Henderson
	DANIEL FREDERICK FINCH	Oxford
	J. HENRY BANKS	Henderson
	GAREY M. BALLANCE[13]	Pelham
9A	MARK E. GALLOWAY (Chief)[14]	Roxboro
	L. MICHAEL GENTRY[15]	Pelham
10	JOYCE A. HAMILTON (Chief)[16]	Raleigh
	JAMES R. FULLWOOD	Raleigh
	ANNE B. SALISBURY	Raleigh
	WILLIAM C. LAWTON	Raleigh
	MICHAEL R. MORGAN	Raleigh
	ROBERT BLACKWELL RADER	Raleigh
	PAUL G. GESSNER	Raleigh
	ANN MARIE CALABRIA	Raleigh
	ALICE C. STUBBS	Raleigh
	KRISTIN H. RUTH	Raleigh
	CRAIG CROOM	Raleigh
	KRIS D. BAILEY[17]	Raleigh
	JENNIFER M. GREEN[18]	Raleigh
	MONICA M. BOUSMAN[19]	Raleigh
11	EDWARD H. MCCORMICK (Chief)	Lillington
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	ALBERT A. CORBETT, JR.	Smithfield
	FRANK F. LANIER	Buies Creek
	ROBERT L. ANDERSON	Clayton
	MARCIA K. STEWART[20]	Smithfield
	JACQUELYN L. LEE[21]	Sanford
	JIMMY L. LOVE, JR.[22]	Sanford
12	A. ELIZABETH KEEVER (Chief)	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	ROBERT J. STIEHL III	Fayetteville
	EDWARD A. PONE	Fayetteville
	C. EDWARD DONALDSON	Fayetteville
	KIMBRELL KELLY TUCKER	Fayetteville

DISTRICT	JUDGES	ADDRESS
	JOHN W. DICKSON	Fayetteville
	CHERI BEASLEY	Fayetteville
	DOUGALD CLARK, JR.	Fayetteville
13	JERRY A. JOLLY (Chief)	Tabor City
	NAPOLEON B. BAREFOOT, JR.	Supply
	THOMAS V. ALDRIDGE, JR.	Whiteville
	NANCY C. PHILLIPS	Elizabethtown
	DOUGLAS B. SASSER	Whiteville
	MARION R. WARREN	Southport
14	KENNETH C. TITUS (Chief)	Durham
	RICHARD G. CHANEY	Durham
	ELAINE M. O'NEAL	Durham
	CRAIG B. BROWN	Durham
	ANN E. MCKOWN	Durham
	MARCIA H. MOREY	Durham
15A	J. KENT WASHBURN (Chief)	Graham
	ERNEST J. HARVIEL	Graham
	BRADLEY REID ALLEN, SR.	Graham
	JAMES K. ROBERSON[23]	Graham
15B	JOSEPH M. BUCKNER (Chief)	Hillsborough
	ALONZO BROWN COLEMAN, JR.	Hillsborough
	CHARLES T. L. ANDERSON	Hillsborough
	M. PATRICIA DEVINE	Hillsborough
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM G. MCILWAIN	Wagram
	RICHARD T. BROWN	Laurinburg
16B	GARY L. LOCKLEAR (Chief)	Lumberton
	HERBERT L. RICHARDSON	Lumberton
	J. STANLEY CARMICAL	Lumberton
	JOHN B. CARTER, JR.	Lumberton
	WILLIAM JEFFREY MOORE	Pembroke
17A	RICHARD W. STONE (Chief)	Wentworth
	FREDRICK B. WILKINS, JR.	Wentworth
17B	OTIS M. OLIVER (Chief)	Dobson
	CHARLES MITCHELL NEAVES, JR.	Elkin
	SPENCER GRAY KEY, JR.	Elkin
18	LAWRENCE MCSWAIN (Chief)	Greensboro
	WILLIAM L. DAISY	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	JOSEPH E. TURNER	Greensboro
	WENDY M. ENOCHS	Greensboro
	ERNEST RAYMOND ALEXANDER, JR.[24]	Greensboro
	SUSAN ELIZABETH BRAY	Greensboro
	PATRICE A. HINNANT	Greensboro
	A. ROBINSON HASSELL	Greensboro

DISTRICT	JUDGES	ADDRESS
	H. THOMAS JARRELL, JR.	High Point
	SUSAN R. BURCH[25]	Greensboro
	THERESA H. VINCENT[26]	Greensboro
	WILLIAM K. HUNTER[27]	Greensboro
19A	WILLIAM M. HAMBY, JR. (Chief)	Concord
	DONNA G. HEDGEPETH JOHNSON	Concord
	MICHAEL KNOX	Concord
	MARTIN B. MCGEE	Concord
19B	WILLIAM M. NEELY (Chief)	Asheboro
	VANCE B. LONG	Asheboro
	MICHAEL A. SABISTON	Troy
	JAYRENE RUSSELL MANESS	Carthage
	LEE W. GAVIN	Asheboro
	LILLIAN B. JORDAN	Asheboro
19C	ANNA MILLS WAGONER (Chief)	Salisbury
	TED A. BLANTON	Salisbury
	CHARLES E. BROWN	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
20	TANYA T. WALLACE (Chief)	Rockingham
	SUSAN C. TAYLOR	Albemarle
	JOSEPH J. WILLIAMS	Monroe
	CHRISTOPHER W. BRAGG	Monroe
	KEVIN M. BRIDGES	Albemarle
	LISA D. THACKER	Wadesboro
	HUNT GWYN	Monroe
21	WILLIAM B. REINGOLD (Chief)	Winston-Salem
	ROLAND H. HAYES	Winston-Salem
	CHESTER C. DAVIS	Winston-Salem
	WILLIAM THOMAS GRAHAM, JR.	Winston-Salem
	VICTORIA LANE ROEMER	Winston-Salem
	LAURIE L. HUTCHINS	Winston-Salem
	LISA V. L. MENEFEE	Winston-Salem
	LAWRENCE J. FINE[28]	Winston-Salem
22	SAMUEL CATHEY (Chief)	Statesville
	JAMES M. HONEYCUTT	Lexington
	JIMMY L. MYERS	Mocksville
	JACK E. KLASS[29]	Lexington
	MARTIN J. GOTTHOLM	Statesville
	MARK S. CULLER	Mocksville
	WAYNE L. MICHAEL	Lexington
	L. DALE GRAHAM[30]	Taylorsville
	JULIA SHUPING GULLETT[31]	Mooresville
23	EDGAR B. GREGORY (Chief)	Wilkesboro
	DAVID V. BYRD	Wilkesboro
	JEANIE REAVIS HOUSTON	Wilkesboro

DISTRICT	JUDGES	ADDRESS
	MITCHELL L. MCLEAN	Wilkesboro
24	ALEXANDER LYERLY (Chief)	Banner Elk
	WILLIAM A. LEAVELL III	Bakersville
	KYLE D. AUSTIN	Pineola
	BRUCE BURRY BRIGGS	Mars Hill
25	JONATHAN L. JONES (Chief)	Valdese
	ROBERT E. HODGES	Nebo
	ROBERT M. BRADY	Lenoir
	GREGORY R. HAYES	Hickory
	DAVID ABERNETHY	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
	BURFORD A. CHERRY[32]	Hickory
26	WILLIAM G. JONES (Chief)	Charlotte
	RESA L. HARRIS	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
	JANE V. HARPER	Charlotte
	FRITZ Y. MERCER, JR.	Charlotte
	PHILLIP F. HOWERTON, JR.	Charlotte
	YVONNE M. EVANS	Charlotte
	DAVID S. CAYER	Charlotte
	C. JEROME LEONARD, JR.[33]	Charlotte
	ERIC L. LEVINSON	Charlotte
	ELIZABETH M. CURRENCE	Charlotte
	RICKYE MCKOY-MITCHELL	Charlotte
	LISA C. BELL	Charlotte
	LOUIS A. TROSCH, JR.	Charlotte
	REGAN A. MILLER	Charlotte
	NANCY BLACK NORELLI	Charlotte
	HUGH B. LEWIS[34]	Charlotte
	Avril U. Sisk[35]	Charlotte
27A	DENNIS J. REDWING (Chief)[36]	Gastonia
	JOYCE A. BROWN	Belmont
	ANGELA G. HOYLE[37]	Gastonia
	JOHN K. GREENLEE[38]	Gastonia
	JAMES A. JACKSON[39]	Gastonia
	RALPH C. GINGLES, JR.[40]	Gastonia
27B	LARRY JAMES WILSON (Chief)	Shelby
	ANNA F. FOSTER	Shelby
	K. DEAN BLACK	Denver
	CHARLES A. HORN, SR.	Shelby
28	EARL JUSTICE FOWLER, JR. (Chief)	Asheville
	PETER L. RODA	Asheville
	GARY S. CASH	Asheville
	SHIRLEY H. BROWN	Asheville

DISTRICT	JUDGES	ADDRESS
	REBECCA B. KNIGHT	Asheville
	MARVIN P. POPE, JR.[41]	Asheville
29	ROBERT S. CILLEY (Chief)	Pisgah Forest
	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
	LAURA J. BRIDGES	Hendersonville
	C. RANDY POOL	Marion
	C. DAWN SKERRETT[42]	Cedar Mountain
30	JOHN J. SNOW, JR. (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva

EMERGENCY JUDGES

ABNER ALEXANDER	Winston-Salem
CLAUDE W. ALLEN, JR.	Oxford
PHILIP W. ALLEN	Reidsville
E. BURT AYCOCK, JR.	Greenville
LOWRY M. BETTS	Pittsboro
DONALD L. BOONE[43]	High Point
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Fayetteville
WILLIAM A. CHRISTIAN[44]	Sanford
SPENCER B. ENNIS[45]	Graham
J. PATRICK EXUM	Kinston
J. KEATON FONVIELLE[46]	Shelby
STEPHEN F. FRANKS	Hendersonville
GEORGE T. FULLER	Lexington
HARLEY B. GASTON, JR.[47]	Gastonia
ADAM C. GRANT, JR.	Concord
LAWRENCE HAMMOND, JR.	Asheboro
ROBERT L. HARRELL	Asheville
JAMES A. HARRILL, JR.	Winston-Salem
PATTIE S. HARRISON[48]	Roxboro
ROBERT W. JOHNSON	Statesville
ROBERT K. KEIGER	Winston-Salem
C. JEROME LEONARD, JR.[49]	Charlotte
EDMUND LOWE	High Point
JAMES E. MARTIN[50]	Ayden
J. BRUCE MORTON	Greensboro
DONALD W. OVERBY	Raleigh
L. W. PAYNE JR.	Raleigh
STANLEY PEELE	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III[51]	Raleigh

RETIRED/RECALLED JUDGES

WILLIAM A. CREECH	Raleigh
ROBERT T. GASH	Brevard
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed to a new position and sworn in 8 January 2001.
2. Appointed to a new position and sworn in 2 February 2001.
3. Retired 3 December 2000 and appointed and sworn in as Emergency Judge 19 December 2000.
4. Elected and sworn in 4 December 2000.
5. Elected and sworn in 4 December 2000.
6. Appointed to a new position and sworn in 4 January 2001.
7. Appointed Chief Judge effective 1 May 2001.
8. Appointed and sworn in 17 November 2000 to replace Dwight L. Cranford who was appointed to the Superior Court.
9. Appointed Chief Judge effective 11 January 2001 to replace Albert S. Thomas, Jr. who was sworn in as Judge of the Court of Appeals 5 January 2001.
10. Elected and sworn in 4 December 2000.
11. Appointed and sworn in 1 March 2000.
12. Appointed and sworn in 3 September 2001 to replace Rodney R. Goodman who retired 1 September 2001.
13. Appointed to a new position and sworn in 5 January 2001.
14. Appointed Chief Judge effective 4 December 2000.
15. Elected and sworn in 4 December 2000.
16. Appointed Chief Judge effective 1 December 2000.
17. Elected and sworn in 4 December 2000.
18. Elected and sworn in 4 December 2000.
19. Appointed to a new position and sworn in 2 February 2001.
20. Elected and sworn in 4 December 2000.
21. Elected and sworn in 4 December 2000.
22. Appointed to a new position and sworn in 15 December 2000.
23. Elected and sworn in 4 December 2000.
24. Deceased 31 December 2000.
25. Elected and sworn in 4 December 2000.
26. Elected and sworn in 4 December 2000 to replace Donald L. Boone who retired 30 November 2000.
27. Appointed and sworn in 30 April 2001.
28. Appointed and sworn in 19 April 2001 to replace Ronald G. Spivey who was appointed and sworn in as Superior Court Judge 19 April 2001.
29. Retired 30 June 2001.
30. Elected and sworn in 13 December 2000.
31. Appointed to a new position and sworn in 6 April 2001.
32. Elected and sworn in 4 December 2000.
33. Retired 30 November 2000.
34. Elected and sworn in 4 December 2000.
35. Appointed to a new position and sworn in 8 January 2001.
36. Appointed Chief Judge 1 May 2001 to replace Harley B. Gaston, Jr. who retired 30 April 2001.
37. Elected and sworn in 4 December 2000.
38. Elected and sworn in 4 December 2000.
39. Elected and sworn in 4 December 2000.
40. Appointed and sworn in 12 June 2001.
41. Appointed to a new position and sworn in 26 January 2001.
42. Elected and sworn in 4 December 2000.
43. Appointed and sworn in 14 December 2000.
44. Appointed and sworn in 9 October 2000.
45. Appointed and sworn in 1 December 2000.
46. Reappointed and sworn in 8 November 2000.
47. Appointed and sworn in 1 May 2001.
48. Appointed and sworn in 1 December 2000.
49. Appointed and sworn in 1 December 2000.
50. Appointed and sworn in 19 December 2000.
51. Appointed and sworn in 1 December 2000.

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28	J. ROBERT HUFSTADER	Asheville

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

CONSTITUTION OF UNITED STATES CITED

RULES OF APPELLATE PROCEDURE CITED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 17th day of November 2000, and said persons have been issued a certificate of this Board:

Bernard James Graves, Jr. ..... Applied from the State of Tennessee
Judy A. Endicott Newbold ..... Applied from the State of Oklahoma
Jeffrey Wayne Norris ..... Applied from the State of Pennsylvania
Christopher Howard Oldham ..... Applied from the State of Colorado
Joseph Francis Dodge ..... Applied from the State of Michigan
Bruce Andrew Pickens ..... Applied from the State of New York
Steven James Pugh ..... Applied from the State of Texas
Gary A. Scarzafava ..... Applied from the State of Texas
Keith F. Oberkfell ..... Applied from the State of Illinois
Patrick Terrence Gaffney ..... Applied from the District of Columbia
Garmon Gray Dale, Jr. ..... Applied from the State of Texas
Nita Saffell Yates ..... Applied from the State of Ohio
Ronald H. Gitter ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 27th day of November, 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 17th day of November, 2000 and said person has been issued a license certificate.

JULY 2000 NORTH CAROLINA BAR EXAMINATION

Marie Crepeau Moseley ..... New Bern

Given over my hand and seal of the Board of Law Examiners this the 27th day of November, 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 duly passed the examinations of the Board of Law Examiners as of the 8th day of December, 2000 and said persons have been issued a license certificate.

FEBRUARY 2000 NORTH CAROLINA BAR EXAMINATION

David Tyler Lewis ..... Charlotte
B. Ford Robertson ..... Raleigh

LICENSED ATTORNEYS

JULY 2000 NORTH CAROLINA BAR EXAMINATION

Joseph Alexander Bianco ..... Arlington, Virginia
Terryl Blackmon ..... Tampa, Florida
Joseph L. Brinkley ..... Charlotte
Kenneth Allen De Ville ..... Greenville
Jeffery Robert DeNio ..... Charlotte
Benjamin Duane Ellis ..... Marietta, Georgia
Nichole H. Hargrove ..... Charlotte
Glenn Richard Jones ..... Raleigh
Britt Bernheim Ludwig ..... Chapel Hill
Erin P. Madill ..... Cary
William Eric Medlin ..... Greensboro
Paulette Cline Mulligan ..... Hendersonville
Sean Kendall Murphy ..... Charlotte
Susan Calabrese Roccesano ..... Durham
Allison Lee Thompson ..... Lewisville

Given over my hand and seal of the Board of Law Examiners this the 11th day of December, 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 22nd day of December 2000, and said persons have been issued a certificate of this Board:

James C. Diana ..... Applied from the District of Columbia
Tonja Peige Durell Wise ..... Applied from the State of Indiana
Todd Christopher Brockmann ..... Applied from the State of Missouri
Susan Lee Hofer ..... Applied from the State of Michigan
Robert John Roth ..... Applied from the State of New York
Alan Leslie Button ..... Applied from the State of New York
Scott Allen Scurfield ..... Applied from the State of Pennsylvania
Jeffrey G. Roberts ..... Applied from the State of Kentucky
Dennis J. Williamson ..... Applied from the State of Oklahoma
Theodore Frederick Kerin ..... Applied from the State of New York
Candice S. Cummings ..... Applied from the State of Pennsylvania
Lucian Cox Jones ..... Applied from the State of NewYork
Theodore Edward Mackall, Jr. ..... Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners this the 2nd day of January, 2001.

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 19th day of January, 2001 and said person has been issued a license certificate.

JULY 2000 NORTH CAROLINA BAR EXAMINATION

Karen Denise Little ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 29th day of January, 2001.

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 2nd day of March 2001, and said persons have been issued a certificate of this Board:

Brenda Stacey Berlin ..... Applied from the District of Columbia
George Edward Coleman III ..... Applied from the State of Tennessee
David Alexander Collins ..... Applied from the State of Michigan
Malea Drew ..... Applied from the State of Illinois
McDara Patrick Folan III ..... Applied from the State of Ohio
Stephen Jay Gugenheim ..... Applied from the State of Texas
William Benjamin Hood, II ..... Applied from the State of Ohio
Paul Crane Jacobson ..... Applied from the State of Virginia
McRay Judge II ..... Applied from the State of Illinois
Steven C. Lian ..... Applied from the State of North Dakota
Cathleen Cory Kailani Memmer ..... Applied from the State of Virginia
Edward F. O'Keefe ..... Applied from the State of Colorado
Julia Natalie Oliver ..... Applied from the State of Tennessee
Ethan Ainsworth Ontjes ..... Applied from the State of Virginia
Richard E. Rowe ..... Applied from the State of West Virginia
Jonathan Lee Thornton ..... Applied from the State of Virginia
Kenneth F. Whitted ..... Applied from the District of Columbia
Meg Sohmer Wood ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 10th day of March, 2001.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 24th day of March, 2001 and said persons have been issued license certificates.

FEBRUARY 2001 NORTH CAROLINA BAR EXAMINATION

Jamyle Katherine Newlin Acevedo ..... High Point
Luis Michael Agosto ..... Huntersville
Barry David Alexander ..... Morrisville
DeLisa Kilpatrick Alexander ..... Raleigh
Aimee Kathryn Marie Anderson ..... Wilmington
Season D. Chiari Atkinson ..... Durham
Dianne Chipps Bailey ..... Charlotte
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Scott David Beasley ..... Raleigh
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Amanda Clare Blackman ..... Pfafftown
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Traci Lee Cox ..... Randleman
Charmel L. Cross ..... Durham
Michael J. Crowley ..... Apex
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Edward Bilbro Davis ..... Charlotte
Rosalind L. Day ..... Charlotte
Phoebe Winship Dee ..... Ft. Pierce, Florida
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Barbara Bolton DuRant ..... Oxford
Gary L. Edwards, II ..... Kingsport, Tennessee
Gregory Roy Everman ..... Charlotte

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Donna Forga ..... Chapel Hill
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Laura Suzanne Pleicones ..... Rock Hill, South Carolina
Phillip Charles Price ..... Waynesville
John Daren Pritchard ..... Charlotte
Elizabeth Raghunanan ..... Durham

Kristie Marie Ravert ..... Wendell
Holly A. Roberson ..... Rocky Mount
Stephen Edward Robertson ..... Greensboro
Karen Elisabeth Sapp ..... Chapel Hill
Steven L. Satter ..... Charlotte
Benjamin David Schwartz ..... Charlotte
Rakesh Kumar Sehgal ..... Clemmons
Dawn Sheek ..... Trinity
Anginna Terese Sims ..... Winston-Salem
John E. Slaughter, III ..... Durham
Hope Fisher Smelcer ..... Charlotte
Tamara Avis Smith ..... Wilmington
John Jeremy Snell ..... Fayetteville, Arizona
Kenneth Darwin Snow ..... Charlotte
Sean David Soboleski ..... Wilmington
Martin Edward Steele ..... Hickory
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Joel Benjamin Wilson ..... Carrboro
Carrie Hailman Wolfe ..... Charleston, South Carolina
Christine Wright ..... Durham
Sebronzik Wright ..... Charlotte
Jacqueline Michelle Yount ..... Charlotte
Laura Kay Zhao ..... Charlotte
Ina Zucker ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 9th day of April, 2001.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 6th day of April, 2001 and said persons have been issued a license certificate.

FEBRUARY 2001 NORTH CAROLINA BAR EXAMINATION

Stephen Smith Ashley, Jr. ..... Greensboro
Celeste Yvonne Breza ..... Washington
Patrick R. Broadway ..... Santa Clarita, California
JoAnna Lee Carson ..... Raleigh
Heather Graham Connor ..... Mandeville, Louisiana
Darcia Deann Daggett ..... Winston-Salem
Carleena Vidyah Deonanan ..... Elizabeth City
Robert Cowan deRosset, IV ..... Raleigh
Robert Joseph Dewey ..... Mooresville
Marc Hunter Eppley ..... Winston-Salem
Maria Margaret Fakadej ..... Clayton
Bruce L. Ferguson ..... Hiawassee, Georgia
Jenny Rebecca Gonzalez ..... Newark, Ohio
Sara Stone Veith Jenkins ..... Tarboro
Roger Brian Johnson ..... Columbia, South Carolina
David Nevin Jonson ..... Raleigh
Tracy L. Kreider ..... Asheville
Dawn R. Kreysar ..... Chapel Hill
Angela Cornella Lee ..... Raleigh
Monica Ann Majoras ..... Charlotte
Gary Eugene McClanahan ..... Tucker, Georgia
Amy Clayborne McLean ..... Charlotte
Brent DeLynn Moore ..... Charlotte
Gail Patricia Moseley ..... Morrisville
Seth Allen Neyhart ..... Durham
Julie Barker Pape ..... Winston-Salem
Charles Theodore Peterson, Jr. ..... Bermuda Run
Stephen Hugh Smalley ..... Raleigh
Carla A. Talbert ..... Lexington
Donna Groot Taylor ..... Gastonia
Frank Paul Testa ..... Charlotte
Benjamin Earl Fossum Bisho Waller ..... Chapel Hill
Thomas David Winokur ..... Tallahassee, Florida
Cheryl Hudson Wright ..... Charlotte
Denise Campbell Yarborough ..... Asheville

Given over my hand and seal of the Board of Law Examiners this the 9th day of April, 2001.

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 as of the 23rd day of March, 2001 and said person has been issued a license certificate.

COMITY APPLICANT

James S. Felt . . . . . .Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 9th day of April, 2001.

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 6th day of April, 2001 and said person has been issued a license certificate.

FEBRUARY 2001 NORTH CAROLINA BAR EXAMINATION

Aaron C. Hemmings . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners this the 16th day of April, 2001.

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 20th day of April, 2001 and said persons have been issued a license certificate.

FEBRUARY 2001 NORTH CAROLINA BAR EXAMINATION

Brian Joseph Garstka . . . . . .Charlotte
John B. Tate, III . . . . . .Washington
Joseph Williams Hart . . . . . .Winston-Salem
Douglas Andrew Rubel . . . . . .Morrisville
David Campbell Sutton . . . . . .Greenville

Given over my hand and seal of the Board of Law Examiners this the 27th day of April, 2001.

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 20th day of April 2001, and said persons have been issued a certificate of this Board:

Clark Hastings Campbell ..... Applied from the District of Columbia
John Mark Cooper ..... Applied from the State of Virginia
Jeffrey Mark Gershon ..... Applied from the State of Indiana
Jeffrey Theodore Heintz ..... Applied from the State of Ohio
Lori Ann Kroll ..... Applied from the District of Columbia
April MacBride ..... Applied from the State of New York
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Nita Kay Stanley ..... Applied from the State of Virginia
Michael Geoffrey Wimer ..... Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 27th day of April, 2001.

FRED P. PARKER III
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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 29th day of June 2001, and said person has been issued a certificate of this Board:

Christopher Windly Rhue ..... Applied from the State of Virginia

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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 27th day of July 2001, and said persons have been issued a certificate of this Board:

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Jennifer M. Roof Lamb ..... Applied from the District of Columbia
David Eric Rosenthal ..... Applied from the State of New York
Candyce Thompson Beneke ..... Applied from the State of Texas
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Kevin Alan Wolff ..... Applied from the District of Columbia
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Harold E. Eaton, Jr. . . . . .Applied from the State of Vermont
Jackson Wyatt Moore . . . . . .Applied from the State of Texas
Ben John Cassarion, Jr. . . . . .Applied from the State of New York
Thomas P. Lutz . . . . . .Applied from the State of Pennsylvania
Rick D. Rhodes . . . . . .Applied from the District of Columbia
Donald Lee Beci . . . . . .Applied from the State of Illinois
David Schieferstein . . . . . .Applied from the State of Colorado

Given over my hand and seal of the Board of Law Examiners this the 6th day of August, 2001.

FRED P. PARKER III
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State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JIMMIE WAYNE LAWRENCE

No. 585A97

(Filed 16 June 2000)

1. Appeal and Error— preservation of issues—constitutionality of short-form indictments

Although defendant did not challenge the constitutionality of the short-form indictment used to charge him with first-degree murder at trial, this issue is properly preserved because a challenge to an indictment alleged to be invalid on its face that could deprive the trial court of jurisdiction may be made at any time.

2. Homicide— first-degree murder—short-form indictments—constitutionality

Although the short-form indictment used to charge defendant with first-degree murder did not allege elements differentiating the degrees of murder and did not charge the aggravating circumstances that would increase the maximum penalty from life imprisonment to the death penalty, the trial court did not err in concluding the indictment did not violate defendant's right to due process under the Fifth and Fourteenth Amendments because: (1) indictments based on N.C.G.S. § 15-144 are in compliance with both the North Carolina and United States Constitutions; (2) North Carolina case law approves the use of

short-form indictments and there has not been a federal mandate to change that determination; and (3) there is no requirement that the indictment set forth aggravating circumstances under N.C.G.S. § 15A-2000(e) since they are not elements of first-degree murder, but are circumstances to be considered in the jury's recommendation of life imprisonment or death.

3. Jury— selection—capital sentencing—panel of fewer than twelve jurors—no prejudicial error

Although the trial court erred in a capital sentencing proceeding by permitting the State to pass a panel of fewer than twelve jurors to defendant in violation of N.C.G.S. § 15A-1214(d), defendant failed to show prejudice because: (1) defendant did not exhaust his peremptory challenges and did not request removal of the one new prospective juror; and (2) defendant was not forced to accept an undesirable juror.

4. Appeal and Error— preservation of issues—constitutional issue—failure to raise at trial

Although defendant contends an improper jury selection procedure in his capital sentencing proceeding violated his constitutional right to a fair and impartial jury, defendant did not raise this constitutional issue at trial, and therefore, it was not preserved for appellate review under N.C. R. App. P. 10(b)(1).

5. Jury— selection—capital sentencing—peremptory challenge—racial discrimination—no prima facie showing

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the State's use of a peremptory challenge to strike from the jury a black prospective juror because: (1) the challenge of an African-American prospective juror when defendant is also an African-American does not, standing alone, establish a prima facie showing of racial discrimination or a Batson violation; (2) although the acceptance by the prosecution of white prospective jurors similarly situated to black prospective jurors who have been peremptorily stricken is a factor to consider in determining purposeful discrimination, defendant cannot pick a single factor and match it to the other jurors since the factors are viewed as a totality; and (3) although the black prospective juror initially indicated he could impose the death penalty, he later expressed uncertainty about his ability to impose the death penalty in light of his religious views.

6. Criminal Law— denial of complete transcript—narrative form—"substantial equivalent"

Although the trial court did not comply with the requirements of N.C.G.S. § 7A-450 to provide defendant with a complete transcript of his capital sentencing proceeding since a mechanical malfunction resulted in the elimination of a portion of one detective's testimony and all of a special agent's testimony, defendant is not entitled to any relief as a result of this omission because: (1) the State provided the unrecorded testimony in narrative form, which constitutes an available alternative that is "substantially equivalent" to the complete transcript under N.C. R. App. P. 9(c)(1); (2) the charge conference and jury instructions were fully recorded and available for review; and (3) the missing part of the transcript was not relevant to defendant's defense.

7. Appeal and Error— preservation of issues—constitutional issue—failure to raise at trial

Although defendant contends the trial court violated his constitutional rights to present evidence and to confront witnesses against him in a capital sentencing proceeding by not allowing defendant's expert witness to give his opinion as to defendant's state of mind at the time of the homicide, defendant did not raise this constitutional issue at trial, and therefore, it was not preserved for appellate review under N.C. R. App. P. 10(b)(1).

8. Witnesses— expert testimony—capacity to form intent

The trial court did not err in a capital sentencing proceeding by excluding the testimony of an expert witness that defendant did not act with deliberation since he was reacting to a potential fear that he was about to be harmed when he killed the victim because: (1) the purpose of such testimony was for the expert to tell the jury that certain legal standards had not been met; (2) the expert was not in any better position than the jury to make this determination; and (3) the expert's testimony would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. N.C.G.S. § 8C-1, Rules 402, 403, and 702.

9. Burglary and Unlawful Breaking or Entering— first-degree burglary—failure to submit lesser-included offense—not required

The trial court did not err by refusing to submit misdemeanor breaking or entering as a lesser-included offense of first-degree

burglary, based on defendant's contention that the jury could infer that defendant possessed some intent at the time of the break-in other than to commit murder, because: (1) the evidence was clear that defendant entered the mobile home with the intent to commit murder; and (2) the fact that defendant may have also intended to commit the felonies of assault and kidnapping does not constitute evidence that he entered the mobile home without the intent to commit a felony therein.

10. Appeal and Error— preservation of issues—no offer of proof

The trial court did not err in a capital sentencing proceeding by limiting testimony from defendant's expert witness on direct examination concerning whether the expert was court-appointed because defendant did not make an offer of proof developing the witness' response to the pertinent questioning, and thus, defendant has failed to preserve this issue under N.C.G.S. § 8C-1, Rule 103(a)(2).

11. Evidence— expert testimony—court-appointed—cross-examination—expert fees

The trial court did not err in a capital sentencing proceeding by allowing the State to cross-examine defendant's expert witness concerning fees charged by the witness because: (1) N.C.G.S. § 8C-1, Rule 611(b) permits cross-examination of a witness on any matter relevant to any issue in the case, including credibility; and (2) even where the expert is court-appointed and paid with state funds, the State may properly cross-examine the expert about any potential bias resulting from compensation as a defense witness.

12. Sentencing— capital—prosecutor's closing argument—defense expert's compensation

Even though defendant did not object to the prosecutor's questions or closing argument, the trial court did not abuse its discretion in a capital sentencing proceeding by allowing the prosecutor during closing argument to mention defense expert's compensation because the passing reference was not so grossly improper as to require the trial court to intervene ex mero motu.

13. Conspiracy— murder—kidnapping—sufficiency of evidence

Viewing the evidence in the light most favorable to the State reveals the trial court did not err by denying defendant's motions to dismiss the charges of conspiracy to commit murder

and conspiracy to commit kidnapping because the mutual, implied understanding between defendant and his accomplice is apparent from the effortless manner in which they supported each other throughout the commission of the murder and the kidnapping.

14. Burglary and Unlawful Breaking or Entering— first-degree burglary—sufficiency of evidence—intent to commit murder

Viewing the evidence in the light most favorable to the State reveals the trial court did not err by denying defendant's motion to dismiss the charge of first-degree burglary because substantial evidence exists that defendant intended to commit murder at the time of the breaking and entering.

15. Sentencing— capital—aggravating circumstances—committed during course of felony—sufficiency of evidence

Although defendant contends the trial court erred in his capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during the course of a felony based on the evidence being insufficient to support the burglary charge, the Supreme Court has already determined that the evidence supported the submission of burglary.

16. Criminal Law— jury request to review testimony—denial by court—exercise of discretion

The trial court did not commit prejudicial error in defendant's capital sentencing proceeding by failing to exercise its discretion under N.C.G.S. § 15A-1233, based on its denial of the jury's request to see the transcript of a witness's testimony and the instruction to the jury that its duty was to recall the evidence as it was presented, because: (1) the trial court did not impermissibly deny the request based solely on the unavailability of the transcript; and (2) defendant acquiesced in the instruction.

17. Sentencing— capital—instructions—meaning of life imprisonment

The trial court did not err in a capital sentencing proceeding by its instruction that the jury should determine its sentencing recommendation as though life imprisonment without parole means imprisonment for life without parole in the state's prison, because the trial court gave nearly identical instructions regarding the meaning of life imprisonment as provided under N.C.G.S. § 15-2002.

18. Sentencing— capital—aggravating circumstances—committed during course of felony—part of a course of violent conduct—separate evidence

The trial court did not err in a capital sentencing proceeding by submitting to the jury as aggravating circumstances N.C.G.S. § 15A-2000(e)(5), that the murder was committed during the course of a felony (burglary), and N.C.G.S. § 15A-2000(e)(11), that the murder was part of a course of violent conduct, because each aggravating circumstance was based on separate evidence not required to prove the other, since: (1) the (e)(5) circumstance is based on evidence that defendant murdered the male victim during the commission of the burglary; and (2) the (e)(11) circumstance is based on evidence that following the murder, defendant kidnapped the female victim by brandishing a handgun and demanding that she leave with him.

19. Sentencing— capital—peremptory instructions—nonstatutory mitigating circumstances—jurors free to reject

The trial court did not err in a capital sentencing proceeding by its peremptory instruction to the jury concerning uncontroverted nonstatutory mitigating circumstances because jurors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value.

20. Sentencing— capital—death penalty—proportionate

The trial court did not err by imposing the death penalty for first-degree murder because: (1) defendant was convicted under both the felony murder rule and premeditation and deliberation; (2) the victim was killed in his own home during the nighttime; (3) defendant repeatedly shot the victim in front of the victim's two small children; and (4) the jury found the aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) and § 15A-2000(e)(11), either of which our Supreme Court has held to be sufficient to support a sentence of death.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Bowen (Wiley F.), J., on 11 December 1997 in Superior Court, Harnett County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 1 September 1999. Heard in the Supreme Court 17 April 2000.

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

M. Gordon Widenhouse for defendant-appellant.

PARKER, Justice.

Defendant Jimmie Wayne Lawrence was indicted on 10 February 1997 for first-degree murder in the killing of victim Dale Jerome McLean. On 3 March 1997 defendant was indicted for first-degree burglary. On 15 September 1997 defendant was indicted for conspiracy to commit murder, conspiracy to commit kidnapping, and first-degree kidnapping for the kidnapping of victim Gwen Morrison. Defendant was tried capitally and found guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. He was also found guilty of first-degree kidnapping, first-degree burglary, conspiracy to commit kidnapping, and conspiracy to commit murder. 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 also sentenced defendant to consecutive sentences of 125 to 159 months' imprisonment for defendant's convictions of conspiracy to commit kidnapping and conspiracy to commit murder, 51 to 60 months' imprisonment for the first-degree burglary conviction, and 58 to 79 months' imprisonment for defendant's conviction of first-degree kidnapping. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error.

The State's evidence tended to show that defendant and Gwen Morrison dated for almost two years and that their relationship ended in early December 1996. Morrison began living with Dale McLean in late December 1996. On 18 January 1997, Morrison and McLean were at home with McLean's two children, ten-year-old Chastity McLean and five-year-old Dale "Junior" McLean, when someone knocked on the back door. McLean looked out the window and said, "It's Jimmie." Morrison opened the door and stood on the top step in her nightgown and slippers.

Defendant was standing on the ground in front of the mobile home; and a man that Morrison had never seen before, William Rashad Lucas, was standing behind defendant holding a sawed-off shotgun. Defendant asked Morrison to leave with him. When Morrison refused, defendant pulled a nine millimeter handgun from the front of his pants. Morrison then told defendant that she did not

want any trouble and that she would leave with him, but that she needed to get her shoes and coat first. Morrison turned toward the door and defendant ran up the steps, pushing Morrison through the door into the mobile home. As defendant and Morrison came through the door, Chastity and Junior were sitting in the living room and McLean was walking empty-handed down the hallway toward the door. Defendant pushed Morrison away and shot McLean, who grabbed his head and fell to the floor. Defendant stood over McLean and fired several more rounds. Defendant then grabbed Morrison by the arm and said that he would also kill her if she did not leave with him.

Defendant led Morrison outside and put her into the backseat of his vehicle. Lucas drove to defendant's house. Lucas told defendant that he should have shot Morrison, too, because she "was going to tell everything." Morrison, defendant, and Lucas then got into Lucas' car; and Lucas drove to the Comfort Inn in Sanford, North Carolina, where Lucas stayed in the car with Morrison while defendant rented a room. Once inside the room, Lucas put his shotgun on a bed and left; he returned thirty minutes later with a pair of jeans that belonged to his girlfriend. Lucas left again, and defendant took a shower after telling Morrison that he would kill her if she tried to leave.

Morrison sat on the bed while defendant showered. When defendant came out of the bathroom, he lay on the bed next to Morrison and fell asleep with his arm or leg over her body so that she could not leave the room. Defendant awoke later and asked Morrison to have sex with him. Morrison agreed out of fear that defendant would kill her if she refused him. Sometime thereafter, defendant returned a call to his mother and told her to have his father pick him up. He then told Morrison to put on the jeans that Lucas had brought earlier. Someone arrived at the Comfort Inn driving defendant's vehicle; defendant put the shotgun under the mattress and left. Morrison then called her cousin to come get her.

Meanwhile, after defendant and Lucas had driven away with Morrison, Chastity called her grandmother, who instructed Chastity to call the police. Shortly thereafter, members of the Harnett County Sheriff's Department arrived. The officers found no signs of life in McLean. A detective carried the children away from the crime scene, and Chastity calmed down enough to give a statement that defendant had shot her father.

The Lee County Sheriff's Department subsequently took defendant into custody; and with defendant's consent, several agents from the State Bureau of Investigation ("SBI") searched defendant's room at the Comfort Inn. The agents found the shotgun in the hotel room, and Lucas' girlfriend later turned over the nine-millimeter handgun to the Harnett County Sheriff's Department.

The pathologist who performed the autopsy on McLean found a total of nine gunshot wounds on McLean's body, all fired at a close range of no more than three feet. The gunshot wounds on McLean's right arm, nose, and forehead were not the fatal injuries. The cause of death was any one of the four bullets that entered McLean's brain through the right side of his skull. A forensic firearms examiner from the SBI determined that the shell casings collected at the scene from around McLean's body had been fired from defendant's nine-millimeter pistol.

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

PRETRIAL ISSUES

[1] By two separate assignments of error, defendant contends that the short-form indictment used to charge him with first-degree murder is constitutionally inadequate. We initially address whether this issue is properly before this Court. Defendant did not contest the murder indictment at trial and, in fact, filed numerous motions stating that he was charged with first-degree murder and would be tried capitally. This Court has previously stated that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). A defendant waives an attack on an indictment when the validity of the indictment is not challenged in the trial court. *See State v. Wallace*, 351 N.C. 481, 503, —— S.E.2d ——, —— (2000); *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Wallace*, 351 N.C. at 503, —— S.E.2d at ——. Therefore, this issue is properly before this Court.

[2] Defendant contends that the short-form murder indictment violated his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution in two respects. First,

defendant argues that the United States Supreme Court's recent ruling in *Jones v. United States*, 526 U.S. 227, 232, 143 L. Ed. 2d 311, 319 (1999), requires a finding that the short-form indictment was unconstitutional in that it failed to allege all of the elements of the crime charged. Specifically, defendant argues that the short-form indictment failed to allege those elements that differentiate first-degree murder from second-degree murder. Second, defendant argues that *Jones* requires a finding that the short-form indictment was unconstitutional in that it failed to charge the aggravating circumstances that would increase the maximum penalty for first-degree murder from life imprisonment to the death penalty. *See id.* at 243 n.6, 143 L. Ed. 2d at 326 n.6.

The indictment against defendant for murder contained the following language:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Jimmie Wayne Lawrence] unlawfully, willfully and feloniously and of malice aforethought did kill and murder Dale Jerome McLean.

This indictment complied with N.C.G.S. § 15-144, which provides for a short-form version of an indictment for murder as follows:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; . . . and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

N.C.G.S. § 15-144 (1999). This Court has consistently held that indictments based on this statute are in compliance with both the North Carolina and United States Constitutions. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985). Further, this Court recently reconsidered the constitutionality of the short-form

murder indictment in light of *Jones* and noted that *Jones* " 'announce[d] [no] new principle of constitutional law, but merely interpret[ed] a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century.' " *Wallace*, 351 N.C. at 508, ——S.E.2d at ——, (quoting *Jones*, 526 U.S. at 251-52 n.11, 143 L. Ed. 2d at 331 n.11). We further emphasized our "overwhelming case law approving the use of short-form indictments and the lack of a federal mandate to change that determination" in reaffirming our previous holdings regarding the constitutionality of the short-form murder indictment. *Id.*

Similarly, *Jones* did not impose a requirement that the indictment for first-degree murder set forth aggravating circumstances. As noted in *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 140 L. Ed. 2d 350, 358 (1998), an indictment "need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crimes." "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Poland v. Arizona*, 476 U.S. 147, 156, 90 L. Ed. 2d 123, 132 (1986) (quoting *Bullington v. Missouri*, 451 U.S. 430, 438, 68 L. Ed. 2d 270, 278 (1981)). The aggravating circumstances set forth in N.C.G.S. § 15A-2000(e) are not elements of first-degree murder but are circumstances to be considered by the jury in making its recommendation for a sentence of life imprisonment or death. No statutory or constitutional mandate requires the inclusion of aggravating circumstances in the short-form indictment. Therefore, defendant's arguments concerning the validity of his indictment for first-degree murder are without merit and are overruled.

JURY SELECTION

[3] In his next assignment of error, defendant contends that the trial court erroneously permitted the State to pass a panel of fewer than twelve jurors to defendant. Defendant contends that this violated the provisions of N.C.G.S. § 15A-1214 and entitles him to a new trial.

The North Carolina jury selection statute 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.
>
> . . . .
>
> (f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 jurors before the replacement jurors are tendered to a defendant. . . . This procedure is repeated until all parties have accepted 12 jurors.

N.C.G.S. § 15A-1214(d), (f) (1999).

In this case, the number of jurors who reported for jury duty was significantly lower than the number of jurors summoned. On the afternoon of the first day of jury selection, the trial court postponed further *voir dire* and recessed for the day when defendant expressed concern at being tendered a panel of less than twelve jurors. The trial judge noted, though, that "the fact that we're handling it this way today does not necessarily mean that we'll handle it this way tomorrow or the next day, depending—you know, it depends on how tight it gets." The following colloquy then took place:

> [DEFENSE COUNSEL]:
>
> Is it my understanding there's a possibility that, if we run out tomorrow, then they would be passed to me with what we've got?
>
> [THE COURT]:
>
> There's a possibility. We'll talk about that tomorrow.

The next morning, the State and defendant proceeded with *voir dire* until there were no more replacement jurors in the jury pool. The State then passed a panel of ten jurors to defendant composed of nine jurors that defendant had already accepted and one new prospective juror, Sam Altman. Defendant questioned juror Altman without objecting to the incomplete panel. Defendant expressed his satisfaction with juror Altman, and *voir dire* concluded until the next day when jury selection continued according to the statutory requirements. *See* N.C.G.S. § 15A-1214.

When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial. *See State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). Although the jury selection procedure violated the express requirement of N.C.G.S. § 15A-1214(d) that the State pass a full panel of twelve jurors, defendant has failed to show prejudice. Defendant, without objection, questioned and accepted juror Altman. Defendant did not exhaust his peremptory challenges and did not request removal of juror Altman for cause. Thus, defendant was not forced to accept an undesirable juror; and he cannot establish any prejudice as a result of the jury selection procedure. *See* N.C.G.S. § 15A-1443(c) (1999); *State v. Miller*, 339 N.C. 663, 681, 455 S.E.2d 137, 147, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995); *State v. Fletcher*, 348 N.C. 292, 312, 500 S.E.2d 668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999).

[4] Defendant further argues that the improper jury selection procedure violated his constitutional right to a fair and impartial jury. 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. Fleming*, 350 N.C. 109, 122, 512 S.E.2d 720, 730 (holding that defendant failed to raise a constitutional issue at trial and thus waived appellate review of that issue), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 274 (1999); *see also State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *State v. Frye*, 341 N.C. 470, 493, 461 S.E.2d 664, 675 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

[5] Defendant next assigns error to the trial court's overruling of defendant's objection to the State's impermissible use of a peremptory challenge to strike from the jury a black prospective juror, Milton Monk, solely on account of his race. Article I, Section 26 of the Constitution of North Carolina prohibits the use of peremptory challenges for racially discriminatory reasons, *see Fletcher*, 348 N.C. at 312, 500 S.E.2d at 680, as does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *see Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986).

In *Batson* the United States Supreme Court established a three-part test to determine if the prosecutor has engaged in impermissible racial discrimination in the selection of jurors. *See Hernandez v. New*

York, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 405 (1991) (citing *Batson*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-89). First, the defendant must establish a *prima facie* case that the State has exercised a peremptory challenge on the basis of race. *See id.* Second, once the *prima facie* case has been established by the defendant, the burden shifts to the State to rebut the inference of discrimination by offering a race-neutral explanation for attempting to strike the juror in question. *See id.* at 358-59, 114 L. Ed. 2d at 405; *see also State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). The explanation must be clear and reasonably specific, but " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). The prosecutor is not required to provide a race-neutral reason that is persuasive or even plausible. *See Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680. The issue at this stage is the facial validity of the prosecutor's explanation; and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. *See State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Our courts also permit the defendant to introduce evidence at this point that the State's explanations are merely a pretext. *See Gaines*, 345 N.C. at 668, 483 S.E.2d at 408.

Third, and finally, the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination. *See Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405; *Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680. As this determination is essentially a question of fact, the trial court's decision as to whether the prosecutor had a discriminatory intent is to be given great deference and will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous. *See Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680; *State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). " 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985)).

With respect to prospective juror Monk, defendant makes two arguments that the trial court erred when it failed to find that the State's peremptory strike was the result of purposeful discrimination.

First, defendant contends that the trial court erroneously concluded its analysis upon finding that defendant failed to establish a *prima facie* showing of purposeful discrimination. Defendant argues that the trial court should have required the prosecutor to state his reasons for challenging juror Monk, the first African-American and the first venire member called into the box. However, defendant concedes this Court has previously held that the challenge of an African-American prospective juror when the defendant is also an African-American does not, standing alone, establish a *prima facie* showing of racial discrimination or a *Batson* violation. *See, e.g., State v. Hoffman*, 348 N.C. 548, 551, 500 S.E.2d 718, 720-21 (1998); *State v. Smith*, 347 N.C. 453, 462, 496 S.E.2d 357, 362, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998); *State v. Quick*, 341 N.C. 141, 146, 462 S.E.2d 186, 189 (1995). Therefore, we conclude that the trial court properly denied defendant's *Batson* challenge based on defendant's failure to make a *prima facie* showing of racial discrimination.

Second, defendant argues that the prosecution accepted other jurors, who were white, even though their answers to questions about capital punishment were essentially the same as prospective juror Monk's responses. Defendant contends that differentiation shows purposeful racial discrimination. The acceptance by the prosecution of white prospective jurors similarly situated to black prospective jurors who have been peremptorily stricken is a factor to be considered in determining whether there has been purposeful racial discrimination. *See Fletcher*, 348 N.C. at 317, 500 S.E.2d at 683; *Kandies*, 342 N.C. at 435, 467 S.E.2d at 75. But defendant's approach in this argument involves finding a single factor observed by defendant, not one articulated by the prosecutor, and matching that factor to the three white jurors who were passed by the prosecutor. *See State v. Robinson*, 330 N.C. 1, 19, 409 S.E.2d 288, 298 (1991). As we have said previously, "This approach 'fails to address the factors as a totality which when considered together provide an image of a juror considered . . . undesirable by the State.' " *Id.* (quoting *Porter*, 326 N.C. at 501, 391 S.E.2d at 152). Further, defendant has failed to acknowledge that, although prospective juror Monk initially indicated that he could impose the death penalty, after listening to the prosecutor question several other prospective jurors about their views, he later expressed uncertainty about his ability to impose the death penalty in light of his religious views. For these reasons we are unable to conclude that the trial court erred in not finding that prospective juror Monk was peremptorily stricken for impermissible, racially discriminatory reasons.

GUILT-INNOCENCE PHASE

[6] In his next assignment of error, defendant contends that the absence of a complete transcript of the proceedings violated his constitutional rights to appellate review and to effective assistance of counsel on appeal. We disagree.

Under N.C.G.S. § 7A-450, an indigent defendant is entitled to receive a copy of the trial transcript at State expense when necessary to perfect an appeal. *See* N.C.G.S. § 7A-450 (1999); *see also State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 419 (1982). Further, where, as here, new counsel represents the indigent on appeal, counsel cannot effectively represent his client or assign plain error without the benefit of a complete transcript. *See Hardy v. United States*, 375 U.S. 277, 279-80, 11 L. Ed. 2d 331, 334 (1964). However, the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal. *See Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 403-04 (1971); *State v. Eason*, 336 N.C. 730, 747-48, 445 S.E.2d 917, 928 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995); *Rankin*, 306 N.C. at 716, 295 S.E.2d at 419.

In this case a mechanical malfunction resulted in the elimination of a portion of Detective Bernice Smith's testimony and all of Special Agent Tom Trochum's testimony from the record. In its amendments to the proposed record on appeal, the State set out the unrecorded testimony in narrative form as permitted under N.C. R. App. P. 9(c)(1). The trial court held a settlement conference at which Detective Smith and Agent Trochum both testified that the State's summary was an accurate reflection of their testimony at trial. The court reporter from defendant's trial also testified that, according to her handwritten notes, no objections were made during the omitted portion and that defendant did not ask Agent Trochum any questions on cross-examination. The trial court subsequently settled the record as proposed by the State.

While the trial court did not comply with the requirement of N.C.G.S. § 7A-450 to provide defendant with a complete transcript of his proceedings, we hold that defendant is not entitled to any relief as a result of this omission. The State's narrative constitutes an available alternative that is "substantially equivalent" to the complete transcript, as demonstrated by Detective Smith's and Agent Trochum's testimony that the State's narrative accurately summarizes

their testimony at trial. *Rankin*, 306 N.C. at 717, 295 S.E.2d at 419. Additionally, defendant did not object at trial or ask Agent Trochum any questions on cross-examination. The charge conference and jury instructions were fully recorded and available for review. Inasmuch as defendant admitted shooting the victim, the focus of his defense was his intent. The missing part of the transcript was not relevant to this issue. This assignment of error is overruled.

[7] Next, defendant contends that the trial court erred in not allowing defendant's expert witness to give his opinion as to defendant's state of mind at the time of the homicide. Defendant argues that the trial court's ruling violated defendant's constitutional rights to present evidence and to confront the witnesses against him. However, defendant did not raise the 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 constitutional issue for appellate review. *See Fleming*, 350 N.C. at 122, 512 S.E.2d at 730; *King*, 342 N.C. at 364, 464 S.E.2d at 293; *Frye*, 341 N.C. at 493, 461 S.E.2d at 675.

[8] Defendant also argues that the trial court improperly excluded Dr. Strahl's relevant, admissible expert witness testimony under N.C.G.S. § 8C-1, Rule 401. 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 than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). Any relevant evidence is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. *See State v. Eason*, 328 N.C. 409, 421, 402 S.E.2d 809, 814 (1991); N.C.G.S. § 8C-1, Rules 402, 403 (1999). Expert testimony is admissible under N.C.G.S. § 8C-1, Rule 702, "if it will assist 'the trier of fact to understand the evidence or to determine a fact in issue.' " *State v. Weeks*, 322 N.C. 152, 164, 367 S.E.2d 895, 903 (1988) (quoting N.C.G.S. § 8C-1, Rule 702 (1986)). In determining the admissibility of expert opinion, the test is "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978).

In the present case, the trial court admitted a substantial portion of the proffered testimony of defendant's expert witness related to defendant's mental condition at the time of the homicides. Dr. Nathan

Strahl, a forensic psychiatrist, testified on direct examination that defendant developed "paranoid thinking" following an incident at a party in which someone held a gun to defendant's head. Dr. Strahl further testified that defendant had a history of alcohol problems and had suffered a head injury in a motorcycle accident. Dr. Strahl also opined that defendant's ability to make or carry out plans, to reflect on potential conduct, to consider alternative conduct, and to consider the full range of consequences of his action was markedly reduced by the combination of the brain injury, alcohol problems, and paranoid thinking. In addition to this testimony, however, defendant attempted to have Dr. Strahl testify that defendant was reacting to a potential fear that he was about to be harmed when defendant killed McLean. The trial court sustained the prosecutor's objection to this last testimony and refused to admit it into evidence.

The purpose of such testimony was for the expert to tell the jury that certain legal standards had not been met, namely, that defendant did not act with deliberation and that, as a result of his paranoid thinking, alcohol problems, and brain injury, defendant was responding to a threat he genuinely perceived. We are not convinced that Dr. Strahl was in any better position than the jury to make such determinations. Having the expert testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. *See Weeks*, 322 N.C. at 167, 367 S.E.2d at 904. Therefore, we conclude that the trial court did not err in refusing to admit this testimony.

[9] Defendant next contends that the trial court erred in refusing to submit misdemeanor breaking or entering as a lesser-included offense of first-degree burglary. First-degree burglary is the breaking and entering of an occupied dwelling of another in the nighttime with the intent to commit a felony therein. *See* N.C.G.S. § 14-51 (1999); *see also State v. Gibbs*, 335 N.C. 1, 52, 436 S.E.2d 321, 350 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Misdemeanor breaking or entering does not require intent to commit a felony within the dwelling. *See* N.C.G.S. § 14-54(b) (1999); *see also State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

An indictment for burglary need not specify the particular felony that the accused intended to commit at the time of the breaking or entering if " 'the 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 if it " 'informs the defendant of the charge against him with sufficient certainty to enable him to prepare his defense.' " *State v. Worsley*, 336 N.C. 268, 281, 443 S.E.2d 68, 74 (1994) (quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985)). The accused must intend to commit the felony at the time of entrance, and intent can be inferred from the defendant's subsequent actions. *See Peacock*, 313 N.C. at 559, 330 S.E.2d at 193.

The indictment for first-degree burglary charged that defendant "broke and entered with the intent to commit a felony therein, to wit: murder." The trial court instructed the jury that it could find defendant guilty of first-degree burglary if it found that defendant broke and entered into an occupied dwelling house during the nighttime without the tenant's consent and that at the time of the breaking and entering defendant "intended to commit murder." No lesser-included offenses were submitted to the jury despite defendant's timely request. Defendant argues that because substantial evidence was presented from which the jury could have inferred that defendant possessed some intent at the time of the break-in other than to commit murder, the trial court should have instructed the jury on the lesser-included offense of misdemeanor breaking or entering. Defendant contends that the failure to do so warrants a new trial.

A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense. *See State v. Montgomery*, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995); *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). The trial court may refrain from submitting the lesser offense to the jury only where the "evidence is clear and positive as to each element of the offense charged" and no evidence supports a lesser-included offense. *Peacock*, 313 N.C. at 558, 330 S.E.2d at 193.

Defendant, relying on *State v. Gray*, 322 N.C. 457, 368 S.E.2d 627 (1988), contends that an instruction should have been submitted to the jury for the lesser-included offense of misdemeanor breaking or entering since the evidence revealed that, in addition to shooting McLean, defendant drew a gun and forcibly removed Morrison from the premises. Thus, defendant argues that, from the foregoing evidence, a rational jury could have found that, at the time of the breaking and entering, defendant intended to assault or kidnap Morrison rather than to murder McLean.

The question in this case is whether there was any evidence of misdemeanor breaking or entering. In *Gray*, 322 N.C. at 458, 368 S.E.2d at 628, the defendant was tried for first-degree rape and felonious breaking or entering. This Court held that misdemeanor breaking or entering should have been submitted to the jury since "[t]he jury was not compelled to find from the evidence that the defendant intended to commit rape at the time he entered the building." *Id.* at 461, 368 S.E.2d at 630.

In contrast, this Court held that the trial court properly refused to submit the lesser-included offense of breaking or entering in *Montgomery*, 341 N.C. at 569, 461 S.E.2d at 740. The indictment for burglary in that case charged that the defendant intended to commit the felonies of larceny and rape when he broke into the victim's apartment. *Id.* at 567, 461 S.E.2d at 739. However, the trial court instructed the jury that, to convict the defendant of first-degree burglary, it must find that the defendant intended to commit larceny, not rape, at the time of the breaking and entering. *Id.* This Court held that "the evidence was clear and positive that defendant entered the apartment with the intent to commit larceny, and the fact that he also may have intended to commit the felonies of rape and murder does not constitute evidence that he entered the apartment without the intent to commit a felony therein." *Id.* at 568, 461 S.E.2d at 740.

In the present case, the State's evidence that defendant killed McLean after he entered the mobile home was substantial evidence that he had the intent to commit murder when he entered the mobile home. *See id.* The State's evidence at trial showed that defendant went to McLean's house and insisted that Morrison leave with him. Lucas stood behind defendant holding a sawed-off shotgun. When Morrison refused to leave with defendant, he pulled out a gun. As Morrison turned to go back into the house to get shoes and a jacket, defendant ran up the steps, pushed her through the door, and immediately began shooting at McLean. Defendant continued to shoot McLean after he had fallen to the floor, firing a total of nine rounds. Defendant then forced Morrison to leave with him, telling her that he would kill her, too, if she refused to go with him. Thus, the evidence was clear and positive that defendant entered the mobile home with the intent to commit murder; the fact that defendant also may have intended to commit the felonies of assault and kidnapping does not constitute evidence that he entered the mobile home without the intent to commit a felony therein. This assignment of error is overruled.

[10] In his next assignment of error, defendant contends that the trial court erred by excluding evidence from defendant's expert witness and by allowing the State to cross-examine defendant's expert witness concerning fees charged by the witness. Defendant further contends that the trial court permitted the prosecutor to distort the expert's testimony by characterizing the witness as biased in favor of defendant. The trial court limited defense expert Dr. Strahl's testimony on direct examination as follows:

Q. Have you had occasion to testify in court before, Dr. Strahl?

A. Yes, I have.

Q. Have you testified for the State of North Carolina in cases?

A. Yes, I have.

Q. You were appointed in this case by this Court to assist in preparation of the case?

[PROSECUTOR]:

Objection.

[THE COURT]:

Sustained.

Q. Did you have occasion, Dr. Strahl, in your involvement in this case, to know or see Jimmy [sic] Wayne Lawrence?

A. Yes, I did.

Defendant did not make an offer of proof developing the witness' response to the questioning. Accordingly, defendant has failed to preserve this issue for appellate review according to the standard set forth in N.C.G.S. § 8C-1, Rule 103(a)(2). *See State v. Atkins*, 349 N.C. 62, 79, 505 S.E.2d 97, 108 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). We do not agree with defendant's contention that the relevance and content of the excluded testimony was necessarily apparent from the context within which questions were asked and that, therefore, no offer of proof was necessary to preserve this issue for appeal. *See id.*; *State v. Geddie*, 345 N.C. 73, 96, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997). Although the initial thrust of the questioning related to Dr. Strahl's experience and his knowledge of this specific defendant, nothing in the record on appeal indicates whether Dr. Strahl was court-appointed or privately retained. Therefore, for this Court to attempt

to presume the content of Dr. Strahl's excluded testimony or its relevance would be speculation.

[11] With respect to the fees charged by the expert witness, defendant argues that the following exchange during the State's cross-examination of Dr. Strahl was misleading since Dr. Strahl was court appointed:

> Q. I take it you were retained by the Defense to evaluate the defendant and, of course, to come to court and testify in this case; is that right?
>
> A. That is correct.
>
> Q. I assume you are being paid or you're hoping to be paid for your work in this case; are you not?
>
> A. Yes, sir, I am.
>
> Q. What hourly rate is it that you're charging or you hope to be paid?
>
> A. $150 an hour, which is the standard, average rate in North Carolina, and, in fact, in the nation, as well.
>
> Q. How many hours do you have in this case up to this moment?
>
> A. At least 20, perhaps more.

The State appropriately attempted to illustrate a potential source of bias. The subject of compensation of a defendant's expert witness is an appropriate matter for cross-examination. Rule 611(b) of the North Carolina Rules of Evidence permits cross-examination of a witness "on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1999). This Court has additionally stated that the scope of cross-examination is subject to the control of the trial court and that "questions must be asked in good faith." *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). Further, "this Court has consistently held that 'an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called.' " *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 598-99 (1994) (quoting *State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988)); *see also State v. Wilson*, 335 N.C. 220, 226, 436 S.E.2d 831, 835 (1993). Even where the expert witness was court-appointed and paid with state funds, as defendant alleges is the situation in this case, the State may properly cross-examine the expert about any potential bias resulting from

compensation as a defense witness. *See Brown*, 335 N.C. at 493, 439 S.E.2d at 599. Therefore, we conclude that the prosecutor's cross-examination of defense expert Dr. Strahl was proper.

[12] With respect to mention of the expert's compensation during the prosecutor's closing argument, we further conclude that the argument did not violate the scope of permissible prosecutorial conduct. During closing argument, the prosecutor argued as follows:

> But again, the psychiatrist simply relied upon the word of the defendant. He bases his opinion upon four hours of talking to him while he's collecting $150 an hour for doing so. The psychiatrist never talked to the investigating officers in this case. None. Never talked to Gwen Morrison. But he talked to the defendant.

Preliminarily, we note that defendant in this case did not object to the prosecutor's questions or closing argument; and where a defendant fails to object, an appellate court reviews the prosecutor's arguments to determine whether the argument was "so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). As we have stated previously, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996).

When viewed in context of the conflicting evidence concerning defendant's intent and state of mind at the time of the murder, we conclude that it was not a "gross impropriety" to argue Dr. Strahl's potential bias related to his compensation. We have consistently held that " 'counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case.' " *Allen*, 322 N.C. at 195, 367 S.E.2d at 636 (quoting *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976)); *see also Atkins*, 349 N.C. at 83, 505 S.E.2d at 110. In *State v. Harris*, 338 N.C. 129, 147-48, 449 S.E.2d 371, 379 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995), this Court found no error in the prosecutor's closing argument that the defendant's mother shaded her testimony in favor of her son. Similarly, in *State v. Murillo*, 349 N.C. 573, 604, 509 S.E.2d 752, 770

(1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 87 (1999), we found no error in the prosecutor's argument regarding the defendant's forensic expert "that when you need someone to say something, you can find them. You can pay them enough and they'll say it."

In light of our previous holdings, we cannot conclude that the prosecutor's passing reference to Dr. Strahl's fee was so grossly improper as to require the trial court to intervene *ex mero motu* when, at trial, defense counsel apparently did not believe the argument was prejudicial. *See id.* at 606, 509 S.E.2d at 771; *State v. Campbell*, 340 N.C. 612, 630, 460 S.E.2d 144, 153 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996). This assignment of error is overruled.

[13] Defendant next contends that the trial court erred by denying his motions to dismiss the charges of conspiracy to commit murder, conspiracy to commit kidnapping, and first-degree burglary. Defendant argues that there was insufficient evidence of these 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).

First, the offenses of conspiracy to commit murder and conspiracy to commit kidnapping require, *inter alia*, an agreement between defendant and Lucas to kidnap Morrison and to murder McLean. *See State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975). The parties do not necessarily have to reach an express agreement. " 'A

mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953) (quoting *State v. Conner*, 179 N.C. 752, 755, 103 S.E. 79, 80 (1920)). The existence of a conspiracy may be shown with direct or circumstantial evidence. *See Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526. The proof of a conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933).

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 to support a finding that defendant and Lucas conspired to kidnap Morrison and to murder McLean. The State's evidence at trial tended to show that defendant and Lucas drove together to McLean's home. Both defendant and Lucas were carrying weapons. When defendant knocked on the door and demanded that Morrison leave with him, Lucas stood behind defendant holding a sawed-off shotgun. When defendant pushed Morrison into the house and starting shooting McLean, Lucas climbed the stairs and stood in the doorway holding the shotgun. Lucas drove defendant and Morrison to defendant's house where Lucas stood guard over Morrison while defendant went inside the house. Lucas then drove defendant and Morrison to the hotel where Lucas stayed in the car with Morrison while defendant rented a room. Later, Lucas left his shotgun in the room while he went to his girlfriend's house to get clothing for Morrison and to hide defendant's handgun. The mutual, implied understanding between defendant and Lucas is apparent from the effortless manner in which they supported each other throughout the commission of the murder and the kidnapping. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss the charges for conspiracy to commit murder and conspiracy to commit kidnapping.

[14] Second, the offense of first-degree burglary requires, *inter alia*, that defendant intended to commit a felony—in this case, murder—at the time of the breaking and entering. *See State v. Barlowe*, 337 N.C. 371, 377, 446 S.E.2d 352, 356 (1994). "The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering the building." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992).

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 intended to commit murder at the time of the breaking and entering. The State's evidence at trial tended to show that defendant had recently ended a long-term relationship with Morrison. Defendant went to McLean's home at night, uninvited, and accompanied by a friend. Both defendant and his friend were carrying weapons. Defendant's friend stood behind him while defendant talked with Morrison. When Morrison turned to go back inside the mobile home, defendant pushed her through the door and immediately attempted to shoot McLean. Defendant's gun initially jammed, and Morrison pulled on defendant's arm to stop him from shooting McLean; but defendant pushed Morrison away and shot McLean. Defendant stood over McLean's fallen body and continued to shoot him numerous times in front of his young children. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss the charge of first-degree burglary.

SENTENCING HEARING

[15] Defendant next assigns error to the trial court's submission of the (e)(5) aggravating circumstance that the murder was committed during the course of a burglary. N.C.G.S. § 15A-2000(e)(5) (1999). The trial court submitted and the jury found this aggravating circumstance. In support of his argument, defendant argues that the evidence was insufficient to support the burglary charge; thus, it was error to submit burglary as an aggravating circumstance. Having previously determined that the evidence supported the submission of burglary, we find defendant's argument to be without merit.

[16] Next, defendant argues that the trial court committed prejudicial error by failing to exercise its discretion under N.C.G.S. § 15A-1233, thereby entitling defendant to a new trial. In this case the jury sent a note to the trial judge requesting the transcript of prosecution witness Gwen Morrison's testimony. The trial court instructed the jury that its duty was to recall the evidence as it was presented and thereby denied the request.

N.C.G.S. § 15A-1233 provides, in pertinent part:

> (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) (1999). As this Court has previously explained, "[t]he 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." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999).

"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." *State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375-76 (1997); *see also Barrow*, 350 N.C. at 646, 517 S.E.2d at 378. " '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.' " *Johnson*, 346 N.C. at 124, 484 S.E.2d at 376 (quoting *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980)); *see also Barrow*, 350 N.C. at 646, 517 S.E.2d at 378.

Here, the trial court instructed the jury, without objection from the parties, as follows:

> As to the second question, members of the jury, it is your duty to recall the evidence as the evidence was presented. So you may retire and resume your deliberation.

From these instructions, we are convinced that the trial judge did not impermissibly deny the request based solely on the unavailability of the transcript. *See Barrow*, 350 N.C. at 648, 517 S.E.2d at 378-79 (holding that the trial court failed to exercise its discretion by stating that it did not have the ability to present the transcript to the jury); *State v. Ashe*, 314 N.C. 28, 35, 331 S.E.2d 652, 656-57 (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"). Instead, the trial judge plainly exercised his dis-

cretion in denying the jury's request. Defendant does not contend that the trial court abused its discretion. Moreover, defendant acquiesced in the instruction and cannot now complain that he was prejudiced by the trial court's action. This assignment of error is without merit.

[17] Defendant next contends that the trial court erred in not instructing the jury that a sentence of life imprisonment means a sentence of life imprisonment without parole. In response to the jury's question about the meaning of "life imprisonment," the trial court gave the following instruction:

> In considering whether to recommend death or life imprisonment without parole, you should determine the question as though life imprisonment without parole means exactly what the statute says "imprisonment for life without parole in the state's prison."

Defendant argues that the trial court's use of the phrase "as though" was misleading and violated defendant's statutory and constitutional rights.

First, defendant asserts that the trial court's erroneous instruction resulted in an arbitrary death sentence in violation of the Eighth Amendment to the United States Constitution. 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 Fleming*, 350 N.C. at 122, 512 S.E.2d at 730; *King*, 342 N.C. at 364, 464 S.E.2d at 293; *Frye*, 341 N.C. at 493, 461 S.E.2d at 675.

Second, defendant argues that the trial court's instruction violated N.C.G.S. § 15A-2002, which provides, in pertinent part:

> The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole.

N.C.G.S. § 15A-2002 (1999).

In *State v. Thomas*, 344 N.C. 639, 653, 477 S.E.2d 450, 457 (1996), *cert. denied*, 522 U.S. 824, 139 L. Ed. 2d 41 (1997), we rejected the argument that the trial court's instruction regarding life imprisonment, that the jury "should determine the question as though life imprisonment means exactly what the statute says: imprisonment

for life in the State's prison," violated the requirement of N.C.G.S. § 15A-2002. In this case, the trial court gave nearly identical instructions regarding the meaning of life imprisonment. Thus, having found no compelling reason to depart from our prior holdings, we reject this assignment of error.

[18] In his next assignment of error, defendant contends the trial court erred by submitting to the jury as aggravating circumstances both that the murder was committed during the course of a felony (burglary), N.C.G.S. § 15A-2000(e)(5), and that the murder was part of a course of conduct which involved commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). The trial court then instructed the jury "that the same evidence can not be used as a basis of finding more than one aggravating fact." Defendant argues that submission of both aggravating circumstances constituted impermissible and unconstitutional duplication in the evidence of aggravation. According to defendant, the evidence potentially overlapped such that the jury might have used the evidence supporting the former circumstance to find the existence of the latter circumstance. We do not find defendant's argument persuasive.

In a capital case the trial court may not submit multiple aggravating circumstances supported by the same evidence. *See State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979) (finding error where same evidence supported two circumstances submitted, that the murder was committed to (i) avoid or prevent arrest, N.C.G.S. § 15A-2000(e)(4); and (ii) to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, N.C.G.S. § 15A-2000(e)(7)). "Aggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Further, this Court has approved submitting the course of conduct aggravating circumstance where more than one victim is killed or injured. *See State v. Cummings*, 332 N.C. 487, 512, 422 S.E.2d 692, 706 (1992) (defendant killed woman and twenty-six months later killed her sister); *State v. Jones*, 327 N.C. 439, 452, 396 S.E.2d 309, 317 (1990) (defendant fired shots endangering store customers, killed one, seriously wounded another, and committed armed robbery against store clerk). In addition, when a jury finds a defendant guilty on theories of both premeditation and deliberation and felony murder, and both theories are supported by the evidence, the felony underlying the felony murder may properly be submitted as an aggravating circum-

stance. *See Gibbs*, 335 N.C. at 59, 436 S.E.2d at 354; *State v. Jennings*, 333 N.C. 579, 626, 430 S.E.2d 188, 213, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

In *Gibbs*, 335 N.C. at 58, 436 S.E.2d at 354, a burglary-murder case, the trial court submitted as aggravating circumstances that the murder was committed during the course of a felony, N.C.G.S. § 15A-2000(e)(5), and as part of a course of violent conduct, N.C.G.S. § 15A-2000(e)(11). This Court held the two circumstances were not supported by the same evidence. *Gibbs* 335 N.C. at 61, 436 S.E.2d at 355. The (e)(5) circumstance was supported by evidence that defendant murdered the victim while engaged in the commission of a burglary. *Id.* at 60, 436 S.E.2d at 355. However, the (e)(11) circumstance neither required nor relied upon proof of burglary; instead, the course of conduct circumstance was supported by evidence that defendant murdered the victim, then killed two other people. *Id.* at 60-61, 436 S.E.2d at 355. Thus, the Court concluded that "Defendant need not have engaged in a violent course of conduct in order to have committed *a* capital felony in the course of the burglary." *Id.* at 61, 436 S.E.2d at 355.

Similarly, in this case, each aggravating circumstance was based on evidence not required to prove the other. The (e)(5) circumstance is based on evidence that defendant murdered McLean during the commission of the burglary. The (e)(11) circumstance is based on entirely separate evidence that, following the murder of McLean, defendant kidnapped Morrison by brandishing a handgun and demanding that she leave with him. Concluding that the trial court properly instructed the jury not to consider the same evidence as the basis of more than one aggravating circumstance, that different evidence supported each aggravating circumstance, and that the two circumstances were not inherently duplicative on the peculiar facts of this case, we hold the trial court did not err in submitting both.

[19] Next, defendant contends that the trial court erred in instructing the jury that it could refuse to find uncontroverted nonstatutory mitigating circumstances if the jury deemed the evidence to have no mitigating value. Defendant argues that a jury in a capital case may not refuse to consider any relevant mitigating evidence and that, by instructing the jury to consider if a submitted nonstatutory mitigating circumstance has mitigating value, the trial court allowed the jury to disregard relevant mitigating evidence. Defendant argues that all eleven nonstatutory mitigating circumstances submitted to the jury were inherently mitigating and that the jury should not have been

allowed to reject any of the mitigating circumstances. Defendant argues the jury should have been required to consider and give effect to all the circumstances supported by uncontroverted evidence when recommending sentence because the jury "may not refuse to consider[] any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L. Ed. 2d 256, 277 (1989). Defendant argues that once a peremptory instruction is given as to a mitigating circumstance, the only question that remains is how much weight the jury will give the circumstance. Defendant argues that, contrary to the jury instructions given in this case, the jury cannot decide a nonstatutory mitigating circumstance has no weight after being given a peremptory instruction which states that all of the evidence tends to show the existence of the mitigating circumstance.

The trial court instructed the jury that all the evidence tended to show each particular mitigating circumstance but that the jury must determine if the circumstance existed and had value. We conclude that the trial court's peremptory instructions for nonstatutory mitigating circumstances were correct. *See State v. Lynch*, 340 N.C. 435, 475, 459 S.E.2d 679, 699 (1995) (holding that identical jury instructions regarding nonstatutory mitigating circumstances were not erroneous), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996). In *State v. Green*, 336 N.C. 142, 172, 443 S.E.2d 14, 32, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994), the defendant argued that the trial court erred in not instructing the jury to consider and give weight to an uncontroverted nonstatutory mitigating circumstance. This Court held that a juror may find that a nonstatutory mitigating circumstance exists but may give that circumstance no mitigating value. *Id.* at 173, 443 S.E.2d at 32. The Court noted that in *State v. Gay*, 334 N.C. 467, 493, 434 S.E.2d 840, 855 (1993), the Court held that peremptory instructions could be given for nonstatutory mitigating circumstances. *Green*, 336 N.C. at 173, 443 S.E.2d at 32. This Court in *Green* went on to note that "nothing we stated in *Gay* supports the notion that the peremptory instructions to be used with regard to nonstatutory mitigating circumstances should be identical to those used with regard to statutory mitigating circumstances." *Id.* The Court held that "even if a jury finds from uncontroverted and manifestly credible evidence that a nonstatutory mitigating circumstance exists, 'jurors may reject the nonstatutory mitigating circumstance if they do not deem it to have mitigating value.' " *Id.* at 173-74, 443 S.E.2d at 32-33 (quoting *Gay*, 334 N.C. at 492, 434 S.E.2d at 854).

Defendant, in essence, argues that the jury should have been instructed to consider and give weight to uncontroverted nonstatutory mitigating circumstances. We conclude that the trial court's peremptory instructions for nonstatutory mitigating circumstances were correct. For each nonstatutory mitigating circumstance, the trial court first set out a mitigator and then instructed as follows:

> [B]ecause the evidence is unrebutted as to [named mitigating circumstance], I instruct you to find the existence of that mitigating circumstance if one or more of you find the facts to be as all the evidence tends to show. If one or more of you deems this mitigating circumstance to have mitigating value, you would so indicate by having your foreperson write yes in the space provided. If none of you finds the facts to be as all the evidence tends to show or if none of you deem it to have mitigating value, you would have your foreperson write no in the space provided.

"[J]urors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value." *State v. Basden*, 339 N.C. 288, 304, 451 S.E.2d 238, 247 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995); *see also State v. Spruill*, 338 N.C. 612, 661, 452 S.E.2d 279, 306 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). Defendant's argument is contrary to our prior decisions on this issue, and defendant has demonstrated no reason why we should reverse or alter our precedent. *See, e.g., Lynch*, 340 N.C. at 476, 459 S.E.2d at 700. This assignment of error is without merit and is, therefore, overruled.

PRESERVATION ISSUES

Defendant raises nine additional issues that he concedes have been decided contrary to his position previously by this Court: (i) the trial court erred by denying defendant's motion to question prospective jurors about their understanding of the meaning of a life sentence for first-degree murder and of parole eligibility for a life sentence of first-degree murder; (ii) the trial court erred by instructing jurors that they must be unanimous to answer "no" for Issues One, Three, and Four, and to reject the death penalty in their punishment recommendation; (iii) the trial court erred by allowing the State to introduce victim-impact evidence; (iv) the trial court's capital sentencing jury instructions defining defendant's burden to prove mitigating circumstances to the satisfaction of each juror did not adequately guide the jury's discretion about the requisite degree of proof; (v) the trial court erred by allowing the jury to refuse to give effect to mitigating evi-

dence if the jury deemed the evidence not to have mitigating value; (vi) the trial court erred in allowing death qualification of the jury by excusing for cause certain jurors who expressed an unwillingness to impose the death penalty; (vii) 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 Three and in determining the substantiality of the aggravating circumstances in Issue Four; (viii) the trial court erred by instructing each juror to consider only the mitigation found by that juror at Issue Two in deciding Issues Three and Four; and (ix) the trial court erred by sentencing defendant to death because the death penalty statute is unconstitutionally vague and overbroad and is imposed in an arbitrary and discriminatory manner.

Defendant raises these issues for purposes of urging 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

[20] 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. *See 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.

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. *See 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 which are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *See 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 was convicted of first-degree murder based upon premeditation and deliberation, and under the felony murder rule. Defendant was also convicted of conspiracy to commit murder, conspiracy to commit kidnapping, first-degree burglary and first-degree kidnapping. The jury found both aggravating circumstances submitted: (i) that the murder was committed while defendant was engaged in the commission of a burglary, N.C.G.S. § 15A-2000(e)(5); and (ii) that the murder was part of a course of conduct in which defendant committed other crimes of violence against another person, N.C.G.S. § 15A-2000(e)(11).

Five statutory mitigating circumstances were submitted for the jury's consideration: (i) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (iii) 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); (iv) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (v) 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 all of the statutory mitigating cir-

cumstances to exist except N.C.G.S. § 15A-2000(f)(7). The trial court submitted eleven nonstatutory mitigating circumstances; and the jury found one of these to exist and to have mitigating value: "the defendant is the father of two daughters and has a loving and supportive relationship with his children."

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 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 is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

This case has several features which distinguish it from the cases in which we have found the sentence to be disproportionate. First, the jury convicted defendant on the basis of both the felony murder rule and premeditation and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Second, the victim was killed in his own home during the nighttime. A murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Finally, defendant repeatedly shot McLean in front of McLean's two small children. *See State v. McNeill*, 346 N.C. 233, 243, 485 S.E.2d 284, 290 (1997) (noting that the defendant killed the victim in front of her children in affirming the death sentence), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998); *State v. Fullwood*, 323 N.C. 371, 404, 373 S.E.2d 518, 538 (1988) (relying on the fact that the defendant killed the victim in front of several small children as one basis for finding the death sentence proportionate), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). Therefore, we conclude that the present

case is distinguishable from those cases in which we have found the death penalty disproportionate.

We also consider cases in which this Court has found the death penalty to be proportionate. We note that defendant's sentence is not disproportionate simply because the jury found four mitigating circumstances and only two aggravating circumstances. *See Lynch*, 340 N.C. at 483-84, 459 S.E.2d at 704-05. Even a "single aggravating circumstance may outweigh a number of mitigating circumstances and . . . be sufficient to support a death sentence." *State v. Bacon*, 337 N.C. 66, 110, 446 S.E.2d 542, 566 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Additionally, we emphasize that while two of the statutory mitigating circumstances found in this case, that defendant was under the influence of mental or emotional disturbance when he committed the murder, N.C.G.S. § 15A-2000(f)(2), and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6), are often persuasive to the jury in recommending life imprisonment, they are not conclusive. *See State v. McDougall*, 308 N.C. 1, 36 nn.9-10, 301 S.E.2d 308, 329 nn.9-10, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *see also State v. Lee*, 335 N.C. 244, 298, 439 S.E.2d 547, 576 (affirming the death sentence where the jury found the existence of the (f)(2) and (f)(6) mitigating circumstances), *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994); *State v. Rook*, 304 N.C. 201, 236, 283 S.E.2d 732, 754 (1981) (affirming the death sentence after assuming that the jury found the (f)(2) and (f)(6) mitigating circumstances), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). The jury could have reasonably given these two statutory mitigating circumstances less weight in making the ultimate decision of life imprisonment or death.

Further, this Court has deemed four statutory aggravating circumstances, standing alone, to be sufficient to sustain death sentences; the (e)(5) and (e)(11) circumstances are among them. *See Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. As we said earlier, the evidence introduced at trial was sufficient for the jury to find that defendant committed the murder during the commission of first-degree burglary and as part of a course of violent conduct. Thus, 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.

We conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and that the death sentence in this case is not disproportionate. Accordingly, the judgments of the trial court are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHNNY WAYNE HYDE

No. 529A98

(Filed 16 June 2000)

1. Witnesses— sequestration—denial

A first-degree murder defendant did not show abuse of discretion in the trial court's denial of defendant's motion to sequester witnesses. Furthermore, claims that denial of sequestration violated defendant's constitutional rights were not made at trial and will not be considered on appeal.

2. Confessions and Incriminating Statements— voluntariness—promises and threats

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress his inculpatory statements where the court's findings that no promises, threats, or suggestions of violence were made to induce defendant to make a statement or to give permission to the State to obtain a shirt with a bloodstain were amply supported by competent evidence and the court's conclusion that defendant's statements were voluntary was supported by the findings.

3. Jury— selection—oath

The trial court did not err by not requiring prospective jurors to swear to tell the truth during jury voir dire. The jurors were properly sworn pursuant to N.C.G.S. § 9-14, an oath of truthfulness is not statutorily mandated, and defendant did not request the oath nor object to its absence during voir dire.

4. Jury— selection—procedure

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution in the proce-

dure followed for calling replacement jurors following excusals. Defendant specifically requested or consented to any deviation from the prescribed statutory procedure and concedes on appeal that the court's jury selection method did not disadvantage or prejudice him.

5. Jury— selection—sequestration

The trial court did not abuse its discretion by refusing to sequester the jury pool during jury selection for a first-degree murder prosecution where defendant noted that one prospective juror stated that he would give a witness less credibility since he knew the witness and another had stated that defense counsel had "misrepresented" her former son-in-law. Defendant did not assert any constitutional basis for his motion in trial court and admitted in his brief that the only damage from the comments was obvious. Taken to its logical conclusion, defendant's argument would require individual voir dire in every capital case to avoid the potential of a prospective juror saying something unexpected.

6. Appeal and Error— preservation of issues—constitutional issues—jury selection

The defendant in a capital first-degree murder prosecution did not object at trial and preserve for appeal the question of whether the jury selection procedure prescribed in N.C.G.S. § 15A- 1214(d) through (f) is unconstitutional since it allows a prosecutor a greater number of prospective jurors from which to choose than it allows defendant.

7. Jury— selection—excusals prior to trial

The trial court did not err in a first-degree murder prosecution by excusing, deferring, or disqualifying several prospective jurors prior to defendant's case being called for trial. Assuming that the court failed to comply with N.C.G.S. § 9-6(a) strictly, defendant is not entitled to a new trial absent a showing of corrupt intent, discrimination or irregularities which affected the actions of the jurors actually drawn and summoned. Finally, defendant had no right to be present during the preliminary qualification of prospective jurors since the jurors were excused before defendant's trial began.

8. Jury— selection—capital trial—ability to consider life sentence

A first-degree murder defendant who did not exhaust all of his peremptory challenges could not demonstrate prejudice from the trial court's rulings on his questions about prospective jurors' abilities to consider a life sentence.

9. Evidence— photographs—homicide victim and crime scene

The trial court did not err in a first-degree murder prosecution by admitting fifty-one photographs of the crime scene, the victim, and the autopsy. Although numerous, the photographs were unique in subject matter and in detail and were relevant and probative in that they corroborated defendant's confession and illustrated the medical examiner's testimony. It cannot be said that the trial court's decision to admit the photographs was so arbitrary that it could not be supported by reason.

10. Sentencing— capital—aggravating circumstance—avoiding arrest

The trial court in a capital sentencing proceeding properly submitted the aggravating circumstance that the murder was committed to avoid lawful arrest, N.C.G.S. § 15A-2000(e)(4), where the murder was committed during a burglary and defendant told authorities that he killed the victim because he thought the victim would tell the next day.

11. Sentencing— capital—prosecutor's argument—killing committed in victim's home

There was no plain error in a capital sentencing proceeding where the prosecutor argued that the victim was killed in his own home. The killing occurred while defendant and others were engaged in a first-degree burglary, requiring submission of the aggravating circumstance that the killing occurred in the commission of burglary, and the argument served to inform the jury about this aggravating circumstance. This argument did not compel the imposition of the death penalty upon a circumstance not listed in N.C.G.S. § 15A-2000(e).

12. Sentencing— capital—instructions—weight to be given mitigating circumstances

The trial court did not err in a capital sentencing proceeding by denying defendant's requested instruction that statutory mitigating circumstances have value or in the instructions given on

the distinction between statutory and nonstatutory mitigating circumstances. Defendant's argument that the jury may not have fully understood that statutory mitigating circumstances have mitigating value as a matter of law has been rejected in other cases. The instructions given here required the jury to give weight to any found mitigating circumstances and were consistent with the pattern jury instructions.

13. Sentencing— capital—death penalty—arbitrariness

The record in a capital sentencing proceeding fully supported the aggravating circumstances found by the jury and there was no suggestion that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

14. Sentencing— capital—death penalty—proportionate

A death sentence was proportionate where defendant killed a defenseless victim in his home and was convicted of both felony murder and premeditated and deliberate murder. This case is more similar to cases where death was found proportionate than to those where it was found disproportionate or to those in which juries have consistently recommended life imprisonment.

Justice 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 Wainwright, J., on 23 July 1998 in Superior Court, Onslow County, upon a jury verdict finding defendant guilty of first-degree murder. On 21 April 1999, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 14 March 2000.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, for the State.

Elizabeth G. McCrodden for defendant-appellant.

PARKER, Justice.

Defendant Johnny Wayne Hyde was indicted for one count each of first-degree murder; first-degree burglary; robbery with a dangerous weapon; and conspiracy to commit first-degree murder, first-degree burglary, and robbery with a dangerous weapon. He was tried for first-degree murder, first-degree burglary, robbery with a danger-

ous weapon, and conspiracy to commit first-degree burglary at the 6 July 1998 Criminal Session of Superior Court, Onslow County. Defendant was found guilty of first-degree murder on the basis of premeditation and deliberation and under the felony-murder rule, first-degree burglary, and conspiracy to commit first-degree burglary; he was found not guilty of robbery with a dangerous weapon. Upon the jury's recommendation following a capital sentencing proceeding, the trial court, on 23 July 1998, sentenced defendant to death for the murder; the trial court also sentenced defendant to consecutive terms of 77 to 102 months' imprisonment for first-degree burglary and 29 to 44 months' imprisonment for conspiracy to commit first-degree burglary.

Based on defendant's statement to Onslow County Sheriff's Detective W. Len Condry and Onslow County Sheriff Ed Brown, the State's evidence tended to show that on the night of 1 August 1996, defendant was drinking with James Blake and Joel Coleman at a shed next to defendant's house. Defendant heard Blake and Coleman discussing where they could obtain other drugs since the blue pills that they were ingesting were not intoxicating enough. Blake and Coleman mentioned that Leslie Egbert Howard, the victim, always had drugs in his residence. Defendant then listened as Blake and Coleman planned the break-in of the victim's mobile home; the victim was considered an easy target since he was always alone. Sometime after midnight, Blake and Coleman asked defendant for his assistance in breaking into the victim's residence to steal "weed." Defendant agreed, and they gathered several items from defendant's shed. Blake and Coleman dressed in camouflage-style coats, gloves, and toboggans. Defendant carried a knife and a hand saw, while Blake carried an ax head and a pipe.

Defendant, Blake, and Coleman then walked to the victim's mobile home. Blake used the ax head and pipe to pry open the front door. Defendant led the way down the hallway to the victim's bedroom and found the victim sitting up in the bed. The victim then lunged at defendant, and defendant stabbed the victim several times with the knife. When the victim fell to his knees, either Blake or Coleman hit the victim in the back of the head with the pipe. The victim then fell to the floor on his back. Defendant stabbed the victim in the side and in the back with a drill bit from the shed. Defendant then began cutting the victim's throat with the hand saw until the sight of blood and the foul smell became nauseating. Sheriff Brown asked defendant about his intention when he used the saw. Defendant

replied, "I guess to kill him. I guess we thought he would tell the next day if we didn't after all we did." Defendant further stated, "I went over there that night just to be the muscle to help them get the herb. I had no intention of killing [the victim] when we went over there." Coleman resumed cutting the victim's throat for about three minutes while Blake was in the living room keeping a lookout. Someone then yelled that a car was approaching, and then all three men ran from the victim's mobile home back to defendant's shed. Blake set fire to all the weapons in a barrel to "burn off the blood" and then placed them in a trash receptacle to be picked up the next day.

When defendant returned to his residence, his sister saw that defendant was covered in blood and asked him what had happened. Defendant told his sister that he thought that he and the others "had just killed [the victim]." Defendant's sister assisted defendant in washing his bloody clothing. All the clothing came clean except for a small spot of blood on the T-shirt he had worn.

On 2 August 1996 the victim's father discovered the victim's body. Shortly thereafter members of the Onslow County Sheriff's Department and the Onslow County Emergency Medical Services arrived. An emergency medical technician determined that the victim was deceased. The cause of death was a combination of multiple stab wounds to the chest and abdomen, blunt trauma to the head, and massive lacerations to the neck. None of the weapons used to kill the victim were recovered at the murder scene.

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

On appeal to this Court, defendant brings forward sixteen assignments of error. For the reasons stated herein, we conclude that defendant's trial and capital sentencing proceeding were free of error and that the death sentence is not disproportionate.

PRETRIAL ISSUES

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion for sequestration and segregation of the State's witnesses during motion hearings. In his motion defendant alleged "[t]hat a collective gathering of the State's witnesses during the motion hearings may well lead to a loss of individual recollection and the substitution of a 'mass consensus' recollection when the witnesses are actually called upon to testify." Defendant argues that the trial court's ruling allowing witnesses to hear the

testimony of one another on the same subject matter undermined his ability to effectively cross-examine those witnesses in violation of both the North Carolina and the United States Constitutions. We disagree.

"A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998). In this case, defendant has failed to show any abuse of discretion in the trial court's ruling. Moreover, although defendant claims that the denial of his motion to sequester violated several of his federal and state constitutional rights, he made no constitutional claims at trial. "Constitutional questions not raised and ruled upon at trial shall not ordinarily be considered on appeal." *Id.*, 508 S.E.2d at 508. Accordingly, we overrule this assignment of error.

[2] In his next assignment of error, defendant contends that the trial court erred by denying his motion to suppress and to exclude from evidence defendant's inculpatory statements made to Onslow County Sheriff Ed Brown, Onslow County Sheriff's Detective Len Condry, and Onslow County Sheriff's Detective Captain Keith Bryan on 1 November 1996. Defendant contends that the statements were involuntary since they were improperly obtained as a direct result of promises and threats made by the law enforcement officers. We disagree.

At the *voir dire* on defendant's motion, at which defendant testified, the trial court made certain findings of fact, which we summarize: On 1 November 1996 at 3:30 p.m. in an interview room of the Onslow County Sheriff's Department, Detective Condry advised defendant of his rights. Defendant waived his rights orally and in writing. Defendant remained in the locked interview room for approximately one hour while Detective Condry was interviewing another suspect. Defendant knocked on the door in order to go to the rest room, and Captain Bryan escorted defendant to the rest room and gave defendant access to a water fountain. While waiting back at the interview room, Captain Bryan told defendant that "if the defendant was asked any questions, it would be best if the defendant told the truth because the truth would come out anyway and it would take a load off of him." Captain Bryan never made any promises or threatened defendant.

Detective Condry moved defendant from the interview room down the hallway to the conference room. Before starting the examination, Detective Condry readvised defendant of his rights; and defendant agreed to talk with the officers. Defendant appeared coherent and did not appear to be impaired from alcohol or drugs. After initially denying any involvement in the murder, defendant admitted his participation in the murder. During the questioning, neither Detective Condry nor Sheriff Brown made any promises, threats, or suggestions of violence to defendant in order to induce him to make a statement. Defendant stated that a shirt he had worn when he committed the murder was located at his residence, and he gave the police permission to retrieve the shirt. Defendant also made a drawing of two of the murder weapons. The interview ended at approximately 6:30 p.m. Around 7:00 p.m. defendant rode with Detective Condry and Detective Frank Terwiliger to his residence to retrieve his shirt and was allowed to visit his mother, who lived at the residence. After leaving defendant's residence, the officers purchased food for defendant. The officers made no promises, threats, or suggestions of violence to defendant in order to persuade defendant to obtain the shirt. On 3 November 1996 during the booking of defendant, defendant "spontaneously and voluntarily told Detective Condry that he not only deserved the death penalty, but that he also wanted the death penalty."

Based upon its findings of fact, the trial court concluded that defendant's statements had been made after "defendant, on two occasions, freely, knowingly, intelligently, understandingly, and voluntarily waived his Miranda Rights." The trial court further concluded that none of defendant's constitutional rights were violated.

In *State v. Payne*, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991), this Court stated the following:

> North Carolina law is well established regarding this Court's role in reviewing a trial court's determination of the voluntariness of a confession.
>
> > Findings of fact made by a trial judge following a voir dire hearing on the voluntariness of a confession are conclusive upon this Court if the findings are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported. This is true even though the evidence is conflicting.

> *State v. Jackson*, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983) (citations omitted).

We conclude that the trial court's findings were amply supported by competent evidence in the record.

Our next task is to determine whether the trial court's conclusion of law is supported by the findings. The trial court's conclusion of law that defendant's statements were voluntarily made is a fully reviewable legal question. *See State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). "[T]he court looks at the totality of the circumstances of the case in determining whether the confession was voluntary." *Jackson*, 308 N.C. at 581, 304 S.E.2d at 152. Factors the court considers are

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

Hardy, 339 N.C. at 222, 304 S.E.2d at 608.

Applying these principles, we find no error in the trial court's conclusion. Defendant testified at the *voir dire* that he was read his *Miranda* warnings, that he understood his rights, that he did not want a lawyer, and that he signed the waiver. Defendant was coherent and not under the influence of any intoxicating substance during the interview. Defendant was familiar with the criminal justice system, having been previously arrested and convicted for assault on a female, possession of stolen property, and simple assault. The length of the interview was approximately two hours, and the record is devoid of any evidence that the atmosphere was inherently coercive or intimidating. Defendant's argument that Captain Bryan's statement to him "that it would take a load off of his shoulders if he would be honest because the truth would come out" constitutes an implicit promise that confessing would benefit him is not persuasive. *See State v. Corley*, 310 N.C. 40, 52, 311 S.E.2d 540, 547 (1984) (admitting defendant's statement after officer told him that "things would be a lot easier on him if he went ahead and told the truth"). Given the totality of circumstances, we conclude that the trial court did not err in concluding that defendant's statements were voluntarily made. This assignment of error is overruled.

JURY SELECTION ISSUES

[3] In another assignment of error, defendant contends that the trial court erred by not requiring that prospective jurors swear to tell the truth during jury *voir dire*. We disagree. The record discloses that the jurors were properly sworn pursuant to N.C.G.S. § 9-14. While defendant concedes that an oath of truthfulness is not statutorily mandated, he nonetheless argues that the trial court's failure to require the jurors to tell the truth during *voir dire* tainted the jury selection process. However, defendant did not request that jurors so swear, nor did he object to any lack of oath during *voir dire*. Therefore, this assignment of error is not properly preserved for appellate review and is overruled. *See* N.C. R. App. P. 10(b)(1); *State v. Fleming*, 350 N.C. 109, 122, 512 S.E.2d 720, 731, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 274 (1999). *See also State v. McNeil*, 349 N.C. 634, 643-44, 509 S.E.2d 415, 421 (1998).

[4] Next, defendant assigns error to the trial court's denial of his motion for individual *voir dire* and sequestration of the jurors during *voir dire*.

"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) (1999). "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." *Fleming*, 350 N.C. at 120, 512 S.E.2d at 729. A trial court will not be reversed for an abuse of discretion absent "a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Barts*, 316 N.C. 666, 679, 343 S.E.2d 828, 839 (1986).

Defendant's first argument in support of an abuse of the trial court's discretion in refusing to permit individual *voir dire* is that the trial court did not understand or follow the statutory process providing for collective *voir dire*. 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 prosecu-

tor 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.

Defendant notes two instances where the trial court called replacement jurors for prospective jurors Donald Shipley, Marion Jones, Jr., and Antonio Kuhn contrary to the statutory selection process. We disagree. With respect to the first group of jurors, the record indicates that the State made its challenges for cause, exercised its peremptory challenges, and accepted twelve prospective jurors. Thereafter defendant made his challenges for cause, exercised his peremptory challenges, and accepted five jurors of the initial twelve. The trial court then seated seven more prospective jurors. The State repeated the process and passed the seven jurors to defendant. Defendant examined these seven jurors and successfully challenged for cause Mr. Shipley. Prior to defendant's exercise of peremptory challenges to the remaining six jurors, the trial court stated,

> Let the record reflect the jury has exited the courtroom. Tomorrow morning we'll proceed with Ms. Geracos [defendant's counsel] going ahead and let [sic] us know what she wants to do about the remaining six jurors.

When court resumed, defendant renewed challenges for cause for Jones and Kuhn which had previously been denied. The trial court reconsidered and allowed those challenges for cause for these jurors

whom defendant had previously peremptorily excused. The following colloquy then transpired between the trial court, the defense counsel, and the prosecution:

> [DEFENSE COUNSEL]: Now we have more challenges. The other thing is since you have challenged Mr. Shipley, do you expect us to exercise our remaining challenges or challenge these jurors before the State examines, puts another juror back in seat number 1. They've not passed the full twelve at this point.
>
> THE COURT: I thought y'all would probably with this new development talk to your client and see what we want to do with the ones that exist right now and state's nodding its head in agreement with that. I think we ought to deal with these six jurors.
>
> [DEFENSE COUNSEL]: My position is the state is, they are to pass us a full box of 12 and right now we'll only have eleven because you've allowed the challenge for cause for Mr. Shipley.
>
> [PROSECUTOR]: That's correct.
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> [PROSECUTOR]: Here's how it happened. We passed y'all full twelve. Y'all didn't challenge Mr. Shipley for cause until you started your examination. I think the appropriate thing to do is put somebody in the box and let them exercise their peremptory.
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> THE COURT: In other words, let's go ahead and replace Mr. Shipley and let [the prosecutor] examine that juror number 1 and then we'll turn it back to [defense counsel], is that correct?
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> [PROSECUTOR]: That will be fine.
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> [DEFENSE COUNSEL]: That's agreeable, Your Honor.

Defendant notes another instance involving prospective juror James Graham, whom he had successfully challenged. Defendant again argues that the trial court acted contrary to statute by attempting to seat a juror before defendant passed on the only other juror he was questioning. We disagree. The following colloquy transpired between the trial court, defense counsel, and the prosecution in a bench conference:

> THE COURT: It may be six of one, half dozen of the other. What ran through my mind was whether or not you [defense counsel] wanted to go ahead and complete your questioning

process also with Mr. Beasley and maybe then make your motion [for cause]. I don't really care. We can do it either way. Well, basically not that we have to, but basically if we were eliminating someone for cause, then we're [sic] releasing another juror, then [the prosecutor] would take back over. I'm just thinking about in the interest of time whether or not anyone has an opinion about that of [sic] whether to go on with Mr. Beasley, and again I say that may be six of one—

[DEFENSE COUNSEL]: We would need a ruling, though, on the motion for challenging him for cause.

THE COURT: What I was thinking, did you get finished? You could come back to Mr. Graham and complete your questioning? Does anybody—

[PROSECUTOR]: I think that the Court, based upon what [defense counsel] just said, I think the Court probably needs to rule on the challenge for cause.

THE COURT: And go ahead and replace?

[PROSECUTOR]: No, I think they have to decide if they want the other and question him and we get the panel back after they've passed on them. They did not pass on them.

THE COURT: The consensus is we'll make a ruling on Mr. Graham?

[PROSECUTOR]: Yes, sir.

THE COURT: You complete your questioning on Mr. Beasley and then decide what you're going to do with Mr. Beasley and with Mr. Graham, depending on which way the decision goes. Everybody is nodding affirmatively. Is everybody in agreement?

[DEFENSE COUNSEL]: Yes, sir.

We conclude that the record discloses no confusion or error by the trial court. Defendant specifically requested or consented to any deviation from the prescribed statutory procedure. Moreover, defendant concedes that the trial court's jury selection method did not disadvantage or prejudice him.

[5] Defendant's second argument in support of an abuse of the trial court's discretion in refusing to sequester the jury is that the method

of questioning prospective jurors before other prospective jurors tainted the jury selection process against him. Specifically, defendant notes that one prospective juror stated that he would give one of defendant's potential witness' testimony less credibility since he knew the witness and that another prospective juror stated that she knew one of the defense lawyers and that the defense counsel had "misrepresented" her former son-in-law in a child abuse case. Defendant asserts that the trial court's abuse of discretion violated his Fourteenth Amendment right to due process and his Sixth Amendment right to a fair and impartial jury; however, defendant did not assert any constitutional basis for his motion in the trial court and has, thus, waived appellate review of this issue on constitutional grounds. *See Fleming*, 350 N.C. at 122, 512 S.E.2d at 730. Further, in his brief defendant argues only that the damage to defendant from these statements made in open court in the presence of jurors and prospective jurors is obvious. Taken to its logical conclusion, defendant's argument would require individual *voir dire* in every capital case to avoid the potential of a prospective juror saying something unexpected. We conclude that defendant has failed to demonstrate any prejudice in the manner in which the jury was selected and how the trial court abused its discretion in denying defendant's motion. Accordingly, we overrule this assignment of error.

[6] In the next assignment of error, defendant contends that the jury selection procedure prescribed in N.C.G.S. § 15A-1214(d) through (f) is unconstitutional since it allows the prosecutor a greater number of prospective jurors from which to choose than it allows defendant. As in *Fleming*, defendant did not raise this constitutional issue at trial; therefore, defendant has failed to preserve this assignment of error for appellate review. N.C. R. App. P. 10(b)(1); *see Fleming*, 350 N.C. at 122, 512 S.E.2d at 730 (holding that defendant waived appellate review of constitutional issue since issue was not raised at trial); *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709-10 (1998) (same), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). This assignment of error is overruled.

[7] By another assignment of error, defendant contends that the trial court erred by excusing, deferring, or disqualifying several prospective jurors prior to defendant's case being called for trial. Defendant argues that the trial court improperly excused these jurors because of stated religious scruples and for reasons other than compelling personal hardship or because the service would be contrary to the public welfare, health, or safety. *See* N.C.G.S. § 9-6(a) (1999). He claims

that he was deprived of the right to reject prospective jurors in violation of his constitutional rights. We disagree.

N.C.G.S. § 9-6(a) provides in pertinent part:

> (a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.
>
> (b) Pursuant to the foregoing policy, each chief district court judge shall promulgate procedures whereby he . . . , prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. . . .
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> . . . .
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> (f) The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section.

"Decisions concerning the excusal of prospective jurors are matters of discretion left to the trial court." *State v. Neal*, 346 N.C. 608, 619, 487 S.E.2d 734, 741 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998). Based on a review of the record, we conclude that the trial court did not commit error in excusing prospective jurors prior to the calling of defendant's case.

Assuming *arguendo* that the trial court failed to comply with the statute strictly, defendant is not entitled to a new trial absent a showing of "corrupt intent, discrimination or irregularities which affected the actions of the jurors actually drawn and summoned." *State v. Murdock*, 325 N.C. 522, 526, 385 S.E.2d 325, 327 (1989). Other than defendant's blanket conclusion that the trial court's actions in excusing these jurors were arbitrary and capricious, defendant has failed to demonstrate corrupt intent or that he was prejudiced by the jury that was impaneled.

"Defendant's right to be present at all stages of his trial does not include the right to be present during preliminary handling of the jury venires before defendant's own case has been called." *State v. Workman*, 344 N.C. 482, 498, 476 S.E.2d 301, 309-10 (1996); *see also State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992) (not error to excuse

prospective jurors after unrecorded bench conferences when trial had not commenced). The record reflects and defendant acknowledges that the jury was impaneled before the State called defendant's case for trial. We conclude that defendant had no right to be present during the preliminary qualification of prospective jurors since the jurors were excused before defendant's trial began. Accordingly, we overrule this assignment of error.

[8] In his next assignment of error, defendant contends that the trial court erred by sustaining objections to his questioning of prospective jurors about their ability to consider a life sentence. Specifically, defendant contends that the trial court limited his *voir dire* of prospective jurors Wilkie, Whaley, and Marshburn.

The examination of prospective juror Wilkie is representative of the questioning of the other two prospective jurors at issue in this case which defendant claims chilled his ability to question succeeding prospective jurors in violation of his right to a fair and impartial jury. In the first round of *voir dire*, the trial court sustained an objection to the form of the following questions on the ground that defendant was "staking out" the juror:

> Q. . . . Mr. Wilkie, if a person intentionally takes the life of another, they are convicted of first degree murder, do you think that he should get the death penalty and should not get life?
>
> . . . .
>
> Q. Mr. Wilkie, I take it from what you're saying, sir, that your attitude is strong enough about the death penalty that we would have to prove to you that and offer you evidence that you should spare his life and—
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> . . . .
>
> Q. So if we didn't offer any mitigating circumstances you would then feel that if we offered none you would vote for the death penalty then, wouldn't you?
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> . . . .
>
> Q. Well, then, what you're saying, sir, is if we offered no mitigating circumstances you would, in fact, automatically vote for the death penalty.
>
> . . . .

Q. Well, if we offered no evidence at all would[] you still consider life in prison without parole?

"The extent and manner of questioning during jury *voir dire* is within the sound discretion of the trial court." *State v. Richardson*, 346 N.C. 520, 529, 488 S.E.2d 148, 153 (1997), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998). In order to reverse a conviction based on an error in the jury selection process, defendant must demonstrate "a clear abuse of discretion, as well as prejudice." *Id.*

"Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). "[S]uch questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action." *Id.* Defendant contends the questions excluded by the trial court prevented him from asking juror Wilkie whether he would automatically impose the death penalty upon convicting defendant of first-degree murder.

Even if it be assumed without deciding that the questions were proper, defendant cannot prevail on this issue. Although defendant exercised a peremptory challenge to excuse Marshburn, he accepted jurors Wilkie and Whaley and did not exhaust all his peremptory challenges. Defendant cannot demonstrate prejudice in the jury selection process if he does not exhaust his peremptory challenges. *See* N.C.G.S. § 15A-1214(h); *State v. Billings*, 348 N.C. 169, 182, 500 S.E.2d 423, 431 (no prejudice results from the trial court's limiting defendant's questioning of a prospective juror where defendant does not exhaust his peremptory challenges), *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998); *State v. McCarver*, 341 N.C. 364, 378, 462 S.E.2d 25, 32 (1995) (same), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Thus, we conclude that defendant cannot demonstrate prejudice resulting from the trial court's rulings. This assignment of error is overruled.

GUILT/INNOCENCE ISSUES

[9] Next, defendant assigns error to the trial court's denial of his pretrial motion *in limine* to exclude or limit photographs of the crime scene and of the autopsy and a motion to limit the number of photographs of the victim. Defendant argues that these photographs had no probative value and that they were excessive and inflamma-

tory. Defendant argues that these gory photographs were so prejudicial that he is entitled to a new trial. We find that none of defendant's arguments has merit.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). "Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found." *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816-17 (1991). Photographs depicting "[t]he condition of the victim's body, the nature of the wounds, and evidence that the murder was done in a brutal fashion [provide the] circumstances from which premeditation and deliberation can be inferred." *State v. Warren*, 348 N.C. 80, 111, 499 S.E.2d 431, 448, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). "The large number of photographs, in itself, is not determinative." *State v. Goode*, 350 N.C. 247, 259, 512 S.E.2d 414, 421 (1999).

The trial court allowed the State to use approximately fifty-one photographs. These photographs, albeit numerous, were unique in subject matter and in detail in that they all depicted the exceedingly large number of wounds inflicted upon different parts of the victim's body by various weapons, including a knife, a drill bit, a pipe, an ax head, and a limb or pruning saw. They depicted the condition of the victim's body, its location, and the crime scene. The photographs also corroborated defendant's confession in that they demonstrated that the victim was attacked in his bedroom, that he fell to the floor with his head toward the closet, that he was stabbed while on the floor, and that his neck was cut with a saw while on the floor. Further, the autopsy photographs illustrated the testimony of the medical examiner, who described which injuries were consistent with a particular weapon. We conclude that the photographs were relevant and had probative value.

We must now determine whether the prejudicial effect of the photographs outweighs their probative value. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S.

§ 8C-1, Rule 403 (1999); *see also State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523. This determination is 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.

After having reviewed the photographs and determined that they were relevant and probative, that they corroborated defendant's confession, that they illustrated the medical examiner's testimony, and that they contributed to the finding of premeditation and deliberation, 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. Accordingly, we overrule this assignment of error.

SENTENCING ISSUES

[10] By another assignment of error, defendant contends that the trial court erred in submitting, over defendant's objection, the aggravating circumstance that the murder was committed to avoid lawful arrest. Defendant argues that the evidence did not support the submission of this aggravating circumstance to the jury. We disagree.

N.C.G.S. § 15A-2000(e)(4) provides that a jury in a capital sentencing hearing may consider as an aggravating circumstance that "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest." N.C.G.S. § 15A-2000(e)(4) (1999). "Submission of the aggravating circumstance that the capital felony was committed to avoid or prevent a lawful arrest has been upheld in circumstances where a murder was committed to prevent the victim from capturing defendant and where a purpose of the killing was to eliminate a witness." *McCarver*, 341 N.C. at 400, 462 S.E.2d at 45.

The evidence in the case before us tends to show that defendant burglarized the victim's residence and that he killed him since he believed the victim would report him to the authorities. While defendant was describing the assault on the victim in his statement to police investigators, Sheriff Brown asked defendant, "[W]hat was your intention when you used the saw?" Defendant replied, "I guess to kill him . . . . I guess we thought he would tell the next day if we didn't [kill him] after all we did." "Trying to kill him. After all the other stuff[,] if we didn't kill him we knew he would tell on us the next day." Further, this statement is corroborated by another statement defendant made to his girlfriend, Ginger Guthrie, shortly after

the victim was murdered. Ms. Guthrie testified that defendant said that "he wasn't for sure about [whether the victim would say anything] after all that he knows he stabbed him with the drill bit and everything; he wasn't too sure about that."

Defendant argues that his statement to the law enforcement officers three months after the murder evidences an " 'after-the-fact desire not to be detected or apprehended' " and " 'cannot raise a reasonable inference that at the time of the killing defendant killed for the purpose of avoiding lawful arrest.' " (Quoting *State v. Williams*, 304 N.C. 394, 425, 284 S.E.2d 437, 456 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982). This argument is without merit. We conclude that the evidence was sufficient to support a rational jury's finding that one of defendant's purposes for killing the victim was to eliminate a witness whom he thought would report him to the authorities. Therefore, the trial court properly submitted this aggravating circumstance for the jury's consideration. This assignment of error is overruled.

[11] In the next assignment of error, defendant contends that the trial court erred in allowing the prosecutor to make an allegedly improper closing argument. Specifically, he argues that he was prejudiced by the prosecutor's statements suggesting that the imposition of the death penalty was warranted since the victim was killed in his own home. Defendant argues that these statements improperly placed before the jury an aggravating circumstance not listed in N.C.G.S. § 15A-2000(e). We disagree.

During the sentencing hearing, defendant failed to object during closing argument. Thus, "defendant must establish that the argument was so grossly improper that the trial court abused its discretion by not intervening *ex mero motu*. To establish such an abuse, defendant must show the prosecutor's comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair." *State v. Robinson*, 346 N.C. 586, 606-07, 488 S.E.2d 174, 187 (1997).

"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*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). The trial court's exercise of discretion over the latitude of counsel's argument will not be disturbed absent any gross impropriety in the argument that would likely influence the

jury's verdict. *See State v. McNeil*, 350 N.C. 657, 685, 518 S.E.2d 486, 503 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 321 (2000).

The evidence in this case tends to show that defendant and others committed the first-degree murder of the victim while engaged in first-degree burglary. Based on this evidence, the trial court had a duty to submit the aggravating circumstance that "[t]he capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of . . . burglary." N.C.G.S. § 15A-2000(e)(5). The offense of first-degree burglary necessarily requires that the dwelling be actually occupied at the time of intrusion. *See State v. Fields*, 315 N.C. 191, 196, 337 S.E.2d 518, 521 (1985). The prosecutor's statements about the victim being killed in his home served to inform the jury about this aggravating circumstance. Contrary to defendant's contention, the prosecutor's argument did not compel the imposition of the death sentence upon any circumstance not listed in N.C.G.S. § 15A-2000(e). We conclude that the prosecutor's argument was not so "grossly improper" as to require the trial court to intervene *ex mero motu*. This assignment of error is overruled.

[12] In his final assignment of error, defendant contends that the trial court erred in denying his requests to instruct the jury that statutory mitigating circumstances have mitigating value. Defendant further argues that the instructions given did not adequately address the significant distinction between statutory and nonstatutory mitigating circumstances. We disagree.

"A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). "The trial court need not give the requested instruction verbatim, however; an instruction that gives the substance of the requested instructions is sufficient." *Id.*

"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). The thrust of defendant's argument is that the jury may not have fully understood that the statutory mitigating circumstances have mitigating value as a matter of law. This Court has considered and rejected this argument in *State*

v. Simpson, 341 N.C. 316, 348-49, 462 S.E.2d 191, 209-10 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996), and in *Conner*, 345 N.C. at 328, 480 S.E.2d at 629.

Here, the trial court gave virtually identical instructions to the jury with regard to the (f)(1), (f)(2), (f)(6), (f)(7), and (f)(8) mitigating circumstances, in part, as follows:

> Accordingly, as to this mitigating circumstance, I charge you that if one or more of you find the facts to be as all . . . the evidence tends to show, you will answer "yes" as to mitigating circumstance number one on the issues and recommendation form.

With respect to all of the nonstatutory mitigating circumstances, the trial court instructed the jury, in part, as follows:

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

The trial court also gave a virtually identical instruction after setting out each nonstatutory mitigating circumstance.

With respect to the statutory catchall mitigating circumstance, the trial court instructed the jury as follows:

> If one or more of you so find by a preponderance of the evidence, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form. If none of you find the circumstance to exist, you would so indicate by having your foreperson write "no" in that space.

The instructions given with respect to Issues Three and Four required the jury to give weight to any found mitigating circumstances. As we noted in *Conner*, "defendant's request for an instruction that conveyed to the jury that it must give value to found statutory mitigators was fulfilled by the instruction given." 345 N.C. at 328, 480 S.E.2d at 629. We conclude the same in this case. Further, 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). Accordingly, we overrule this assignment of error.

PROPORTIONALITY

[13] Finally, this Court exclusively has the statutory duty in capital cases to review the record and determine (i) whether the record supports the aggravating circumstances found by the jury; (ii) whether the death sentence was entered 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. N.C.G.S. § 15A-2000(d)(2). Having thoroughly reviewed the record, the transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no suggestion that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. Accordingly, we turn to our final statutory duty of proportionality review.

[14] The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony-murder rule, first-degree burglary, and conspiracy to commit first-degree burglary. At defendant's capital sentencing proceeding, the jury found the three submitted aggravating circumstances: (i) that the murder was committed to avoid lawful arrest, N.C.G.S. § 15A-2000(e)(4); (ii) that the murder was committed while defendant was engaged, in the commission of a burglary, N.C.G.S. § 15A-2000(e)(5); and (iii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The jury found five statutory mitigating circumstances that: (i) defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (iii) 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); (iv) defendant aided in the apprehension of another capital felon, Joel Coleman, N.C.G.S. § 15A-2000(f)(8); and (v) defendant aided in the apprehension of another capital felon, James Blake, N.C.G.S. § 15A-2000(f)(8). Two other statutory mitigating circumstances were submitted but not found: (i) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (ii) the catchall, N.C.G.S.

§ 15A-2000(f)(9). Of the thirty-four nonstatutory mitigating circumstances submitted, the jury found twenty-four that 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. We have determined the death penalty 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 that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

Several characteristics in this case support the determination that the imposition of the death penalty was not disproportionate. Defendant was convicted of both felony murder and premeditated and deliberate murder. We have noted that "the finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Moreover, defendant killed the defenseless victim in his home. "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 *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)) (alterations in original), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998).

We also consider cases in which this Court has found the death penalty to be proportionate. "However, 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. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). We conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

We conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and that defendant's death sentence was not excessive or disproportionate. The judgments of the trial court are, therefore, left undisturbed.

NO ERROR.

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

JACK S. GRAY AND MARY B. GRAY T/A TOWER CIRCLE MOTEL v. NORTH CAROLINA INSURANCE UNDERWRITING ASSOCIATION

No. 84PA99

(Filed 16 June 2000)

1. Unfair Trade Practices— settlement of insurance claims— acts prohibited by insurance statute—separate N.C.G.S. § 75-1.1 claim

The Court of Appeals erred in reversing the trial court's amended judgment trebling the jury award of $117,000 to $351,000 under N.C.G.S. § 75-1.1, based on its conclusion that a reasonable jury could not find defendant insurance company's acts were done with such frequency as to indicate a general business practice, because: (1) although the ability to enforce N.C.G.S. § 58-63-15(11) rests with the Commissioner of Insurance, the acts proscribed in that statute were designed to protect the consuming public, and therefore, can be looked at for examples of conduct to support a finding of unfair or deceptive acts or practices under N.C.G.S. § 75-1.1 as a matter of law without the necessity of an additional showing of frequency indicating a "general business practice"; and (2) an insurance company's conduct of "not attempting in good faith to effectuate a prompt, fair and equitable settlement of claims in which liability has become reasonably clear" is a violation of N.C.G.S. § 75-1.1 that is separate and apart from any violation of N.C.G.S. § 58-63.15(11).

2. Unfair Trade Practices— treble damages—not entire award—only unfair or deceptive trade practices claim

The trial court properly trebled only the damages found by the jury that were proximately caused by the violation of N.C.G.S. § 75-1.1 because plaintiffs are not entitled to treble damages on the entire amount fixed by the verdict as damages, since plaintiffs' breach of contract damages are not damages arising from an unfair or deceptive trade practice claim under N.C.G.S. § 75-1.1.

3. Unfair Trade Practices— attorney fees

The Court of Appeals erred by reversing the trial court's award of attorney fees under N.C.G.S. § 75-16.1 based on the erroneous conclusion that plaintiffs failed to establish an unfair or deceptive trade practice claim under N.C.G.S. § 75-1.1.

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, 132 N.C. App. 63, 510 S.E.2d 396 (1999), finding no error in part and reversing in part an amended judgment entered by Parker, J., on 22 April 1997 in Superior Court, Dare County. Heard in the Supreme Court 15 November 1999.

Vandeventer Black LLP, by Norman W. Shearin, Jr., and Robert L. O'Donnell, for plaintiff-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by William W. Pollock; and Smith Helms Mulliss & Moore, L.L.P., by Larry B. Sitton and Matthew W. Sawchak, for defendant-appellee.

FRYE, Chief Justice.

This case involves the relationship between N.C.G.S. § 75-1.1, which prohibits unfair and deceptive acts or practices, and N.C.G.S. § 58-63-15(11), which defines unfair practices in the settlement of insurance claims. *See* N.C.G.S. § 75-1.1(a) (1999); N.C.G.S. § 58-63-15(11) (1999). Plaintiffs contend that there is competent evidence to support a jury finding that defendant engaged in one or more acts prohibited by N.C.G.S. § 58-63-15(11), with such frequency as to indicate a general business practice constituting a violation of N.C.G.S. § 75-1.1; that the jury's special verdict and the trial court's findings in the amended judgment entitle plaintiffs to a finding that the said acts constituted a violation of N.C.G.S. § 75-1.1 separate from

and not based upon the conclusions made by the trial court in reliance upon a *per se* violation of N.C.G.S. § 58-63-15(11); that plaintiffs are entitled to treble damages in the amount of $1,119,770.73; and that plaintiffs are entitled to reasonable attorneys' fees pursuant to N.C.G.S. § 75-16.1. For the reasons stated below, we reverse and remand the decision of the Court of Appeals and hold that defendant violated N.C.G.S. § 75-1.1 separate and apart from any violation of N.C.G.S. § 58-63-15(11).

Defendant, the North Carolina Insurance Underwriting Association, is an association of insurance carriers created by the General Assembly under N.C.G.S. § 58-45-10 for the purpose of providing "essential property insurance" for the "beach area." N.C.G.S. §§ 58-45-1, -5, -10 (1999). Defendant issued a commercial windstorm and hail policy of insurance, effective 14 August 1993, to plaintiffs trading as the Tower Circle Motel. The Tower Circle Motel, which consisted of five buildings, was located in the Village of Buxton on Hatteras Island.

The policy insured the Tower Circle Motel against windstorm and hail damage but not against damage arising from flooding or rain. The policy did not provide fire insurance. The policy contained a standard mortgage clause, which provided in pertinent part:

> 7. **MORTGAGE HOLDERS**
>
> a. The term "mortgage holder" includes trustees.
>
> b. We will pay for covered loss of or damage to buildings or structures to each mortgage holder shown in the Declarations in their order of precedence, as interests may appear.

No mortgage holders were listed in the declarations. Further, under the declarations in the insurance policy, plaintiffs' limits for covered losses were as follows: Buildings One and Two in the amount of $116,000 on each building; Buildings Three and Four in the amount of $58,000 on each building; and Building Five in the amount of $81,000. The policy limit for the covered loss to contents was $17,000 each for Buildings One and Two; $5,000 each for Buildings Three and Four; and $8,000 for Building Five.

On 31 August 1993, Hurricane Emily struck the Outer Banks and caused extensive damage to Hatteras Island, including the Tower Circle Motel. Plaintiffs timely filed a claim under their policy with

defendant for the wind damage to their property. Defendant contracted with Crittenden Adjustment Company (Crittenden) to adjust plaintiffs' claim. In a report dated 30 September 1993, Crittenden informed defendant that wind damage to Buildings One and Two exceeded the policy limits and recommended damage settlement of $116,000 each for Buildings One and Two. Crittenden also recommended damage settlements for Building Three in the amount of $4,276.38; Building Four in the amount of $4,144.38; and Building Five in the amount of $6,053. Crittenden's assessment of the cause of damages by wind to Buildings One and Two was later substantially corroborated, as were Crittenden's damages estimates. However, defendant did not pay the claims. Defendant concluded that the photographs taken by Crittenden did not reflect substantial damage and did not support the conclusion that Buildings One and Two were "total losses." On 6 October 1993, defendant assigned Martin Cutler as a co-adjuster. About two weeks later, defendant asked Crittenden to withdraw from further handling plaintiffs' claims.

On or about 30 September 1993, during the adjustment process, Georgia Gray, plaintiff Jack Gray's sister-in-law, through her counsel, forwarded to defendant a deed of trust on plaintiffs' property. In a letter accompanying the deed of trust, Ms. Gray's counsel indicated that the deed of trust in favor of Ms. Gray's deceased husband, Charles Gray, was outstanding and that Ms. Gray had succeeded to Charles Gray's interest in the property. Ms. Gray's counsel requested "that any loss payment be made payable to the note holder." Defendant then issued an "advance payment" of $25,000 on 21 October 1993, in the form of a check made payable to plaintiffs and Georgia B. Gray as joint payees. Plaintiffs returned the check on 5 November 1993, advising defendant that Georgia Gray was not a payee on their policy and that plaintiffs' obligation on the deed of trust had been paid in full.

On 10 May 1994, pursuant to a recommendation by Martin Cutler, defendant offered plaintiffs $60,821.51 in settlement of plaintiffs' claims under the policy. Plaintiffs rejected that offer.

Plaintiffs commenced a civil action against defendant in July 1994, asserting claims of breach of contract and unfair and deceptive practices and seeking declaratory judgment. On 10 August 1995, plaintiffs filed a motion for partial summary judgment, specifically asking the court to enter an order finding that "Georgia B. Gray is not entitled to any portion of any payments under the policy of insurance issued by defendant to plaintiffs trading as the Tower Circle Motel." On 11 September 1995, the trial court denied the motion.

In December 1996, plaintiffs' claims were tried before a jury in the Superior Court, Dare County. After the presentation of evidence from both sides, the trial court submitted issues that were answered by the jury as follows:

ISSUE ONE:

Did the defendant, North Carolina Insurance Underwriting Association, breach the terms of the policy of insurance which was issued to the plaintiffs, Jack and Mary Gray?

ANSWER: YES

ISSUE TWO:

What amount of money damages are the Grays entitled to recover?

ANSWER: $256,256.91

ISSUE THREE:

Did the defendant, North Carolina Insurance Underwriting Association, do at least one of the following:

[ANSWER:] YES

(A) Fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(B) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[;]

(C) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

(D) Delay in the investigation or payment of claims by requiring an insured claimant to submit a preliminary claim report and then requiring subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(E) Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]

ISSUE FOUR:

Did North Carolina Insurance Underwriting Association do any one or more of the above-stated acts with such frequency as to indicate a general business practice?

[ANSWER:] YES

ISSUE FIVE:

Were the plaintiffs, Jack and Mary Gray, injured as a proximate result of the defendant, North Carolina Insurance Underwriting Association's conduct?

[ANSWER:] YES

ISSUE SIX:

What amount, if any, have the Grays been injured?

ANSWER: $117,000.00

ISSUE SEVEN:

Are the plaintiffs, Jack and Mary Gray, entitled to be paid the proceeds under the insurance policy free of any claim or interest of any party not entitled to receive payment under said policy?

ANSWER: YES

On 26 March 1997, the trial court entered a judgment that incorporated the jury's verdict and findings. The trial court entered an amended judgment on 22 April 1997, setting out additional findings of fact; awarding plaintiffs $607,256.91, which included breach of contract damages in the amount of $256,256.91 and trebled damages in the amount of $351,000 for defendant's unfair and deceptive acts; awarding prejudgment interest on all sums awarded; and taxing costs to defendant, including attorneys' fees in the sum of $117,000. The trial court found that plaintiffs were entitled to the "proceeds under the policy of insurance free of any claim or interest of any party not entitled to receive payment under that policy."

Defendant appealed to the North Carolina Court of Appeals. Plaintiffs cross-appealed, contending, among other things, that the trial court erred by not concluding that defendant's conduct constituted a violation of N.C.G.S. § 75-1.1 separate and apart from and not based upon a violation of N.C.G.S. § 58-63-15(11). The Court of Appeals found no error in the judgment awarding damages based on the breach of contract claim. *Gray v. N.C. Ins. Underwriting Ass'n*,

132 N.C. App. 63, 73, 510 S.E.2d 396, 402 (1999). The Court of Appeals also found no prejudicial error in the trial court's judgment providing declaratory relief. *Id.* at 73, 510 S.E.2d at 403. However, the Court of Appeals reversed the trial court's judgment awarding treble damages and attorneys' fees, concluding that defendant's motion for directed verdict on plaintiffs' N.C.G.S. § 58-63-15(11) claim should have been granted and that the "award of treble damages and attorneys' fees based on a violation of Chapters 58 and 75 was erroneous." *Id.* at 72, 510 S.E.2d at 402. The Court of Appeals also concluded that the trial court did not abuse its discretion by failing to find a violation of N.C.G.S. § 75-1.1 separate and apart from any violation of N.C.G.S. § 58-63-15(11). *Id.* at 71, 510 S.E.2d at 401. On 24 June 1999, this Court allowed plaintiffs' petition for discretionary review.

I.

[1] Plaintiffs contend that defendant violated N.C.G.S. § 58-63-15(11) constituting a violation of N.C.G.S. § 75-1.1 and that defendant violated N.C.G.S. § 75-1.1 separate from and not based upon a violation of N.C.G.S. § 58-63-15(11). We agree with plaintiffs' latter contention.

N.C.G.S. § 75-1.1 provides in pertinent part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) 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(a), (b).

N.C.G.S. § 75-16 provides as follows:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C.G.S. § 75-16 (1999).

In enacting N.C.G.S. §§ 75-1.1 and 75-16, the legislature intended to effect a private cause of action for consumers. *See Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs. *See* N.C.G.S. § 75-1.1(a); *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court. *See Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990). Ordinarily, once the jury has determined the facts of a case, the court, based on the jury's findings, then determines, as a matter of law, whether the defendant engaged in unfair or deceptive practices in or affecting commerce. *Id.* Furthermore, this Court has stated that "it does not invade the province of the jury for this Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75-1.1." *Id.*

In *Marshall v. Miller*, 302 N.C. at 548, 276 S.E.2d at 403, this Court noted that a practice is deceptive if it has the tendency to deceive. This Court has also observed that "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* Good faith is not a defense to an alleged violation of N.C.G.S. § 75-1.1. *Id.* Moreover, where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice. *See Johnson v. Beverly-Hanks & Assocs.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991).

Insurance law in this state is governed by chapter 58 of the North Carolina General Statutes. N.C.G.S. § 58-63-15(11), the unfair claim settlement practices statute, provides the following:

> (11) Unfair Claim Settlement Practices.—Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:
>
> . . . .

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

. . . .

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

. . . .

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

. . . .

l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;

m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage . . . .

N.C.G.S. § 58-63-15(11)(b), (f), (h), (*l*), (m) (alteration to (*l*) in original).

The plain language of N.C.G.S. § 58-63-15(11) provides that the Commissioner of Insurance has the authority to enforce the provisions of that subsection. *See* N.C.G.S. § 58-63-15(11). In *Pearce v. American Defender Life Ins. Co.*, this Court held that a violation of N.C.G.S. § 58-54.4 (the predecessor to N.C.G.S. § 58-63-15), as a matter of law, constituted an unfair or deceptive practice in violation of N.C.G.S. § 75-1.1. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986). However, the Court in *Pearce* was not interpreting the unfair claims settlement statute, now codified as N.C.G.S. § 58-63-15(11), but was interpreting what is now codified as N.C.G.S. § 58-63-15(1), titled "Misrepresentations and False Advertising of Policy Contracts." *See Jefferson-Pilot Life Ins.*

Co. v. Spencer, 336 N.C. 49, 53, 442 S.E.2d 316, 318 (1994) (acknowledging that the Court in *Pearce* held that a violation of N.C.G.S. § 58-63-15(1) constituted a violation of N.C.G.S. § 75-1.1).

In deciding that a violation of N.C.G.S. § 58-54.4 was a violation of N.C.G.S. § 75-1.1 as a matter of law, this Court in *Pearce* found as persuasive the reasoning in *Winston Realty Co. v. G.H.G, Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985):

> "Although defendant is correct in pointing out that Chapter 95 is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice based on the conduct proscribed by Chapter 95. N.C.G.S. § [95-47.6] prohibits private personnel services from engaging in specific conduct and activities, including the conduct specified in subsections (2) and (9) . . . . Although the authority to enforce the Chapter 95 provisions rests with the Commissioner of Labor, it is obvious that the list of proscribed acts found in N.C.G.S. § 95-47.6 were designed to protect the consuming public. The Court of Appeals confronted a similar issue in *Ellis v. Smith- Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980), where the defendant contended plaintiff could not recover damages under N.C.G.S. § 75-1.1 because unfair and deceptive acts in the insurance industry were regulated exclusively by the insurance statutes, N.C.G.S. § 58-54.1, [ch. 58, art. 3A (1982 & Supp. 1985) (amended and recodified as ch. 58, art. 63 (1987))], which do not contain a right of private action. Chapter 95 similarly contains no right of private action. The *Ellis* court held that N.C.G.S. § 75-1.1 does provide a remedy for unfair trade practices notwithstanding that insurance is regulated by statute. 48 N.C. App. at 183, 268 S.E.2d at 273. We find this reasoning persuasive and hold that a violation of either or both N.C.G.S. §§ 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1."

Pearce, 316 N.C. at 469, 343 S.E.2d at 179 (quoting *Winston Realty Co.*, 314 N.C. at 97, 331 S.E.2d at 681).

We find this reasoning equally persuasive and applicable in the instant case. Although the authority to enforce N.C.G.S. § 58-63-15(11) rests with the Commissioner of Insurance, the acts proscribed in N.C.G.S. § 58-63-15(11) were designed to protect the consuming public. *See Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995) (stating that "violations of statutes designed to pro-

tect the consuming public and violations of established public policy may constitute unfair and deceptive practices.").

We also find as persuasive the reasoning of a federal district court sitting in this state:

> "Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies" and "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" are prohibited by Chapter 58 with regard to first party claims. N.C. Gen. Stat. § 58-54.4(11)c & f (1982). The court believes these practices, if found by the jury, could support a finding of unfair or deceptive acts or practices under Chapter 75.

U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320, 1328 (E.D.N.C. 1990).

We agree with the practice of looking to N.C.G.S. § 58-63-15(11) for examples of conduct to support a finding of unfair or deceptive acts or practices. Although N.C.G.S. § 58-63-15(11) does regulate settlement claims in the insurance industry, insurance companies are not immune to the general principles and provisions of N.C.G.S. § 75-1.1.

An insurance company that engages in the act or practice of "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," N.C.G.S. § 58-63-15(11)(f), also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1 because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers. *See Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Thus, such conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," N.C.G.S. § 58-63-15(11).

In the instant case, the insurance policy specifically stated that it contained all the terms, agreements, and provisions governing the relationship between plaintiffs and defendant. The policy provided that defendant would pay for a covered loss to each mortgage holder listed in the policy. However, no mortgage holders were actually listed in the policy. The policy did not contain defendant's unwritten practice of naming as payee on settlement checks any person from

whom it receives a letter claiming that such person has an interest in the insured property. In its answer to an interrogatory propounded to defendant by plaintiffs, defendant admitted that it was defendant's practice to "include as payees all persons who have informed defendant of a mortgage or other interest in the property." At trial, Donald Stauffacher, an assistant plan manager with defendant, testified that "[w]henever we receive notification that there is a lien holder, a mortgagee on a property that we're insuring, we protect that interest by naming them as a payee on any claims check," regardless of whether that mortgage holder is listed on the policy. Although the declarations of the policy did not name Georgia or Charles Gray as a mortgage holder and despite plaintiffs' objections, defendant continued to include Ms. Gray's name on the settlement checks.

Defendant contends that it was legally justified in continuing to include Ms. Gray's name on the settlement checks in order to protect itself from suit. We reject this contention for two reasons. First, assuming *arguendo* that defendant believed that some third party (here, plaintiff Jack Gray's sister-in-law) might file a lawsuit against defendant, such a belief would be an insufficient basis for withholding payment of the policy proceeds to the beneficiary of the policy. The third party here was not a mortgage holder listed in the policy of insurance, and nothing in the policy authorized defendant to delay payment to the policyholder by naming as an additional payee anyone who wrote a letter claiming an interest in the property.

Second, the threat of a lawsuit by the third party against defendant was tenuous at best. The copy of the deed of trust offered into evidence did not identify Ms. Gray as the beneficiary. In April 1994, Cutler informed defendant that Ms. Gray and her attorney had failed to respond to requests to produce a note and the original deed of trust. Defendant, having a duty to pay insurance proceeds to plaintiffs for wind damage, unnecessarily frustrated plaintiffs' ability to recover any amount due under the policy by continuing to include Ms. Gray's name on the settlement checks.

Furthermore, defendant's actions were exacerbated by its apparently arbitrary rejection of Crittenden's damages estimates and its ready acceptance of Cutler's disparate damages estimate.

In the instant case, in answering Issue Three on the verdict sheet, the jury found that defendant committed at least one of the following acts:

(A) Fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(B) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[;]

(C) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

(D) Delay in the investigation or payment of claims by requiring an insured claimant to submit a preliminary claim report and then requiring subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(E) Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]

The Court of Appeals assumed, without deciding, that there was sufficient evidence to warrant submission of Issue Three to the jury but concluded that a reasonable jury could not find that defendant's acts "were done with such frequency as to indicate a 'general business practice.' " *Gray*, 132 N.C. App. at 69, 510 S.E.2d at 400. However, we conclude that the evidence at trial, when taken in a light most favorable to plaintiffs, was sufficient to sustain a jury verdict in plaintiffs' favor on this issue. *See Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (stating the standard of review of directed verdict). Specifically, there was sufficient evidence to sustain a jury verdict that defendant did not attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability had become reasonably clear. As we now hold that "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" is a violation of N.C.G.S. § 75-1.1, it follows that defendant committed a violation of N.C.G.S. § 75-1.1 separate and apart from any violation of N.C.G.S. § 58-63-15(11). Defendant's conduct constituted an unfair or deceptive act or practice in or affecting commerce that proximately caused injury to plaintiffs. *See First Atl. Mgmt. Corp.*, 131 N.C. App. at 252, 507 S.E.2d at 63. Although the trial court did not make this finding in its amended judgment, the trial court, nevertheless, trebled

the jury award of $117,000 to $351,000 upon its finding of a violation of N.C.G.S. § 75-1.1. Accordingly, we conclude that there is no prejudicial error in the trial court's amended judgment awarding damages.

II.

Having decided that defendant violated N.C.G.S. § 75-1.1 separate and apart from any violation of N.C.G.S. § 58-63-15(11), we need not address plaintiffs' contention that defendant committed acts proscribed under N.C.G.S. § 58-63-15(11) with such frequency as to constitute a general business practice and, therefore, violated N.C.G.S. § 75-1.1.

III.

A.

[2] Plaintiffs next contend that if defendant violated N.C.G.S. § 75-1.1, they are entitled to damages in the sum of three times $373,256.91, the total amount fixed by the verdict as damages. We disagree.

Section 75-16 provides that if anyone is injured "by reason of any act or thing done . . . in violation of the provisions of this Chapter," that person can sue "on account of such injury done." N.C.G.S. § 75-16. The statute further provides that "in such case judgment shall be rendered . . . for treble the amount fixed by the verdict." *Id.* Thus, if a defendant violates N.C.G.S. § 75-1.1, treble damages shall be awarded. *See Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991). Plaintiffs contend that the language in N.C.G.S. § 75-16, "treble the amount fixed by the verdict," means that the trial court should treble the entire award that includes damages for breach of contract and damages from the violation of N.C.G.S. § 75-1.1. However, plaintiffs' breach of contract damages are not damages arising from a violation of N.C.G.S. § 75-1.1.

In forging N.C.G.S. § 75-16, the legislature intended for the phrase "treble the amount fixed by the verdict" to mean that damages *proximately caused* by a violation of N.C.G.S. § 75-1.1 shall be trebled, not that damages on every claim that happens to arise in a case involving a violation of N.C.G.S. § 75-1.1 shall be trebled. This Court has stated that in order to recover treble damages, a plaintiff must show that he "suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Pearce*, 316

N.C. at 471, 343 S.E.2d at 180; *accord Ellis*, 326 N.C. at 226, 388 S.E.2d at 131; *see also* Noel L. Allen, *North Carolina Unfair Business Practice* § 10-3(a), at 222 (1995) ("The damages to be trebled must only be those damages as determined by the factfinder that were a direct and proximate result of the § 75-1.1 violation.").

In the instant case, the trial court instructed the jury that Issue One involved breach of contract liability and that Issue Two involved damages from that breach of contract, including consequential damages. On Issue Two, the jury determined that plaintiffs were entitled to money damages of $256,256.91 as a result of the breach of contract of insurance. Under Issue Six, the jury determined that plaintiffs were injured in the amount of $117,000 as a result of defendant's violation(s) of N.C.G.S. § 58-63-15(11). The jury made no specific findings of fact to support the award of damages under Issue Two, other than the finding regarding the breach of contract of insurance. Further, the trial court could not have properly concluded that the breach of contract itself constituted a violation of N.C.G.S. § 75-1.1, and the trial court could not have properly trebled the breach of contract damages. *See Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (holding that a mere breach of contract is not sufficient to make out a claim under N.C.G.S. § 75-1.1; substantial aggravating circumstances attendant to the breach must be shown), *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). After the jury found that defendant violated N.C.G.S. § 58-63-15(11), the trial court then found, as a matter of law, that defendant violated N.C.G.S. § 75-1.1. The trial court then trebled the jury award of $117,000 to $351,000 pursuant to N.C.G.S. § 75-16. Accordingly, the trial court correctly trebled only the damages found by the jury in Issue Six—those proximately caused by the violation of N.C.G.S. § 75-1.1.

B.

Next, plaintiffs, assuming that they are entitled to treble damages, contend that they should not be required to elect between the breach of contract damages determined in Issue Two of the jury verdict and the "separate and distinct damages" determined in Issue Six of the jury verdict. Since neither plaintiffs in their petition for discretionary review nor defendant in its response thereto raised the issue of election of remedies, this issue is not properly before the Court, and we decline to address it. *See* N.C. R. App. P. 16(a).

IV.

[3] In their final argument, plaintiffs contend that the Court of Appeals erred by reversing the trial court's award of reasonable attorneys' fees pursuant to N.C.G.S. § 75-16.1. We agree.

The award of attorneys' fees for an unfair or deceptive practice claim under N.C.G.S. § 75-1.1 is governed by N.C.G.S. § 75-16.1:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 75-16.1 (1999).

The Court of Appeals reversed the award of attorneys' fees, holding that there was no violation of N.C.G.S. § 75-1.1. Having concluded that plaintiffs have established such a violation, we reverse that portion of the Court of Appeals' decision that reverses the trial court's award of attorneys' fees. Upon remand, the trial court may consider an award of attorneys' fees for services rendered after the entry of its judgment. *See City Fin. Co. of Goldsboro, Inc. v. Boykin*, 86 N.C. App. 446, 449-50, 358 S.E.2d 83, 85 (1987) (holding that N.C.G.S. § 75-16.1 includes fees for services rendered at all stages of litigation, including appeals).

For the foregoing reasons, we reverse the decision of the Court of Appeals as to the issues set forth herein. Accordingly, we remand this case to the Court of Appeals for further remand to the Superior Court, Dare County, for reinstatement of the trial court's amended judgment.

REVERSED AND REMANDED.

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

TAMMIE DOBSON v. HOLLY HARRIS AND J.C. PENNEY COMPANY, INC.

No. 435PA99

(Filed 16 June 2000)

Libel and Slander— report of suspected child abuse—presumption of good faith—actual malice

Although plaintiff-customer contends defendant-salesperson reported plaintiff's behavior of suspected child abuse or neglect to the Department of Social Services based on retaliatory motives because defendant was upset that plaintiff stated she was going to report defendant to her supervisor for her unprofessional attitude, the Court of Appeals erred in reversing summary judgment in favor of defendants on the slander per se claim because: (1) N.C.G.S. § 7A-543 (now N.C.G.S. § 7B-301) imposes an affirmative duty for anyone with cause to suspect child abuse or neglect to report that conduct to the Department of Social Services; (2) N.C.G.S. § 7A-550 (now N.C.G.S. § 7B-309) provides immunity from liability to those who act in accordance with the reporting statute, and the statute presumes the reporter's good faith; and (3) plaintiff did not meet her burden under N.C.G.S. § 8C-1, Rule 301 to go forward with evidence to show defendant's bad faith or actual malice by her subjective assessment of defendant's motives.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 134 N.C. App. 573, 521 S.E.2d 710 (1999), affirming in part and reversing and remanding in part an order for summary judgment entered 2 July 1998, by Spainhour, J., in Superior Court, Guilford County. Heard in the Supreme Court 18 April 2000.

James A. Dickens for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by Jon Berkelhammer and Shannon R. Joseph, for defendant-appellant Holly Harris.

FREEMAN, Justice.

This case concerns provisions in the North Carolina General Statutes, N.C.G.S. § 7A-543 (1995) (repealed and recodified as

N.C.G.S. § 7B-301 (1999)),[1] that require anyone suspecting child abuse or neglect[2] to report that behavior to the Department of Social Services. Further, this case examines the rigor of statutory immunity from civil or criminal liability for a person reporting such abuse or neglect, as well as that of a statutory presumption of good faith, codified in N.C.G.S. § 7A-550 (now N.C.G.S. § 7B-309 (1999)). It is clear that the legislative intent of these statutes is that citizens are to be vigilant in assuring the safety and welfare of the children of North Carolina. We therefore conclude that such policy compels a significant evidentiary burden for those who challenge the presumption that people who report such abuse or neglect do so in good faith.

The circumstances giving rise to this lawsuit arose in May 1997 in a J.C. Penney department store. Defendant Harris worked at the catalogue-layaway counter. Plaintiff, accompanied by her fifteen-month-old child, came to the store to pay for and pick up an item she had put on layaway. Defendant Harris retrieved the wrong item and mistakenly reported to plaintiff the balance due. Neither she nor defendant Harris realized the error until after plaintiff had written her check. When plaintiff did so, however, she berated Harris, who apologized and retrieved the proper item. As it was more expensive, plaintiff had to rewrite a check for the correct amount. Plaintiff alleged that defendant Harris' unprofessional attitude spurred her to ask for the name of Harris' supervisor; Harris obliged. Meanwhile, plaintiff's child had become restive, and plaintiff reportedly yelled at the child, picked her up off the counter where she had been sitting, and slammed her back down. Shortly thereafter, plaintiff and her child left the store.

The parties' accounts differ as to the actual danger threatened the child by her mother's treatment of her at the store, but it sufficiently alarmed defendant Harris that she subsequently notified a

1. Effective 1 July 1999, for acts committed on or after that date, the General Assembly recodified the North Carolina Juvenile Code by repealing all existing statutory provisions, including those from chapter 7A cited in this opinion, and adding them into new chapter 7B. Act of Oct. 27, 1998, ch. 202, pt. III, secs. 5-6, pt. XIV, sec. 37(b), 1998 N.C. Sess. Laws 695, 742, 895. The acts in this case were committed in May 1997; thus, the pertinent statutes in this opinion reflect the codification in effect at that time. Where applicable, we have added a parenthetical indicating the new statute number.

2. The statute specifies a child "abused, neglected, or dependent, as defined by G.S. 7A-517 [now N.C.G.S. § 7B-101 (1999)]." N.C.G.S. § 7A-543. Our use of the phrase "child abuse or neglect" incorporates by reference the definitions of all three situations as stated in that statute.

representative of the Guilford County Department of Social Services (DSS). The representative requested the name and address of plaintiff, which defendant Harris obtained from plaintiff's check.

Plaintiff was informed by DSS that a complaint had been made against her for abuse and neglect of her child, and an investigation was initiated that ultimately lasted some two months.

In her complaint and affidavit, plaintiff accused defendant Harris of reporting her to DSS in retaliation for her requesting the name of Harris' supervisor, and she sued Harris and J.C. Penney as *respondeat superior* for damages due to slander *per se* and the intentional infliction of emotional distress.

In her answer and verified responses to interrogatories, defendant Harris asserted that she had honestly reported her perception of plaintiff's actions to the proper parties and that her report was "made in good faith, without malice, pursuant to a moral and social duty to make such statements." The qualified privilege afforded such statements, she averred, barred plaintiff's claim for slander *per se*.

The trial court granted defendants' motion for summary judgment. The Court of Appeals affirmed the grant of summary judgment in favor of defendant J.C. Penney and in favor of defendant Harris as to intentional infliction of emotional distress. It reversed summary judgment on plaintiff's claim against defendant Harris for slander *per se* and remanded for trial on that issue.

This Court granted defendant Harris' petition for discretionary review, which raised the single question whether the facts alleged in plaintiff's complaint and affidavit supporting her claim for slander *per se* were sufficient to overcome the statutory presumption of defendant's good faith in reporting child abuse or neglect.

False accusations of crime or offenses involving moral turpitude are actionable as slander *per se*. *Penner v. Elliott*, 225 N.C. 33, 34, 33 S.E.2d 124, 125 (1945). As a preliminary matter, we agree with the Court of Appeals in the case *sub judice*, 134 N.C. App. at 580, 521 S.E.2d at 716, that child abuse is one such crime or offense " 'involv[ing] an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government.' " *Grievance Comm. v. Broder*, 112 Conn. 269, 275, 152 A. 292, 294 (1930) (quoting *Kurtz v. Farrington*, 104 Conn. 257, 262, 132 A. 540, 541 (1926)), *quoted in State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986). It is this

perception of child abuse or neglect as "inherently base" that not only underpins serious criminal classifications for those who commit it, *see* N.C.G.S. §§ 14-318.2 (1999) (Class 1 misdemeanor), 14-318.4 (1999) (felony), but also has prompted the promulgation of laws like those before us here, which recognize that, when a child's welfare is jeopardized, swiftly engaging the state's protective mechanisms is paramount.

Government has no nobler duty than that of protecting its country's lifeblood—the children. For this reason, all fifty states have codified mandatory reporting statutes that impose a duty to report suspected or observed child abuse upon specified persons or institutions, particularly those that work regularly with children. *See* Danny R. Veilleux, *Annotation: Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4th 782 (2000). North Carolina's reporting statutes, however, impose this duty universally—everyone, not just officers of the state, physicians, teachers, administrators, social workers or clergy, shares the state's role as *parens patriae* in this regard for all North Carolina children.

Affirming that distinguishing adults from children for purposes of definitions under the Juvenile Court Act, N.C.G.S. § 7A-278 (1969), passes muster under the Equal Protection Clause, Justice Huskins wrote in *In re Walker*, 282 N.C. 28, 39, 191 S.E.2d 702, 710 (1972), "it is our view that the desire of the State to exercise its authority as *parens patrieae* and provide for the care and protection of its children supplies a 'compellingly rational' justification for the classification." The doctrine of *parens patriae* in the context of parental autonomy versus the child's welfare was similarly noted by Justice Lake in *In re Williams*, 269 N.C. 68, 79, 152 S.E.2d 317, 326 (1967): "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the State as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.", *quoting with approval Prince v. Massachusetts*, 321 U.S. 158, 166, 64, S. Ct. 438, 442, 88 L. Ed. 645, 652 (1949). North Carolina's reporting statutes similarly give rein to this doctrine, providing procedures clearly intended to encourage the participation of all citizens in swiftly detecting and remedying child abuse or neglect.

N.C.G.S. § 7A-543 (now N.C.G.S. § 7B-301) imposes an affirmative duty for anyone with "cause to suspect" child abuse or neglect to

report that conduct to the department of social services. It provides, in pertinent part:

> Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7A-517 [now 7B-101] . . . shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. . . . The report shall include information as is known to the person making it including . . . information which the person making the report believes might be helpful in establishing the need for protective services or court intervention.

N.C.G.S. § 7A-543, para. 1. In order to encourage people to report circumstances that prompt them to believe a child is in jeopardy, N.C.G.S. § 7A-550 (now N.C.G.S. § 7B-309) provides immunity from liability to those who act in accordance with the reporting statute. Notably, in addition, this latter section *presumes* the reporter's good faith:

> Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in a protective services inquiry or investigation, . . . or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for such action provided that the person was acting in good faith. In any proceeding involving liability, *good faith is presumed.*

N.C.G.S. § 7A-550 (1995) (emphasis added).

Read without this last sentence, these two provisions together codify a "qualified or conditionally privileged communication" as recognized at common law, " '[t]he essential elements [of which] . . . are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.' " *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 285, 182 S.E.2d 410, 415 (1971) (quoting 50 Am. Jur. 2d *Libel and Slander* § 195 (1970)).

Just as public policy underpins the immunity provided under these statutes, so in the common law "[t]he great underlying principle of the doctrine of privileged communications rests in public policy." *Alexander v. Vann*, 180 N.C. 187, 189, 104 S.E. 360, 361 (1920), *quoted in Ponder v. Cobb*, 257 N.C. 281, 295, 126 S.E.2d 67, 77 (1962). When an otherwise defamatory communication is made " 'in pur-

suance of a . . . political, judicial, social, or personal [duty], . . . an action for libel or slander will not lie though the statement be false unless actual malice be proved in addition.' " *Ponder*, 257 N.C. at 294-95, 126 S.E.2d at 77 (quoting *Alexander*, 180 N.C. at 189, 104 S.E. at 361). In the common law, this " '[q]ualified privilege extends to all communications made *bona fide* upon any subject-matter . . . in reference to which [the communicator] has some moral or legal duty to perform.' " *Id.* at 295, 126 S.E.2d at 77 (quoting *Alexander*, 180 N.C. at 189, 104 S.E. at 361). "If the court determines as a matter of law that the occasion is privileged, defendant has 'a presumption that the statement was made in good faith and without malice.' " *Clark v. Brown*, 99 N.C. App. 255, 262, 393 S.E.2d 134, 138 (quoting *Shreve v. Duke Power Co.*, 97 N.C. App. 648, 651, 389 S.E.2d 444, 446, *disc. rev. denied*, 326 N.C. 598, 393 S.E.2d 883 (1990)), *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). "To rebut this presumption, the plaintiff must show actual malice." *Phillips v. Winston-Salem/ Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994), *disc. rev. denied*, 340 N.C. 115, 456 S.E.2d 318 (1995); *see also Davis v. Durham City Schs.*, 91 N.C. App. 520, 372 S.E.2d 318 (1988).

Similarly, under sections 7A-543 and -550, when the statutory steps are followed, the responsibility to report suspected child abuse is conjoined with immunity from civil or criminal liability. Equally important, this responsibility, when met by complying with those requisites, is conjoined with the statutory *presumption* that such reports are made in good faith. Thus, the state interest in protecting minors from abuse and neglect is supported by strong statutory incentives to report their occurrence. *See Coleman v. Cooper*, 89 N.C. App. 188, 197-98, 366 S.E.2d 2, 8 (N.C.G.S. § 7A-550 (now N.C.G.S. § 7B-309) is intended to encourage citizens to report suspected instances of child abuse without fear of potential liability if report made in good faith), *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).

Significantly, the reporting statutes together provide immunity not merely *conditional upon* proof of good faith, but a "good faith" immunity, one which endows the reporter with the mandatory[3] *pre-*

3. The difference between "permissive" and "mandatory" presumptions—both rebuttable—is that with the former, the basic fact underlying the presumption has been established, but the presumed fact may or may not be found to exist; in the latter, "[once] the basic fact has been established, the presumed . . . fact *must* be found unless sufficient evidence of its nonexistence is forthcoming." Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 44, at 148 (5th ed. 1998). "[T]he only questions

sumption that he or she acted in good faith. *See Lehman v. Stephens*, 148 Ill. App. 3d 538, 551, 499 N.E.2d 103, 112, 101 Ill. Dec. 738, 745 (1986), *appeal denied*, 113 Ill. 2d 576, 505 N.E.2d 354, 106 Ill. Dec. 48 (1987). ("good faith immunity" provided by statute allows a rebuttable presumption of good faith). Thus, the statute itself relieves the defendant of the burden of going forward with evidence of her good faith and imposes upon the plaintiff the burden to go forward with evidence of the defendant's bad faith or malice. *See* N.C.G.S. § 8C-1, Rule 301 (1999).

One purpose of summary judgment is to bring an action to an early decision on its merits, avoiding the delay and expense of trial when no material facts are at issue. *E.g.*, *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985); *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). This purpose is well served when the movant, who has reported child abuse or neglect in accord with statutory mandate, is accused of defamation for having done so, for there can be no disincentive to report greater than the spectre of the length and expense of a lawsuit.

Briefly, our review of the propriety of summary judgment retraces these rules: Summary judgment is properly granted when the forecast of evidence "reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). A "genuine issue" is one that can be maintained by substantial evidence. *E.g.*, *Kessing*, 278 N.C. 523, 180 S.E.2d 823. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, *e.g.*, *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 423 S.E.2d 444 (1992), or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim, *e.g.*, *Lowe v. Bradford*, 305 N.C. 366, 289 S.E.2d 363 (1982). The movant's papers are carefully scrutinized, *e.g.*, *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972); those of the adverse party are indulgently regarded, *id.* All facts asserted by the adverse party are taken as true, *e.g.*, *Norfolk & W. Ry. Co. v. Werner Indus.*, 286 N.C. 89, 209 S.E.2d 734 (1974), and their inferences must be viewed in the light most favorable to that party, *e.g.*, *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

[as to their distinction are] . . . the quantum of rebutting evidence required and the effect on burdens of proof." *Id.* at 149, n.200.

On her motion for summary judgment on plaintiff's claim of slander *per se*, defendant was entitled to immunity and to the presumption of good faith once she showed she had complied with the reporting statutes by having "cause to suspect"[4] child abuse or neglect and reporting to the DSS (and to none other) as much information known to her that might be helpful in establishing the need for the State to protect or to intervene. Thereafter, plaintiff had the burden of setting forth specific facts "by affidavits or otherwise" showing a genuine issue existed as to whether defendant had made the alleged statements with actual malice. N.C.G.S. § 1A-1, Rule 56(e) (1999). *See, e.g., Towne v. Cope*, 32 N.C. App. 660, 233 S.E.2d 624 (1977) (summary judgment appropriately entered against the plaintiff where the defendant supported motion by establishing affirmative defense of qualified privilege, and the plaintiff, who thereafter had burden of setting forth specific facts "by affidavits or otherwise" showing a genuine issue exists as to whether the defendant made the alleged statements with actual malice, relied simply on the allegations in his complaint).

On a motion for summary judgment, when the movant, charged with slander, is endowed with the presumption of good faith—whether, in this case, by a statutory presumption benefiting reporters of child abuse, *e.g., Davis v. Durham City Schs.*, 91 N.C. App. 520, 372 S.E.2d 318, or by common law presumptions benefiting public officials, *e.g., Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995)—sufficient evidence must be introduced by the opposing party to allow reasonable minds to conclude that the privileged party acted in bad faith or, in the case of slander *per se*, with malice. " 'Every reasonable intendment will be made in support of the presumption,' " *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 687 (1961) (quoting 31 C.J.S. *Evidence* § 146), and " 'the burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence,' " *Styers v. Phillips*, 277 N.C. 460, 473, 178 S.E.2d 583, 591 (1971) (quoting 6 N.C. Index 2d *Public Officers* § 8 (1968)).

The burden of production and the quantum of evidence that must be shown to overcome a presumption is stated in Rule 301 of the North Carolina Rules of Evidence:

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4. Notably, this phrase gives wide margin to whatever prompts the reporter to notify DSS. By contrast with "reasonable cause to believe or suspect" in the statutes of many other states, *see* Danny R. Veilleux, *Annotation: Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse,*

> In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption . . . . The burden of going forward is satisfied by the introduction of evidence *sufficient to permit reasonable minds to conclude that the presumed fact does not exist.* If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved . . . .

N.C.G.S. § 8C-1, Rule 301 (emphasis added); *see also* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 49, at 158 ("Where only the burden of going forward is placed upon the opponent, as in Rule 301, that burden is satisfied by the introduction of evidence 'sufficient to permit reasonable minds to conclude that the presumed fact does not exist.' "). The official commentary to this rule of evidence states:

> Proof of the basic fact [compliance with N.C.G.S. § 7A-543 (now N.C.G.S. § 7B-301)] not only discharges the proponent's burden of producing evidence of the presumed fact [good faith] but also places upon the opponent the burden of producing evidence that the presumed fact does not exist. If the opponent does not introduce any evidence, *or the evidence is not sufficient to permit reasonable minds to conclude that the presumed fact does not exist*, the proponent is entitled to a peremptory instruction[5] that the presumed fact shall be deemed proved.

N.C.G.S. § 8C-1, Rule 301 official commentary (emphasis added).

Evidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise. If plaintiff's forecast of evidence of malice is "not sufficient to permit reasonable minds to conclude" that the reporter's presumed good faith was nonexistent, then summary judgment for defendant is proper.

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73 A.L.R.4th 782, § 18 (2000), this phrase does not call for scrutiny, analysis, or judgment by a finder of fact.

5. In the context of a summary judgment proceeding, entitlement to a "peremptory instruction" means simply that the fact is deemed proved for purposes of the burden of production.

It was so in this case. In her answer defendant Harris asserted the affirmative defense of "qualified immunity," or, more precisely, a statutory, good-faith immunity based upon her compliance with N.C.G.S. §§ 7A-543 and -550. That she did so comply was supported by facts described in her responses to plaintiff's interrogatories, and those particular facts were uncontradicted in the materials before the trial court.

In order to overcome the presumption of good faith that by virtue of the statute inhered to defendant's properly reporting what she saw, it was incumbent on plaintiff to show defendant's actual malice. "If plaintiff cannot meet his burden of showing actual malice, . . . privilege . . . bars any recovery for the communication, even if the communication is false." *Clark*, 99 N.C. App. at 263, 393 S.E.2d at 138.

> Actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity.

Kwan-Sa You v. Roe, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990) (citation omitted). Plaintiff offered no evidence of this nature. In her affidavit, plaintiff stated that Harris reported plaintiff's behavior to DSS "because she was upset and angry that I stated to her that I was going to report her to her supervisor for her unprofessional attitude[]" "with the intent to cause me embarrassment and humiliation and harassment." At best, plaintiff described retaliatory motives for defendant's report. These conclusory averments rest, however, not on experienced or otherwise substantiated fact, but on plaintiff's subjective assessment of defendant's motivations. They are not in themselves "sufficient to permit reasonable minds to conclude that the presumed fact does not exist." N.C.G.S. § 8C-1, Rule 301; *see also Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976) (Rule 56(e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts); *cf. Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979) (good faith *not* presumed; complaint specifically alleged principal had falsely accused the plaintiff of distributing alcoholic beverages on school premises, then maliciously and recklessly published the rumors to the plaintiff's fellow employees notwithstanding the plaintiff's vigorous denial of these accusations and of the rumors upon which they were based; such allegations at the pleading stage served to negate the good-faith element of qualified privilege).

Although summary judgment is rarely appropriate in actions like defamation in which the litigant's state of mind, motive, or subjective intent is an element of plaintiff's claim, *e.g.*, *Proffitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 371 S.E.2d 292 (1988) (libel), it is most appropriate here where plaintiff, who, assuming the burden of production to negate defendant's presumption of good faith with evidence of actual malice, sets forth no specific fact showing an issue as to defendant's motive, but rests upon bare allegation and suspicion.

We hold that the trial court, in surveying the materials before it on defendant's motion for summary judgment, properly granted summary judgment to defendant Harris on the issue of slander *per se*. Viewed in the light most favorable to the nonmovant, the evidence forecast in the parties' pleadings, affidavits, and answers to interrogatories shows no genuine issue of material fact. Because defendant's compliance with the reporting statutes entitled her to immunity from civil liability, plaintiff's claim against her for slander *per se* was barred. Further, the statutory presumption of defendant's good faith remained unrebutted where plaintiff failed to adduce facts sufficient to permit reasonable minds to conclude that defendant acted with actual malice.

For the foregoing reasons, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. EDWARD LEMONS

No. 377A95-2

(Filed 16 June 2000)

Constitutional Law— right of confrontation—nontestifying codefendant's statements—capital sentencing proceeding—no plain error

The trial court did not violate defendant's right of confrontation in a capital sentencing proceeding by admitting a nontestifying codefendant's statements that defendant shot the victims because: (1) defendant did not object to the admission of the statements on constitutional grounds at trial, which requires

plain error review and not the constitutional error standard; (2) in a capital sentencing proceeding where the Rules of Evidence do not apply, a trial court has great discretion to admit any evidence it deems relevant to sentencing; (3) the statements were not admitted during the guilt-innocence phase of the trial; (4) the statements were offered by the State in rebuttal only after defendant's introduction of hearsay evidence in support of the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance and the nonstatutory mitigating circumstance that defendant was not the actual shooter; and (5) there was evidence in addition to the codefendant's statements supporting a jury decision not to find the (f)(4) statutory mitigating circumstance or the nonstatutory mitigating circumstances that defendant was not the shooter.

On remand by the United States Supreme Court, 527 U.S. 1018, 144 L. Ed. 2d 768, (1999), for further consideration in light of *Lilly v. Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117 (1999). Heard on remand in the Supreme Court 12 October 1999.

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

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

ORR, Justice.

Defendant was convicted on two counts each of first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon at the 25 July 1995 Criminal Session of Superior Court, Wayne County, for his participation in the shooting deaths of Margaret Strickland and Bobby Gene Stroud. Upon the jury's recommendation, the trial court sentenced defendant to death for each murder; the trial court also sentenced defendant to consecutive terms of forty years' imprisonment for each count of kidnapping and robbery. On appeal, this Court found no error, affirming the convictions and the sentences imposed by the trial court. *State v. Lemons*, 348 N.C. 335, 501 S.E.2d 309 (1998).

Subsequently, the United States Supreme Court vacated the sentences of death and remanded the case to this Court for further consideration in light of *Lilly v. Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117 (1999). *Lemons v. North Carolina*, 527 U.S. 1018, 144 L. Ed. 2d 768

(1999). This Court on 9 July 1999 ordered the parties to file supplemental briefs addressing the *Lilly* issue.

In its prior opinion, this Court summarized the evidence supporting defendant's convictions and sentences. *Lemons*, 348 N.C. 335, 501 S.E.2d 309. We will not repeat the evidence here except as is necessary to discuss the question before us on remand from the United States Supreme Court.

At the guilt-innocence phase of defendant's trial, Lemons was found guilty, *inter alia*, of the first-degree murders of both Margaret Strickland and Bobby Gene Stroud based upon "malice, premeditation, and deliberation" and under the felony murder rule in the perpetration of robbery with a firearm. At the capital sentencing proceeding, defendant submitted the N.C.G.S. § 15A-2000(f)(4) statutory mitigating circumstance that the murder "was actually committed by another person and the defendant was only an accomplice in and/or an accessory to the murder and his participation in the murder was relatively minor." Defendant also submitted a nonstatutory mitigating circumstance that "defendant was not the actual shooter." Both the statutory and nonstatutory mitigating circumstances were submitted for each murder.

The issue before this Court on remand from the United States Supreme Court arose out of the submission of the (f)(4) mitigating circumstance and the nonstatutory mitigating circumstance referenced above. The following facts, as stated in our prior opinion, explain the context in which the Confrontation Clause issue arguably arose at trial:

> On 7 July 1995, defense counsel filed a notice of intent, "in the event that the co-defendants in this case, Kwame Teague and Larry Leggett, take the 5th Amendment," to introduce hearsay evidence through James Davis, Antoine Dixon, and Leshuan Lathan. The State responded with a notice of intent to introduce hearsay testimony in the form of statements of codefendants Larry Leggett and Kwame Teague if the trial court allowed the hearsay evidence proffered by the defense.
>
> After extensive *voir dire*, the trial court ruled that defendant could offer the hearsay evidence of Antoine Dixon and James Davis. The trial court concluded that defendant's evidence was relevant to the issue of mitigation of defendant's punishment. The trial court also noted the State's notice of intent and indicated

that it would be allowed to proceed "if the evidence so shows and so supports it."

Subsequently, defendant called both Leggett and Teague to the stand. Each, respectively, claimed his Fifth Amendment privilege against self-incrimination. Defendant then offered the testimony of both Dixon and Davis in support of the (f)(4) statutory mitigating circumstance that "[t]he defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor," N.C.G.S. § 15A-2000(f)(4) (1997), and the nonstatutory mitigating circumstance that "defendant was not the actual shooter of Margaret Strickland or Bobby Gene Stroud."

Subsequently, both Dixon and Davis were called to the stand. Dixon testified that Leggett stated that he (Leggett), Teague, and defendant were involved in the Strickland/ Stroud crimes. Dixon further testified that Leggett told him that Teague shot the man and that Leggett shot the woman. Following Dixon's testimony, Davis also testified that Leggett told him that Teague shot the man and that Leggett shot the woman.

In rebuttal, the State offered two statements that Leggett made to law enforcement officers and two statements that Teague made to law enforcement officers. The confessions of both men allege that defendant personally shot the victims. . . . [D]efendant argues that Teague's confessions were inadmissible because they are unreliable and are not inconsistent with Teague's own hearsay declaration that he planned to "put [the crimes] on Ed [defendant]."

Lemons, 348 N.C. at 362-63, 501 S.E.2d at 326 (alteration in original).

Defendant's attorney made the following objection to the admission of Teague's statements at the sentencing proceeding of defendant's trial:

Your Honor, we at this point would like an objection. I believe [the prosecutor] is going for on rebuttal to put forth the two statements given by Kwame Teague and our objection in this matter would be that our understanding on the earlier hearing is we said [the prosecutor] was offering these pursuant to Rule 806 of the Evidence Code for impeachment of testimony on Kwame Teague. The only testimony in this matter in reference to him was that he was going to pin it, that he and Larry were going to pin it

> on Edward or Ed and we contend that does not sufficiently open the door to warrant an offer in rebuttal from the State of the two statements of Kwame Teague. That's the purpose of our objection.

While defendant clearly objected to the admission of the two statements made by Teague on evidentiary grounds, we are unable to find any indication that at trial defendant cited the Sixth Amendment or any constitutional grounds as the basis for his objection to the admission of Teague's two statements into evidence.

In defendant's initial brief to this Court, he argued that he "filed [with the trial court] a motion *in limine* to suppress the admission of the codefendant's confessions based in part on possible confrontation problems" and that "following the court's ruling on admissibility, the defendant entered a line objection to Teague's confessions." Thus, according to defendant in his earlier appeal to this Court, the Confrontation Clause issue was properly preserved for appeal.

In actuality, defendant filed a pretrial motion to suppress statements of the codefendants. In paragraph eight of defendant's pretrial motion to suppress, defendant argued to the trial court that

> [t]he statements of Leggett and Teague, if offered by the State in a joint trial of all three co-defendants[,] would be inadmissible under the rules laid down in *Bruton v. United States*, 391 U.S. 123[, 20 L. Ed. 2d 476] (1968) and *N.C.G.S. § 15A-927(c)(1)*, and in a trial of this defendant alone on the above referenced charges would be inadmissible hearsay unless the maker of such statements testifies at this defendant's trial.

The trial court never ruled on this motion because the State did not try the defendants in a joint trial and never attempted to introduce the statements at the guilt-innocence phase of defendant's trial. Instead, Teague's statements were introduced during the sentencing proceeding of defendant's trial only as rebuttal to the hearsay evidence offered by defendant in support of the (f)(4) mitigating circumstance and a nonstatutory mitigating circumstance that defendant requested. As noted above, defendant never objected to the admission of Teague's statements on any constitutional grounds at the sentencing proceeding of trial.

This Court has held that " 'constitutional question[s] . . . not raised and passed upon in the trial court will not ordinarily be considered on appeal . . . [and] when there is . . . a motion to suppress

a confession, counsel must specifically state to the court before *voir dire* evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence.' " *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

Even though this Court has held that constitutional issues not properly objected to at trial are waived on appeal, Rule 2 of the North Carolina Rules of Appellate Procedure provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

This Court has a long precedent of reviewing the record of capital cases to ascertain whether the trial court committed reversible error. *See State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (although the defendant failed to include the exact words "plain error" in his brief, he succeeded in presenting and arguing the issue fully and in establishing conclusively that fundamental error occurred); *State v. Payne*, 328 N.C. 377, 394, 402 S.E.2d 582, 592 (1991) (although the defendant waived his right to have an issue considered on appeal by failing to object or move for mistrial, because this was a capital case, the Court chose to address the issue).

In response to the mandate by the United States Supreme Court to reconsider this case in light of *Lilly* and in keeping with the Court's long precedent of reviewing unpreserved issues in capital cases, we will review the question of whether defendant's Confrontation Clause rights were violated by the admission of Teague's statements. Nonetheless, as we discuss later in the opinion, because there was no issue of constitutional error preserved at trial, we review this question using a plain error analysis.

"The question presented in [*Lilly*] was whether the accused's Sixth Amendment right 'to be confronted with the witnesses against him' was violated by admitting into evidence at his trial a nontestifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the accused." *Lilly*, 527 U.S. at 120, 144 L. Ed. 2d at 124.

The evidence presented at Lilly's trial showed that in early December 1995, Benjamin Lee Lilly (petitioner), his brother Mark Lilly (Mark), and Gary Wayne Barker (Barker) went on a two-day crime spree that included several robberies. *Id.* In the course of these events, one of the three men shot and killed Alex DeFilippis. *Id.* The three men were taken into custody and questioned separately. *Id.* While petitioner did not mention the murder during questioning and said that the other two men had forced him to commit the robberies, Mark and Barker gave different accounts of the events, but both maintained that petitioner killed DeFilippis and planned the robberies. *Id.* at 120-21, 144 L. Ed. 2d at 124.

The police interrogated Mark twice, and during both interviews, Mark repeatedly emphasized that he was drunk during the entire crime spree. *Id.* at 121, 144 L. Ed. 2d at 124. Mark admitted that he stole alcohol during both robberies and at one point handled a gun. *Id.* He also conceded that he was present during Alex DeFilippis' murder. *Id.*

After the police indicated to Mark that he might get a life sentence for his participation in the crimes, he claimed that petitioner and Barker had stolen some guns during the initial robbery, *id.*, and that "Barker had pulled a gun in one of the robberies," *id.* at 121, 144 L. Ed. 2d at 125. Mark "further insisted that petitioner had instigated the carjacking and that he (Mark) 'didn't have nothing to do with the shooting' of DeFilippis." *Id.* Finally, "Mark stated that petitioner was the one who shot DeFilippis." *Id.*

"The Commonwealth of Virginia charged petitioner with several offenses, including the murder of DeFilippis, and tried him separately. At trial, the Commonwealth called Mark as a witness, but he invoked his Fifth Amendment privilege against self-incrimination." *Id.* Thereafter, the Commonwealth offered as evidence Mark's statements made to the police subsequent to his arrest. *Id.* The Commonwealth argued that Mark's statements were admissible as declarations against penal interest by an unavailable witness. *Id.* Petitioner objected, arguing that the statements were not actually against Mark's penal interest, but instead shifted responsibility for the crimes to Barker and to petitioner in violation of the Sixth Amendment's Confrontation Clause. *Id.* at 121-22, 144 L. Ed. 2d at 125. "The trial judge overruled the objection and admitted tape recordings and written transcripts of [Mark's] statements in their entirety." *Id. at* 122, 144 L. Ed. 2d at 125. The jury found petitioner guilty of numerous crimes, including capital murder, and recom-

mended a sentence of death for the murder conviction, which the court imposed. *Id.*

"The Supreme Court of Virginia affirmed petitioner's convictions and sentences." *Id.* "[T]he court . . . concluded that Mark's statements were declarations of an unavailable witness against penal interest; that the statements' reliability was established by other evidence; and, therefore, that they fell within an exception to the Virginia hearsay rule. The court then turned to petitioner's Confrontation Clause challenge." *Id.* The Supreme Court of Virginia noted that " '[w]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.' " *Lilly v. Commonwealth*, 255 Va. 558, 574, 499 S.E.2d 522, 534 (1998) (quoting *White v. Illinois*, 502 U.S. 346, 356, 116 L. Ed. 2d 848, 859 (1992)). The Virginia court further noted that "admissibility into evidence of the statement against penal interest of an unavailable witness is a 'firmly rooted' exception to the hearsay rule in Virginia." *Id.* at 575, 499 S.E.2d at 534. Thus, the court held that the trial court did not err in admitting Mark's statements into evidence. *Id.* Finally, the Virginia court noted the fact "[t]hat Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility." *Id.* at 574, 499 S.E.2d, at 534.

The United States Supreme Court granted defendant's request for certiorari. *Lilly v. Virginia*, 527 U.S. at 123, 144 L. Ed. 2d at 126. All nine justices of the Supreme Court concurred in the decision that "[t]he admission of the untested confession of Mark Lilly violated petitioner's Confrontation Clause rights." *Id.* at 139, 144 L. Ed. 2d at 136. The Court then reversed the Supreme Court of Virginia and remanded the case to that court to "assess the effect of [the] erroneously admitted evidence in light of substantive state criminal law," *id.*, and "to consider in the first instance whether the Sixth Amendment error was 'harmless beyond a reasonable doubt,' " *id.* at 140, 144 L. Ed. 2d at 136 (quoting *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 711 (1967)). While all nine Justices agreed that petitioner's Confrontation Clause rights were violated by the admission of Mark Lilly's confession, the opinion was not unanimous as to the reasoning. Even though the Court ruled that a co-defendant's inculpating statements were precluded in *Lilly*, it reiterated the Court's long-standing position that this type of evidence was not precluded in all circumstances. The plurality noted that

> [w]hen a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," the Sixth Amendment's residual "trustworthiness" test allows the admission of the declarant's statements.

Id. at 136, 144 L. Ed. 2d at 134 (quoting *Idaho v. Wright*, 497 U.S. 805, 820, 111 L. Ed. 2d 638, 655 (1990)).

We begin our review of the issue on remand by noting that the facts surrounding petitioner's claim in *Lilly* are quite different from the facts surrounding defendant's claim in this case. In *Lilly*, the Commonwealth admitted hearsay evidence of a codefendant at the guilt-innocence phase of petitioner's trial that identified petitioner as the shooter. Petitioner objected to admission of the hearsay evidence at trial on Confrontation Clause grounds, and the trial court overruled petitioner's objection. Petitioner was then convicted of capital murder and sentenced to death. After the Supreme Court of Virginia upheld petitioner's convictions and sentences, the United States Supreme Court reversed the Virginia Court because it felt petitioner's Confrontation Clause rights had been violated. The United States Supreme Court then remanded the case to the Virginia Court to review the case under the constitutional error standard and to decide whether the Sixth Amendment error was harmless beyond a reasonable doubt.

As has been noted above, in the case *sub judice*, Teague's statements were not admitted during the guilt-innocence phase of the trial, but were admitted in rebuttal to defendant's introduction of hearsay evidence during the sentencing proceeding of trial. Additionally, defendant did not object to the admission of the statements on constitutional grounds at trial. As we will discuss in detail below, defendant's failure to object at trial and properly preserve the constitutional issue for appeal requires us to review this potential constitutional error under the plain error standard of review, not the constitutional error standard required by the United States Supreme Court on remand in *Lilly*.

We further note as stated in our prior opinion in this case:

> During the sentencing proceeding, the State "must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support

> the imposition of the death penalty." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Further, "[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. 1, 21, 473 S.E.2d 310, 320 (1996), *cert. denied*, [520] U.S. [1122], 137 L. Ed. 2d 339 (1997).

Lemons, 348 N.C. at 363-64, 501 S.E.2d at 326. Additionally, we note that "[i]n a capital sentencing proceeding, where the Rules of Evidence do not apply, a trial court has great discretion to admit *any* evidence it 'deems relevant to sentenc[ing].' " *State v. Warren*, 347 N.C. 309, 325, 492 S.E.2d 609, 618 (1997) (quoting *Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998).

As a preliminary point, it is unnecessary to reevaluate whether Teague's statements were properly admitted under Rule 806 of the North Carolina Rules of Evidence. The trial court ruled that evidence presented by defendant during sentencing attacked Teague's credibility; thus, evidence of statements made by Teague inconsistent with the hearsay statements submitted by defendant was admissible for impeachment purposes. *See Lemons*, 348 N.C. at 364, 501 S.E.2d at 326-27. However, because "[t]he Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule," *Wright*, 497 U.S. at 814, 111 L. Ed. 2d at 651, we must review the circumstances surrounding the admission of Teague's statements into evidence.

As noted above, defendant failed to properly preserve at trial the issue of whether his Confrontation Clause rights were violated. Thus, we must evaluate the trial court's actions and consider the United States Supreme Court's holding in *Lilly* under a plain error analysis to determine whether defendant deserves a new capital sentencing proceeding. *See* N.C. R. App. P. 10(c)(4); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> [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."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)).

In our review of the record for plain error, we must determine whether the admission of Teague's statements at defendant's sentencing hearing, if error, was so egregious and prejudicial that defendant was not able to receive a fair sentencing proceeding as a result of the trial court's decision to let the statements in as evidence. *See id.* A review of the whole record reveals no "plain error."

Defendant was found guilty of the first-degree murders of Margaret Strickland and Bobby Gene Stroud. Teague's statements that defendant personally shot the victims were not admitted into evidence until the sentencing proceeding of the trial. The statements were offered by the State only after defendant offered into evidence in support of the (f)(4) statutory mitigating circumstance and the nonstatutory mitigating circumstance that defendant was not the actual shooter the hearsay evidence of Antoine Dixon and James Davis that Teague shot the victims. Teague's statements were offered merely in rebuttal to hearsay evidence introduced by defendant that defendant was not the actual shooter and played only a minimal role in the victims' deaths.

Finally, contrary to defendant's arguments, there was evidence in addition to Teague's statements supporting a jury decision not to find the (f)(4) mitigating circumstance or the nonstatutory mitigating circumstance that defendant was not the shooter. The jury in defendant's sentencing hearing was the same as in the guilt-innocence phase, and it was allowed to consider all evidence from both the guilt-innocence phase and the sentencing proceeding of defendant's case. During the State's case-in-chief, Jerry Newsome testified that defendant "said that he made a lick and something had went [sic] wrong and he had to kill two white people." There was also circumstantial evidence from which the jury could infer that defendant was the one who shot and killed the victims. The following circumstantial

evidence was presented at defendant's trial: defendant's access to and use of the gun that killed Strickland, chemical indication of blood on defendant's shoes, defendant's admission to being at the crime scene when the victims were killed, and defendant's admission that he lied in several of his statements to the police.

After reviewing *Lilly* and the circumstances surrounding the admission of Teague's statements during defendant's sentencing hearing, we conclude that defendant has not shown plain error by the admission of the statements. The facts surrounding the admission of the challenged statements are not so egregious as to result in a miscarriage of justice by their admission. Defendant received a fair trial, and we conclude that our original decision was correct.

NO ERROR.

KYLE J. LANNING, EMPLOYEE v. FIELDCREST-CANNON, INC., SELF-INSURED, EMPLOYER

No. 360PA99

(Filed 16 June 2000)

1. Workers' Compensation— wage-earning capacity—test for self-employed injured employee

The test for determining whether a self-employed injured employee has wage-earning capacity is that the employee: (1) must be actively involved in the day-to-day operation of the business; and (2) must utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education, and experience.

2. Workers' Compensation— findings of fact—determination by Industrial Commission

In a workers' compensation case concerning whether plaintiff-employee's income from his multilevel marketing distributorship constitutes wages, the Court of Appeals' opinion is remanded for further findings by the Commission because: (1) the Court of Appeals usurped the Commission's fact-finding role, since the determination of whether plaintiff's management skills are marketable and whether plaintiff is actively involved in the

business' personal management are questions of fact; and (2) the Commission failed to make findings necessary to determine plaintiff's wage-earning capacity.

3. Workers' Compensation— total disability—hybrid award—no statutory provision for offsets

Although this issue was not reached by the Court of Appeals, the Industrial Commission erred in a workers' compensation case by crafting a hybrid award which provided for total disability payments under N.C.G.S. § 97-29 to be offset by a credit to defendant for any net earnings from plaintiff's attempt to become self-employed because: (1) offsets of this nature are contrary to the provisions of N.C.G.S. § 97-30, providing for the payment of partial disability benefits; and (2) absent a provision for a statutory offset, N.C.G.S. § 97-30 is applied to plaintiffs who have some wage earning capacity, and are thus, only partially disabled.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 134 N.C. App. 53, 516 S.E.2d 894 (1999), affirming in part and reversing in part an opinion and award of the North Carolina Industrial Commission entered 14 November 1997 and remanding for further proceedings. Heard in the Supreme Court 17 February 2000.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Jeri L. Whitfield and Manning A. Connors, for defendant-appellee.

PARKER, Justice.

The issue before this Court is whether the Court of Appeals erred in holding that plaintiff-employee's income from his multilevel marketing distributorship constitutes wages and that the Industrial Commission, therefore, erred in determining that plaintiff is totally disabled under N.C.G.S. § 97-29.

On 11 March 1991 a deputy commissioner awarded plaintiff compensation for total disability in the amount of $256.45 per week "for the remainder of his life, his return to work or a change in his condition, whichever first occurs." On 1 July 1992 the Industrial Commission adopted and affirmed the deputy commissioner's opinion and award. Defendant paid total disability benefits to plaintiff

pursuant to the full Commission's opinion and award from 14 December 1988 until 5 October 1994. Plaintiff had returned to full-time employment on or about 5 September 1994.

While working full-time, plaintiff on 10 July 1995 filed with the Commission a motion for modification based on a change of condition, seeking compensation for permanent partial disability pursuant to N.C.G.S. § 97-31. On 21 July 1995 defendant-employer, Fieldcrest-Cannon, Inc., filed a cross-motion seeking an opinion and award reflecting (i) that plaintiff returned to full-time employment at wages greater than he earned at the time of his injury, and (ii) that plaintiff is not entitled to any benefits for permanent partial disability under N.C.G.S. § 97-31.

Defendant requested a hearing to contest plaintiff's motion for modification. A deputy commissioner heard the matter on 5 December 1996, made findings of fact, and concluded that plaintiff, having already received total disability benefits from January 1986 until October 1994,[1] is precluded from electing additional compensation for permanent partial disability. Further, although neither party filed a motion concerning total disability compensation, the deputy commissioner concluded that plaintiff has not experienced a substantial change of condition that entitles him to a reinstatement of total disability benefits. Finally, the deputy commissioner concluded that defendant is entitled to a credit of $894.98 for compensation mistakenly paid to plaintiff while he was employed by Dunning Metal Innovations.

On 14 November 1997 the full Commission reversed the opinion and award "based upon an erroneous interpretation of law and not on any finding of credibility with respect to testimony." The full Commission's findings of fact determined, *inter alia*, the following: Plaintiff is a 36 year old male. Prior to 30 December 1987 he had been employed as a heavy equipment operator, weaver, dump truck driver, and fork lift operator, all of which jobs required a medium to heavy level of exertion and skills learned on the job. Plaintiff completed eight years of education and obtained his GED certificate after he was injured. On 30 December 1985 plaintiff sustained an injury to his

1. The deputy commissioner concluded that plaintiff received compensation for his total disability shortly after plaintiff's original injury forced him to stop working in January 1986. However, the original opinion and award adopted and affirmed by the full Commission in July 1992 ordered defendant to pay plaintiff compensation for total disability in the amount of $256.45 per week beginning on 14 December 1988.

back. Plaintiff underwent two surgeries and undertook physical therapy and work-hardening programs. When plaintiff was discharged from medical treatment, he had a disability rating of 25-30% permanent partial disability to the back.

The Commission further found that in September 1993 plaintiff enrolled in a machinist course at Davidson Community College. After completing this course, plaintiff began working as a machinist with Dunning Metal Innovations on 5 September 1994. The employer's lifting requirements exceeded plaintiff's restrictions, and plaintiff was unable to continue after a month. In October 1994 plaintiff began working full time as a machinist at Everette Machine Company. Plaintiff was able to adapt successfully to this job for over a year because the employer was able to structure plaintiff's job within plaintiff's functional limitations which restricted his ability to sit, stand, and lift. In late 1995 or early 1996, plaintiff's job requirements increased. Plaintiff was promoted to shop foreman; but the growth of Everette's business required plaintiff to perform repetitive lifting in excess of plaintiff's limitations, and the employer was unable to provide plaintiff with the necessary assistance with lifting to assure that plaintiff would be able to perform the job without further injury to his back. Plaintiff's back began bothering him after the job requirements were changed. He lifted seventy-pound sheet metal with a coemployee ten to twenty times a day, and once or twice he lifted the seventy-pound sheet metal by himself. In April 1996 plaintiff suffered a relapse caused by the exertional requirements of the job. The doctor required plaintiff to stay out of work at least temporarily following physical therapy. At this time plaintiff determined that his employer could no longer accommodate the job plaintiff had been performing, and plaintiff did not return to work or seek another machinist job since his restrictions required accommodations that most machinist shops were unlikely to meet. The full Commission made the following further finding of fact:

> 8. Since April, 1996, Employee-Plaintiff's sole income has been as a marketing representative or distributor for Market America. This venture is described as a "multi-level marketing" approach in which representatives purchase a distributorship, sell products and recruit other distributors. Employee-Plaintiff has been expending approximately 10-20 hours per week in this venture, earning $300.00-$600.00 per month in commissions. If this venture is successful, Employee-Plaintiff hopes to spend less time actively soliciting accounts, as his compensation is based

upon (1) his own sales; [or] (2) commissions based upon sales of [other] distributors he has recruited. The Full Commission takes "judicial" notice that US Chamber of Commerce statistics show that most new small businesses fail within the first five years, and multi-level marketing schemes have a high failure rate. Plaintiff's testimony that he might eventually be able to make a living through this scheme thus is found by the Full Commission to be a triumph of hope over experience and thus not highly credible.

Based on these findings of fact, the Commission made the following conclusions of law among others:

1. NCGS § 97-47 provides in part that, "Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article . . . [.]" Plaintiff has undergone substantial, material changes of condition that entitle him to a reinstatement of disability benefits pursuant to NCGS § 97-29, subject to a credit for net earnings from his self-employment enterprise.

While he was able to go back to work for a time after retraining, the job he performed was not ordinarily available in the open market in that machinists are ordinarily required to do lifting beyond plaintiff's lifting restrictions. Additionally, he ultimately was unable to perform the job because of his earlier compensable injury. The substantial and material change of condition is the inability to continue earning wages at the machinist job because the job changed so that he could no longer do it under his physician's work restrictions coupled with the strong inference that similar jobs within his restrictions were unavailable in the economy.

. . . .

3. Employee-Plaintiff originally elected to seek recovery of compensation under N.C.G.S. § 97-29, and successfully prevailed in establishing that he was totally and permanently disabled according to the holdings of the North Carolina Supreme Court in *Whitley vs. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986), and *Peoples vs. Cone Mills Corp.*, 316 N.C. 426, [342]

S.E.2d 798 (1986). This resulted in the Opinion and Award of the Full Commission on July 1, 1992, affirming the Award and Opinion of the Deputy Commissioner on March 11, 1991, both of which were based in part upon a combination of Employee-Plaintiff's exertional limitations in which the Commission found that Employee-Plaintiff lacked the strength and durability to perform work within his residual functional capacity, and in part upon his non-exertional limitations which included Employee-Plaintiff's limited education and learning disability. The Award and Opinion granted Employee-Plaintiff compensation continuing until his "return to work."

4. Employee-Plaintiff thereafter took affirmative steps to overcome his non-exertional limitations through successful completion of a skilled trade course qualifying him as a machinist. During the same period of time, his strength and durability gradually increased to the degree that he became able to sit and stand for the requisite periods of time necessary to perform full time gainful employment on a sustained basis. Through his own efforts, Employee-Plaintiff thereafter successfully returned to work as defined in the Workers' Compensation Act. This event constituted a change of condition creating the presumption that his disability ended. *Tucker vs. Lowde[r]milk*, 233 N.C. [185], 63 S.E.2d 109 (1951), and compensation under the Award was properly terminated.

5. It is important to note that, at this point, Employee-Plaintiff's successful adaptation to full time gainful employment did not arise from an amelioration of Employee-Plaintiff's remaining residual functional capacity, nor otherwise reflect an increase in his remaining functional limitations restricting his ability to lift. The evidence tends to show that once Employee-Plaintiff returned to full-time work, this required him to apply essentially all of []his strength and durability to meet the requirements of his work[] and reduced his ability to engage in normal non-work activities. Furthermore, for Employee-Plaintiff to work at each of his two jobs as a machinist, his employers had to specifically adapt and tailor the job to meet Employee-Plaintiff's restrictions for occasional and repetitive lifting. Neither of these jobs as Plaintiff performed them [was a job] available in significant numbers in the local or national economy. In early 1996, Employee-Plaintiff experienced two further changes in circumstances. First, his employer could no longer adapt or tailor

Employee-Plaintiff's job to Employee-Plaintiff's exertional restrictions. Employee-Plaintiff attempted to continue his employment, but the increased exertion[] directly resulted in a relapse and deterioration of Employee-Plaintiff's medical condition, which caused Employee-Plaintiff to cease work. These substantial and material changes of conditions constitute a recurrence of Employee-Plaintiff's disability cognizable under NCGS § 97-47, which has the following implications: If Employee-Plaintiff is unable to work and earn any wages, he is totally disabled. If he is able to work and earn some wages, he is partially disabled. *Robinson vs. J.P. Stevens and Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982). The disability of an employee is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of his injury. *Hill vs. [Du Bose]*, 234 N.C. 446, 67 S.E.2d 371 (1951), *Robinson vs. J.P. Stevens and Co., Supra.*

6. Employee-Plaintiff's earnings from his venture as a distributor for Market America are not "wages" because these earnings are not directly related to the ability of Employee-Plaintiff to engage in full-time employment, nor to any measurable time or effort expended by Employee-Plaintiff. Nor can this be classified as "employment", as there is no requirement[] that Employee-Plaintiff devote any time or effort to this venture. At most, any income from Employee-Plaintiff's venture as a Market America distributor would properly be classified as income for which Defendant would be entitled to be given credit. *Barnhardt vs. Yellow Cab Co.*, 266 N.C. 419[, 146] S.E.2d 479 (1966). Additionally, US Chamber of Commerce statistics show that the majority of newly-created small enterprises fail as economic entities within the first five years of their life. People do not ordinarily undergo the expense of starting such a risky entrepreneurial experience unless they are unable to obtain a paying job in the real economy. Therefore, creating a new enterprise is more indicative of inability to be employed in the workplace than it is indicative of ability.

The Commission awarded plaintiff permanent total compensation at the rate of $256.45 per week from 22 April 1996 and continuing into the future for those weeks in which plaintiff is unable to earn any wages subject to a credit to defendant for any net earnings from plaintiff's attempt to become self-employed. This compensation is to continue until plaintiff obtains a job earning as much as he earned at

the time he was originally injured or until further orders of the Commission. Defendant appealed to the Court of Appeals.

In a unanimous decision, the Court of Appeals reversed the Commission's award of total disability benefits. *Lanning v. Fieldcrest-Cannon, Inc.*, 134 N.C. App. 53, 61, 516 S.E.2d 894, 900 (1999). The Court of Appeals held that the Commission erred in its conclusion that plaintiff's marketing distributorship is not "employment" and that plaintiff's earnings through Market America are not "wages." *Id.* The Court of Appeals also affirmed (i) the Commission's conclusion that plaintiff experienced a substantial change of condition under N.C.G.S. § 97-47, and (ii) the Commission's finding that machinist jobs within plaintiff's physical capacities were not available in the open market and that plaintiff was not likely to enjoy the same accommodations at other machinist jobs as he did at Everette. *Id.* at 59, 516 S.E.2d at 899. However, defendant did not seek, and this Court did not grant, discretionary review of these last two issues. Accordingly, those issues are not before this Court; and the determination of the Court of Appeals becomes the law of the case as to those issues.

The Workers' Compensation Act ("the Act") defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C.G.S. § 97-2(9) (1999). "Compensation must be based upon loss of wage-earning power rather than the amount actually received." *Hill*, 234 N.C. at 447-48, 67 S.E.2d at 372. If the wage-earning power is only diminished, the employee is entitled to benefits under N.C.G.S. § 97-30. *See Gupton v. Builders Transp.*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). If the capacity to earn is "totally obliterated," the employee may recover under N.C.G.S. § 97-29. *See id.* The focus of this determination is not on "whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff [him]self has such capacity." *Little v. Anson County Sch. Food Serv.*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978). The earning capacity of an injured employee must be evaluated "by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity." *Peoples*, 316 N.C. at 437, 342 S.E.2d at 805-06. The employee's age, education, and work experience are factors to be considered in determining the person's capacity to earn wages. *Little*, 295 N.C. at 532, 246 S.E.2d at 746.

In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the Commissions's legal conclusions are fully reviewable. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). If the findings of the Commission are insufficient to determine the rights of the parties, the appellate court may remand to the Industrial Commission for additional findings. *See Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684. "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Addressing the issue of whether plaintiff's earnings from his Market America distributorship constitute wages, the Court of Appeals relied on its prior decision in *McGee v. Estes Express Lines*, 125 N.C. App. 298, 480 S.E.2d 416 (1997). In *McGee* the plaintiff-employee sustained an injury to his right knee arising out of and in the course of his employment. At the time of the injury the plaintiff had a part-time tax-filing service which he operated out of his home. Following the injury, the plaintiff expanded the tax-filing service, rented an office outside his home, and employed others to work in the business. The plaintiff worked up to four or five hours a day in the business but had not received any wages from the business and only minimal distribution of profits. In *McGee* the Commission concluded that the defendants did not meet their burden of showing that the plaintiff was actually earning wages and was gainfully employed; hence, the Commission ordered that the defendants continue disability payments. The Court of Appeals, holding that the Commission erred and remanding for reconsideration based on the plaintiff's earning capacity rather than his actual wages, stated the following:

> [A]n employee's earning capacity is based on his ability to command a regular income in the labor market. *See Larson's Workmen's Compensation Law* § 57.51(e) (1996). Thus employee ownership of a business can support a finding of earning capacity only to the extent the employee is actively involved in the per-

> sonal management of that business and only to the extent that those management skills are marketable in the labor market. *Id.* (income received from business owned by employee cannot be used to reduce a previously established disability unless the income is the "direct result of the [employee's] personal management and endeavors"). *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806 (emphasizing importance of employee's ability "to earn wages competitively").

McGee, 125 N.C. App. at 300, 480 S.E.2d at 418. Thus, the Court of Appeals limited earning capacity through self-employment to situations in which the employee (i) is actively involved in the personal business, and (ii) possesses management skills that enable the employee to compete in the market.

[1] While an employee's management skills may be significant in the operation of certain businesses, such as the tax-filing service managed by the employee in *McGee*, different skills may be relevant to and necessary for the operation of other types of personal businesses. The determinative issue is whether the skills—be they management, computer, accounting, sales, consulting, or something else—utilized by the employee in the active operation of his own business, when considered in conjunction with the employee's impairment, age, education, and experience, would enable the employee to compete in the labor market. *See Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. We hold, therefore, that the test for determining whether the self-employed injured employee has wage-earning capacity is that the employee (i) be actively involved in the day to day operation of the business and (ii) utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education and experience. In the instant case, given plaintiff's exertional limitations, education, and experience, would he be hired to work in the competitive market place?

The Court of Appeals, after noting the amount plaintiff earns and evidence that plaintiff makes phone calls and calls on companies and individuals to sell his product, concluded that

> there was no basis whatsoever for the Commission's conclusion that plaintiff's marketing business is not "employment" and that his earnings are not "wages." Furthermore, the evidence shows that plaintiff is "actively involved in the personal management of [his] business," and there is little doubt that plaintiff's "manage-

ment skills are marketable in the labor market." *See Estes*, 125 N.C. App. at 300, 480 S.E.2d at 418.

Lanning, 134 N.C. App. at 61, 516 S.E.2d at 900.

[2] The determination of whether a disability exists is a conclusion of law that must be based upon findings of fact supported by competent evidence. *See Hilliard*, 305 N.C. at 594-95, 290 S.E.2d at 683. The Court of Appeals was correct that no finding of fact in the Commission's opinion and award supports its conclusion that plaintiff's business is not "employment" and his earnings are not "wages." The Commission's finding of fact number eight quoted above at best expresses the Commission's skepticism at the likelihood of plaintiff's success in this endeavor. The Court of Appeals erred, however, in its determination that plaintiff's management skills are marketable in the labor market and that the evidence shows plaintiff is "actively involved in the personal management of [his] business." Whether plaintiff's management skills are marketable and whether plaintiff is actively involved in the business' personal management are questions of fact. In making these determinations, the Court of Appeals usurped the fact-finding role of the Commission. *See Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683-84 (stating that "the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony"). As the Commission failed to make findings necessary to determine plaintiff's wage-earning capacity and the rights of the parties, we must reverse the Court of Appeals and remand this action to that court for further remand to the Industrial Commission for findings consistent with the legal principles stated in this opinion.

[3] Inasmuch as this case is being remanded to the Industrial Commission, we will also address an issue, raised by defendant but not reached by the Court of Appeals, that may or may not become pertinent on remand. After concluding that plaintiff was totally disabled, the Commission crafted a hybrid award which provided for total disability payments to be offset by a credit to defendant for "any net earnings from [p]laintiff's attempt to become self-employed." Offsets of this nature are not statutorily authorized and are, in fact, antithetical to the provisions of N.C.G.S. § 97-30 providing for the payment of partial disability benefits. Despite its conclusion that plaintiff is entitled to compensation for total disability under N.C.G.S. § 97-29, the Commission in effect awarded plaintiff compensation for partial disability by granting defendant a credit for any net earnings plaintiff might have. An analogous attempt by the Commission to

adjust benefits was rejected by this Court in *Hendrix*, where then-Justice, later Chief Justice, Mitchell, writing for the Court, noted the inconsistency between the Commission's conclusion that the plaintiff was permanently partially disabled and its award based on total loss of wage-earning capacity reduced only for the weeks the plaintiff actually worked at a restaurant. *See Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986). While plaintiff's substantial post-injury efforts to become self-sufficient are laudatory, neither this Court nor the Commission is the legislature. Absent a provision for a statutory offset, we continue to apply section 97-30 and its three-hundred-week time limit to plaintiffs who have some wage-earning capacity and are, thus, only partially disabled under the Act. *See Gupton*, 320 N.C. at 42, 357 S.E.2d at 678.

For the foregoing reasons, the opinion of the Court of Appeals is reversed and the case remanded to that court for further remand to the Industrial Commission.

REVERSED AND REMANDED.

BRACY DEESE, EMPLOYEE v. CHAMPION INTERNATIONAL CORPORATION, EMPLOYER (SELF-INSURED), AND SEDGWICK JAMES OF THE CAROLINAS, ADMINISTRATOR

No. 500PA98-2

(Filed 16 June 2000)

1. Workers' Compensation— credibility determination—findings of fact

The Court of Appeals erred in a workers' compensation case by reversing the full Industrial Commission's opinion and award based on the erroneous determination that the Commission's findings of fact and conclusions of law are not supported by competent evidence because: (1) the Commission was not required to explain in finding of fact eighteen why it found plaintiff-employee's testimony credible; and (2) even though there is conflicting evidence, there is competent evidence to support the Commission's findings that plaintiff does not have earning capacity and continues to be totally disabled.

2. Workers' Compensation— wage-earning capacity—temporary total disability

Even though the Industrial Commission in a workers' compensation case made a reference in one of its findings of fact that plaintiff-employee was not earning wages at his former wage level, the Commission did not apply the wrong legal standard when it determined that plaintiff was temporarily totally disabled because another finding of fact indicated the Commission properly looked at plaintiff's wage earning capacity in making its determination.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 133 N.C. App. 278, 515 S.E.2d 239 (1999), replacing its holding in a prior decision of this case reported at 131 N.C. App. 299, 506 S.E.2d 734 (1998), and remanding an opinion and award entered by the North Carolina Industrial Commission 4 September 1997. Heard in the Supreme Court 16 February 2000.

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

Robinson & Lawing, L.L.P., by Jane C. Jackson, Jolinda J. Babcock, and Kristin M. Major, for defendant-appellees.

ORR, Justice.

This case arises out of proceedings before the Industrial Commission initiated after defendants, on 13 December 1994, filed a Form 24 application to terminate plaintiff's workers' compensation benefits "on the grounds that the plaintiff is presently either a partner, owner and/or employee of a used car dealership . . . and that plaintiff therefore has earning capacity and does not continue to be totally disabled." Defendants supported their contention with documents and videotapes of plaintiff inspecting vehicles, talking with customers, and working in the office. However, plaintiff failed to respond to defendants' application to terminate benefits. Thus, on 13 February 1995, the Commission entered an administrative decision and order approving defendants' application effective 15 February 1994. On 16 March 1995, plaintiff filed a request that the order be assigned for hearing.

A deputy commissioner conducted a hearing on 21 February 1996. On 14 January 1997, the deputy commissioner entered an opinion and award, finding, *inter alia*, the following:

22. The videotapes are significant in that they shed light on the plaintiff's veracity. The plaintiff's attempts to operate these businesses without the knowledge of the defendants, coupled with the contradiction of his testimony by the videos[,] are circumstances the undersigned finds significant in assessing plaintiff's propensity for truth. In view of the documentary evidence and videotape evidence, the undersigned finds plaintiff's testimony that he was not involved in vehicle sales to be unbelievable.

The deputy commissioner's findings generated conclusions of law to the effect that defendants demonstrated that "plaintiff has regained his wage earning capacity" and that as of 15 February 1994, defendants were entitled to stop payment of temporary total disability benefits.

Plaintiff appealed to the full Commission, which reconsidered the evidence but did not hear live testimony. In its opinion and award entered 4 September 1997, the full Commission made the following pertinent findings of fact:

16. Mr. William Gregory, a private investigator hired by defendant, obtained videotape of plaintiff on the premises of his brother's car lot in the fall of 1994. Prior investigations by Mr. Gregory produced no evidence that plaintiff was engaging in any activity that went beyond his recommended physical limitations. Further, there is no evidence in the record that plaintiff was earning wages at his former wage level with defendant from this car business or from any other employment.

17. The Deputy Commissioner in this matter found plaintiff's testimony regarding his association with his brother's car business and his later investment in said business was not credible. The Deputy Commissioner found that plaintiff had attempted to keep his involvement with the car business hidden from defendant and that plaintiff had never mentioned his involvement to any of his treating physicians until after he learned that his activities had been videotaped.

18. Despite the Deputy Commissioner's first hand observations of the witness at hearing, the Full Commission finds that plaintiff's testimony regarding his association with his brother's car business and his later investment in said business to be credible for the following reasons: plaintiff informed Dr. Lawless that

he had been spending some time with his brother at his brother's car dealership; plaintiff's statements to Dr. Lawless are corroborated by statements to Dr. Lawless by plaintiff's wife; Ms. Donna Kropelnicki, the rehabilitation nurse assigned by defendant to plaintiff's case, had knowledge of the fact that plaintiff was attempting to get out of the house and that he had been frequently visiting his brother's business[;] and[] it was only after Ms. Kropelnicki reported these activities to defendant that the later videotapes were taken.

. . . .

21. As the result of his 4 August 1989 injury by accident, plaintiff has been unable to earn wages in his former employment with defendant or in any other employment from 15 February 1994 through the present and continuing.

Based on the findings of fact, "the Full Commission conclude[d] as a matter of law that the Administrative Decision and Order of [the] Special Deputy Commissioner . . . filed 13 February 1995 which allowed the termination of plaintiff's benefits . . . was erroneously approved." Additionally, the full Commission concluded that "as a result of his 4 August 1989 injury by accident, plaintiff is entitled to have defendant reinstate payments of temporary total disability compensation." Thus, the Commission, with one commissioner dissenting, reversed the deputy commissioner and awarded plaintiff temporary total disability benefits. Defendants then appealed to the Court of Appeals.

In the Court of Appeals' first review of the case *sub judice*, it reversed the opinion and award of the Commission and remanded the case to the full Commission. *Deese v. Champion Int'l Corp.*, 131 N.C. App. 299, 304, 506 S.E.2d 734, 737 (1998). In support of its decision, the court followed its prior holding in *Sanders v. Broyhill Furn. Indus.*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. rev. denied*, 346 N.C. 180, 486 S.E.2d 208 (1997). In *Sanders*, the Court of Appeals held that Commission findings reversing credibility determinations made by a deputy commissioner are reviewable by the Court of Appeals and must be supported by findings "showing why the deputy commissioner's credibility determinations should be rejected." *Id.* at 641, 478 S.E.2d at 226. Applying *Sanders*, the Court of Appeals in this case then reviewed the full Commission's findings of fact and determined that the evidence supporting finding of fact number eighteen,

which set out the Commission's credibility determinations supporting its opinion that plaintiff was credible, was not relevant to the deputy commissioner's credibility determinations that plaintiff was not credible. *Deese*, 131 N.C. App. at 303, 506 S.E.2d at 737. The court further noted that the full Commission failed to consider several credibility issues raised by plaintiff's testimony that the deputy commissioner used to support her determination that plaintiff was not credible. *Id.*

On 3 March 1999, this Court granted plaintiff's petition for discretionary review for the limited purpose of remanding the case to the Court of Appeals for reconsideration in light of *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). In *Adams*, this Court overruled *Sanders* to the extent that it required the full Commission to demonstrate " 'that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.' " *Id.* at 681, 509 S.E.2d at 413-14 (quoting *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226). *Adams* reinforced the proposition that the Commission is the sole judge of the credibility of witnesses and that the ultimate fact-finding function lies with the Commission whether it conducts a hearing or reviews a cold record. *Id.* at 680-81, 509 S.E.2d at 413.

The Court of Appeals filed its second opinion in this case on 18 May 1999. In a unanimous decision, the Court of Appeals stated:

> Here, after receiving evidence and viewing surveillance videotapes, the deputy commissioner determined plaintiff was involved in the auto sales business beginning with his obtaining a dealer license in February 1994. The deputy commissioner then found plaintiff's testimony that he was not involved in the auto sales business not to be credible.
>
> In finding the plaintiff's testimony to be credible, the Commission based its determination on statements made by the plaintiff to his psychologist, Dr. Lawless, and to his rehabilitation nurse, Ms. Kropelnicki. However, plaintiff's statement that he was "spending some time" at his brother's car dealership was, according to testimony at the hearing, made to Dr. Lawless in 1992, as was the corroborating statement made by plaintiff's wife to Dr. Lawless. In addition, the statement made by plaintiff to Ms. Kropelnicki that he was visiting his brother's car lot was made in early January 1994. We fail to see how these statements were relevant to the Commission's credibility determination as plaintiff

did not become involved in the auto sales business until February 1994.

Thus, since this was the only finding to support the Commission's determination that defendant was credible, we conclude there was insufficient evidence to support such a finding.

Deese v. Champion Int'l Corp., 133 N.C. App. 278, 283, 515 S.E.2d 239, 243 (1999). The court further held that it agreed with defendants' argument that the full Commission applied the wrong legal standard in determining disability and that "plaintiff's post-injury earning capacity rather than his actual wages earned is the relevant factor in assessing the disability." *Id.* at 284, 515 S.E.2d at 244. For the reasons stated below, we reverse the Court of Appeals on both issues before this Court for review.

[1] The first issue we must review is whether the full Commission's findings of fact and conclusions of law are supported by competent evidence. We begin our review by applying *Adams*, 349 N.C. 676, 509 S.E.2d 411, to this case.

In *Adams*, this Court carefully detailed the respective roles of the Industrial Commission and the appellate courts when reviewing workers' compensation claims and challenges. The Court also explained the appropriate standard of review to be applied by the Court of Appeals when reviewing Commission decisions. In *Adams*, we said the following:

> N.C.G.S. § 97-85 provides in part:
>
> > If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . .
>
> N.C.G.S. § 97-85 (1991). We have stated that "[i]n reviewing the findings found by a deputy commissioner . . . , the Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner." *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976).
>
> . . . .

. . . Under our Workers' Compensation Act, "the Commission is the fact finding body." *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate . . . "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one." *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226.

. . . .

"The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, on appeal, [an appellate court] "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86 (1991). As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* at 402, 141 S.E.2d at 633. The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.

Adams, 349 N.C. at 680-81, 509 S.E.2d at 413-14.

This Court in *Adams* made readily apparent two points: (1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.

In the Court of Appeals' review of the first issue before this Court, it correctly applied the "supported by any competent evidence" standard of review reiterated in *Adams*. *Id.* at 681, 509 S.E.2d at 414. However, the Court of Appeals erroneously focused its review and based its conclusion that the findings of fact were not supported by any competent evidence on finding of fact eighteen. Finding of fact eighteen reads as follows:

> 18. Despite the Deputy Commissioner's first hand observations of the witness at hearing, the Full Commission finds that plaintiff's testimony regarding his association with his brother's car business and his later investment in said business to be credible for the following reasons: plaintiff informed Dr. Lawless that he had been spending some time with his brother at his brother's car dealership; plaintiff's statements to Dr. Lawless are corroborated by statements to Dr. Lawless by plaintiff's wife; Ms. Donna Kropelnicki, the rehabilitation nurse assigned by defendant to plaintiff's case, had knowledge of the fact that plaintiff was attempting to get out of the house and that he had been frequently visiting his brother's business[;] and[] it was only after Ms. Kropelnicki reported these activities to defendant that the later videotapes were taken.

As a threshold matter, that portion of finding of fact eighteen explaining why the full Commission found plaintiff's testimony credible was unnecessary. The Commission made its findings of fact in the case *sub judice* in September 1997. The only apparent reason the Commission made any findings explaining its determination about credibility was to comply with the Court of Appeals' opinion in *Sanders v. Broyhill Furn. Indus.*, 124 N.C. App. 637, 478 S.E.2d 223, which, as previously noted, this Court overruled in *Adams*. This Court in *Adams* made it clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradi-

tion of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another. The Commission's credibility determinations made in response to *Sanders* cannot be the basis for reversing the Commission's order absent other error.

We now turn to our review of the Commission's other findings of fact to determine if there is any competent evidence to support the Commission's findings and whether its conclusions of law are supported by the findings of fact.

Even though there is conflicting testimony, there is competent evidence in the record to support the Commission's findings of fact. Plaintiff's surgeon testified that plaintiff could not return to a job with manual labor. Defendants produced no evidence that plaintiff had been earning wages from any source or that plaintiff had engaged in any activity that went beyond his physical limitations. Additionally, plaintiff testified that while he invested in the car lot and spent time at the lot, he never worked at the lot, sold a car to a customer, or received any pay or wages from the lot. David Goode also testified that plaintiff did not work at the lot, that plaintiff had never sold a car while Goode was present, and that Goode had never told anyone that plaintiff owned the lot. Thus, there is some competent evidence to support the Commission's findings; therefore, we hold that the Commission's findings of fact were conclusive on appeal. We also hold that the Commission's conclusions of law and award entered are supported by its findings of fact. Accordingly, we reverse the decision of the Court of Appeals as to this issue.

[2] The second question presented for review is whether the Commission applied the correct legal standard in making its determination that the plaintiff was temporarily totally disabled from employment under the Workers' Compensation Act.

> In order to qualify for compensation under the Workers' Compensation Act, a claimant must prove both the existence and the extent of disability. In the context of a claim for workers' compensation, disability refers to the impairment of the injured employee's earning capacity.

Stone v. G&G Builders, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997) (citation omitted).

Defendants argue that the Commission erred by looking at plaintiff's lack of actual wages earned instead of plaintiff's earning capac-

ity. In support of this argument, defendants point the Court to finding of fact sixteen, which reads as follows:

> 16. Mr. William Gregory, a private investigator hired by defendant, obtained videotape of plaintiff on the premises of his brother's car lot in the fall of 1994. Prior investigations by Mr. Gregory produced no evidence that plaintiff was engaging in any activity that went beyond his recommended physical limitations. *Further, there is no evidence in the record that plaintiff was earning wages at his former wage level with defendant from this car business or from any other employment.*

(Emphasis added.)

We do not believe the simple reference in finding of fact sixteen to the fact that plaintiff was not earning wages at his former wage level supports a holding that the Commission applied the wrong standard of review in making its determination that plaintiff was disabled for purposes of the Workers' Compensation Act.

Finding of fact twenty-one reads as follows:

> 21. As the result of his 4 August 1989 injury by accident, plaintiff has been unable to earn wages in his former employment with defendant or in any other employment from 15 February 1994 through the present and continuing.

The language in finding of fact twenty-one indicates that the Commission applied the correct standard of review and that it looked at plaintiff's wage-earning capacity in making its determination that plaintiff was disabled for purposes of the Workers' Compensation Act. Thus, defendants' argument on this issue fails.

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Industrial Commission for reinstatement of its opinion and award.

REVERSED.

STATE OF NORTH CAROLINA v. RONALD ROGERS

No. 176A98

(Filed 16 June 2000)

Constitutional Law— effective assistance of counsel—time for preparation

Defendant is entitled to a new trial because the trial court violated his rights to effective assistance of counsel when it denied defendant's repeated motions for a continuance under N.C.G.S. § 15A-952(g) in his capital trial since it is unreasonable to expect that any attorney could be adequately prepared in thirty-four days to conduct a bifurcated capital trial for this complex case involving incidents in multiple locations over a two-day period with numerous witnesses.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Beale, J., on 8 December 1997 in Superior Court, Richmond County, upon a jury verdict finding defendant guilty of first-degree murder. On 1 November 1999, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 18 May 2000.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, and Robert Montgomery, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant-appellant.

WAINWRIGHT, Justice.

On 20 February 1996, Ronald Rogers (defendant) was indicted for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. In addition, on 18 March 1996, he was indicted for discharging a firearm into occupied property. Defendant was tried capitally before a jury at the 3 November 1997 Criminal Session of Superior Court, Richmond County. The jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation; under the felony murder rule; and on the basis of lying in wait. Defendant was also found guilty of assault with a

deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property. After a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. On 8 December 1997, the trial court sentenced defendant in accordance with the jury's recommendation. In addition, the trial court imposed consecutive sentences of 108 to 139 months' imprisonment for the assault conviction and 36 to 53 months' imprisonment for the discharging a firearm into occupied property conviction.

The State's evidence tended to show, *inter alia*, that on the night of 16 June 1995, a group of people from Richmond County, including Ralph Crump (Crump) and Saifullah Muhammad (Saifullah), went to a drag strip outside of Rockingham to watch some races. A group from Scotland County, including defendant, his brother Eddie "Mookie" Rogers (Mookie), Greg Morrison (Morrison), and Michael Goodwin (Goodwin), was also at the drag strip. An argument began between Morrison and some girls from Richmond County, and a physical altercation resulted, involving Morrison, Crump, Mookie, and Saifullah.

The next evening, a number of persons involved in the previous evening's altercation were at the Universal Lounge near Bennettsville, South Carolina. Defendant, Mookie, Crump, Goodwin, and Morrison were at the club along with Pete Hale (Hale), Victor McCallum (McCallum), and Eddie Keith (Keith). Ricky Thomas (Ricky), the decedent in this case, and his friend Danny Hayes (Hayes) also went to the club that night. There, they met Ricky's cousin, Mike Thomas (Mike), and the three went into the club.

At some point during the evening, a fight broke out in which Mookie was severely beaten. Defendant jumped into the crowd to help his brother. After Mookie got up, the crowd scattered, and people began yelling that someone had a gun. Crump was seen waving a silver handgun. Everyone began running outside. Several witnesses testified that defendant appeared upset because his brother had been hurt and that they saw him outside shooting his handgun into the air. As Ricky and Hayes left the club in Ricky's car, defendant and Mookie approached the car, and either defendant or Mookie pointed a gun at the occupants. Neither Hayes nor Ricky had been involved in the fight.

Saifullah had just arrived at the club when the fight broke out. Saifullah's father, Abdul Muhammad (Abdul), had come along but

stayed outside in Saifullah's Ford Bronco. Saifullah left when he saw the crowd start to run, and he and his father drove toward Hamlet, North Carolina. Saifullah had heard that Crump may have been involved in the fight and wanted to see if he was all right, so he drove to the Tall Pines Apartments in Hamlet where Crump lived. He parked his Bronco in front of the apartment complex office and got out to talk to some people who were in the parking lot. Abdul remained in the Bronco. Saifullah testified that he had several guns in his Bronco, including a .38-caliber handgun and a .45-caliber handgun, but stated that he did not fire them that night.

Ricky and Hayes drove to Hayes' mother's home in Hamlet. Ricky and Hayes then left Hayes' mother's home and drove to Tall Pines Apartments so Ricky could find out why someone had pointed a gun at him. At the apartments, Ricky parked his car beside Saifullah's Bronco and got out to talk with some people there about what had happened at the club. Ricky did not have a weapon.

Defendant, Keith, Hale, and McCallum got into McCallum's car at the club and drove toward Hamlet. Goodwin; Goodwin's wife, Angela; and Morrison followed in a second car. Defendant wanted to go to Hamlet to find out why there had been a fight. Several persons attempted to persuade defendant to go back and check on his brother, who had been taken to the hospital, but defendant refused. The two cars drove by the Tall Pines Apartments in Hamlet and stopped just past the entrance. The occupants of the vehicles got out of the cars and talked by the side of the road. Defendant, Morrison, and McCallum had guns. They walked over a hill toward the apartments. Approximately five minutes later, the other occupants of the vehicles heard gunshots coming from the direction of the apartments. Defendant, Morrison, and McCallum ran back to the cars, and they all left.

Both Hayes and Saifullah heard gunshots coming from behind them as they stood near the office of the Tall Pines Apartments. Both ran away from the gunfire, and neither saw who was shooting.

Officer Mark Terry of the Hamlet Police Department arrived at the apartment complex at around 4:10 a.m. He discovered Ricky lying on his back in the driver's side floorboard of the Bronco. He had suffered a gunshot wound to the back and later died. Abdul was discovered lying on the ground beside the passenger side of the Bronco. He had been shot at least eight and possibly nine times, but survived. Law enforcement officers recovered from the Bronco two weapons

matching the descriptions given by Saifullah and found a Jennings/Bryco 9-mm handgun on the ground near the apartment office. They later recovered a High Point 9-mm handgun from Morrison's residence. Officers found numerous shell casings and bullets on the ground in the area of the shooting and recovered several bullets from the Bronco.

Defendant assigns error to the trial court's denial of his repeated motions for a continuance. He argues the denial of his requests for a continuance resulted in a violation of his constitutional rights to effective assistance of counsel, to confront his accusers, and to due process of law. For the reasons stated below, we find merit in defendant's assignment of error and grant him a new trial.

In the instant case, defendant made his first appearance in court on 7 July 1995. At that time, the trial court appointed Tommy Nichols to represent him. A short time later, defendant retained the services of Eddie Meacham as defense counsel. A probable cause hearing was held on 14 September 1995, and the trial court determined that probable cause existed. Subsequently, indictments were handed down against defendant on 20 February 1996 and 18 March 1996. A Rule 24 hearing was conducted on 18 March 1996 at which the State indicated there was evidence of aggravating circumstances. Defendant was later arraigned and pled not guilty. Throughout these events, defendant was represented by Meacham.

Meacham filed a number of pretrial motions on defendant's behalf on 27 June 1997. These motions were heard on 2 July 1997. However, none of the corresponding orders arising out of these motions were ever prepared for entry. Two weeks later, on 16 July 1997, Meacham made a motion to be allowed to withdraw from the case. Meacham argued that he had not been paid a sufficient fee to proceed with a capital case. At the hearing on Meacham's motion to withdraw, defendant said he would attempt to obtain more funds for Meacham, but he expected Meacham to work on his behalf in the meantime. Defendant indicated that he did not believe Meacham had been performing any work up to that point and that Meacham had been pushing him to take a plea bargain, which he did not want to accept. The trial court denied Meacham's motion.

The trial, which was originally scheduled to begin on 18 August 1997, was postponed to 25 September 1997 because the trial judge was involved in another trial. Subsequently, on 18 September 1997, defendant moved to dismiss Meacham, arguing that conflicts of inter-

est existed for Meacham and that Meacham had not been properly preparing for trial. Judge Michael Beale allowed defendant to dismiss Meacham and to retain new counsel. On 22 September 1997, another hearing regarding defendant's counsel was held before Judge Howard Manning. Judge Manning allowed defendant an additional week to retain counsel, but defendant was unsuccessful. A week later, on 29 September 1997, a second hearing was held before Judge Manning, who appointed Ira Pittman as lead counsel. The following day, Judge Manning appointed Joseph Davis, III, as co-counsel. Defendant's trial was rescheduled to begin during the 3 November 1997 term of court, only thirty-four days later.

Defendant's new counsel met with Meacham and obtained his case file. The file showed that Meacham had not interviewed any of the many witnesses involved. Defense counsel then requested funds from the trial court to hire a private investigator to assist in interviewing witnesses. The motion was allowed on 13 October 1997.

On 22 October 1997, just twenty-three days after being appointed, defense counsel gave immediate notice that they were in need of a continuance by filing a motion to that effect. At the motion hearing on 24 October 1997, defense counsel argued strenuously that they had not had enough time to prepare the case and would not be able to proceed on 3 November as scheduled. The private investigator hired by defendant just the week before had not had time to report any results at the time of the hearing. Further, Pittman had not previously acted as lead counsel in a capital case, and Davis had never participated in a capital case. Defendant's counsel also noted that they were being required to prepare, in effect, for two trials: the guilt/innocence phase and, if necessary, a capital sentencing proceeding. Defendant's counsel also argued that a previous motion for a jury questionnaire had been allowed by the court and that they had not been able to prepare one that could be returned by prospective jurors prior to the commencement of the term of court.

In addition to the motion for a continuance, defendant's counsel filed a motion to withdraw from the case, citing Rule 6(a) of the Rules of Professional Conduct as prohibiting them from undertaking a case for which there was no possibility for them to be fully prepared. Judge Beale denied both motions. On 29 October 1997, defendant's counsel again renewed their motion for a continuance. At a motions hearing on 3 November 1997, Judge Beale denied the motion. Defendant's counsel then renewed their motion to be allowed to

withdraw from the case, and the trial court denied that motion. The case then proceeded to trial.

In determining whether to grant a continuance, the trial court should consider, *inter alia*, the following factors:

(1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;

(2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation.

N.C.G.S. § 15A-952(g) (1999). In most circumstances, a motion to continue is addressed to the sound discretion of the trial court, and absent a manifest abuse of that discretion, the trial court's ruling is not reviewable. *See State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, 517 U.S. 1197, 143 L. Ed. 2d 794 (1996). However, when a motion to continue raises a constitutional issue, as in the instant case, the trial court's ruling is "fully reviewable by an examination of the particular circumstances of each case." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). Generally, the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error. *See State v. Branch*, 306 N.C. 101, 291 S.E.2d 653 (1982).

The rights to effective assistance of counsel, to confrontation of accusers and witnesses, and to due process of law are guaranteed in the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Sections 19 and 23 of Article I of the Constitution of North Carolina. *See* U.S. Const. amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23; *State v. Tunstall*, 334 N.C. 320, 432 S.E.2d 331 (1993). "It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). A defendant must " 'be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony.' " *State v. Thomas*, 294 N.C. 105, 113, 240 S.E.2d 426, 433

(1978) (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)). This Court has previously recognized and discussed the United States Supreme Court's analysis of these claims:

> In addressing the propriety of a trial court's refusal to allow a defendant's attorney additional time for preparation, the Supreme Court of the United States has noted that the right to effective assistance of counsel "is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984). While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed "without inquiry into the actual conduct of the trial" when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. *Id.* at 659-60, 80 L. Ed. 2d at 668. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify" this presumption of ineffectiveness. *Id.* at 661-62, 80 L. Ed. 2d at 669-70.

Tunstall, 334 N.C. at 329, 432 S.E.2d at 336. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *Id.* at 329, 432 S.E.2d at 337; *see also State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976).

After a thorough review of the record, we are convinced that defendant's counsel had insufficient time to prepare for the defense of this case. While it is clear that defendant's prior counsel, Meacham, filed most of the usual pretrial motions, it is equally clear that there was little or no trial preparation conducted before Meacham was dismissed. There was no evidence that any witness interviews had been performed. The orders based on the trial court's rulings on pretrial motions had not been prepared. A jury questionnaire was not submitted for distribution to prospective jurors even though requested by defendant's prior counsel and allowed by the trial court. Pittman and Davis were appointed to a case involving multiple incidents in multiple locations over a two-day period for which they had only thirty-four days to prepare. It is unreasonable to expect that any attorney, no matter his or her level of experience, could be adequately prepared to conduct a bifurcated capital trial for a case as complex and involving as many witnesses as the instant case.

Prejudice to a defendant is presumed when " 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance' is remote." *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336 (quoting *Cronic*, 466 U.S. at 659-660, 80 L. Ed. 2d at 668); *see also State v. Maher*, 305 N.C. 544, 550, 290 S.E.2d 694, 698 (1982). This presumption is applied in response to an error committed before the trial began. Therefore, "[p]rejudice is presumed because no one can be certain how trial counsel might have been able to perform if he had had adequate time to prepare for trial." *Maher*, 305 N.C. at 550, 290 S.E.2d at 698. Taking into account the unique factual circumstances of this case, we hold the presumption of ineffective assistance of counsel is applicable here.

In so holding, we emphasize that "courts do not deny due process just because they act expeditiously. The law's delay is the lament of society." *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948). In the instant case, however, defense counsel was justified in seeking a continuance of defendant's capital trial under the unique circumstances demonstrated here. Nonetheless, we will vigilantly resist any manipulation by parties or their counsel, in capital cases or otherwise, to "disrupt or obstruct the orderly progress of the court," *McFadden*, 292 N.C. at 615, 234 S.E.2d at 747, under the guise of generalized, unsupported, or otherwise nonmeritorious motions to continue.

Accordingly, defendant is entitled to a new trial. As defendant is entitled to a new trial because of an error that occurred before the trial began, we need not address his remaining assignments of error.

NEW TRIAL.

BAILEY v. STATE

[352 N.C. 127 (2000)]

WAKE COUNTY NO. 92CVS10221

JAMES H. POU BAILEY, A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BINKLEY, ROBERT L. BLEVINS, ELLIE L. BOYLES, CHANCEL T. BROWN AND JOAN W. BROWN, ELIZABETH S. BUTLER, DOROTHY T. CARMICHAEL, JOHN CARRICKER, HAROLD D. COLEY, SR., ANNA L. COOPER, CHARLES C. COOPER AND BERTIE S. COOPER, T.J. DUNCAN AND ESTHER P. DUNCAN, DAN R. EMORY, MARTIN W. ERICSON, FRED W. GENTRY, IVEY B. GORDON AND IZORIA S. GORDON, LOUIS N. GOSSELIN, EARL T. GREEN, BOB HAMMONS, DARIUS B. HERRING, RAY F. HOLCOMB, TILLIE M. HOLCOMB, KAY C. HURT, JOHN I. KIGER AND MARIE K. KIGER, CLARENCE T. LEINBACH, WALTER G. LEMING AND BARBARA C. LEMING, YATES LOWE, HARRIETTE B. McCORMICK, VIRGINIA H. MICKEY, WILLIAM F. MORGAN, HARRIETTA B. McCORMICK, EARL RAY PARKER, CALVIN C. PEARCE, MICHAEL PELECH, DIANE S. PEOPLES, MILDRED R. POINDEXTER, WINNIE D. POTTS, PATSY M. REYNOLDS, GLENN D. RUSSELL, BLANCHE S. SHIPP, CLYDE R. SHOOK, HAROLD E. SIMPSON, SONNIE B. SIMPSON, LENORA S. SMITH, FRANCES J. SNOW, CHARLES A. SPEED, JUSTUS M. TUCKER, WALTER P. UPRIGHT, RALPH B. WALKER AND MARTHA M. WALKER, JEAN A. WATSON, ROBERT I. WEATHERSBEE, RUBY WEBSTER, HARRY LEE WILLIAMS, DANIEL W. WILLIAMS, ELIZABETH H. WILSON, WILBUR G. WILSON, ERNEST B. WOOD, THOMAS S. WORSHAM, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONER-PLAINTIFFS, AND W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMON, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, JR., WILLIAM ELMER RIGGS, PAUL L. SALISBURY, JR., RICHARD A. SHARPE, NELSON LEROY SHEAROUSE, FRANCIS C. SIMMONS AND MARY E. SIMMONS, NED RAEFORD SMITH, G. VANCE SOLOMON AND EULALIA T. SOLOMON, THOMAS LASH TRANSOU AND WILBUR EUGENE YOUNG, ADDITIONAL PETITIONER-PLAINTIFFS V. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, JANICE FAULKNER, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, RESPONDENT-DEFENDANTS

WAKE COUNTY NO. 94CVS06904

JAMES H. POU BAILEY, DONALD L. SMITH, MILDRED GODWIN AS SURVIVING BENEFICIARY AND AS EXECUTRIX OF THE ESTATE OF A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BRINKLEY, ROBERT L. BLEVINS, ELLIE L. BOYLES, CHANCEL T. BROWN AND JOAN W. BROWN, ELIZABETH S. BUTLER, DOROTHY T. CARMICHAEL, JOHN CARRICKER, HAROLD D. COLEY, SR., ANNA L. COOPER, CHARLES C. COOPER AND BERTIE S. COOPER, T.J. DUNCAN AND ESTHER P. DUNCAN, DAN R. EMORY, MARTIN W. ERICSON, FRED W. GENTRY, IVEY B. GORDON AND IZORIA S. GORDON,

LOUIS N. GOSSELIN, EARL T. GREEN, BOB HAMMONS, DARIUS B. HERRING, RAY F. HOLCOMB, TILLE M. HOLCOMB, KAY C. HURT, JOHN I. KIGER AND MARIE A. KIGER, CLARENCE T. LEINBACH, WALTER G. LEMING AND BARBARA C. LEMING, YATES LOWE, HARRIETTE B. McCORMICK, VIRGINIA H. MICKEY, WILLIAM F. MORGAN, HARRIETTA B. McCORMICK, EARL RAY PARKER, CALVIN C. PEARCE, MICHAEL PELECH, DIANE S. PEOPLES, MILDRED R. POINDEXTER, WINNIE D. POTTS, PATSY M. REYNOLDS, GLENN D. RUSSELL, BLANCHE S. SHIPP, CLYDE R. SHOOK, HAROLD E. SIMPSON, SONNIE B. SIMPSON, LENORA S. SMITH, FRANCES J. SNOW, CHARLES A. SPEED, JUSTUS M. TUCKER, WALTER P. UPRIGHT, RALPH B. WALKER AND MARTHA M. WALKER, JEAN A. WATSON, ROBERT I. WEATHERSBEE, RUBY WEBSTER, HARRY LEE WILLIAMS, DANIEL W. WILLIAMS, ELIZABETH H. WILSON, WILBUR G. WILSON, ERNEST B. WOOD, THOMAS S. WORSHAM, W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMAN, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, JR., WILLIAM ELMER RIGGS, PAUL L. SALISBURY, JR., RICHARD A. SHARPE, NELSON LEROY SHEAROUSE, FRANCIS C. SIMMONS AND MARY E. SIMMONS, NED RAEFORD SMITH, G. VANCE SOLOMON AND EULALIA T. SOLOMON, THOMAS LASH TRANSOU AND WILBUR EUGENE YOUNG, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, JANICE FAULKNER, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND OFFICER *EX OFFICIO* OF THE RETIREMENT SYSTEMS, THE TEACHERS AND STATE EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 95CVS04346

CHARLES R. PATTON, EUGENE E. MOODY, MARY L. PRITCHARD, MERRILL R. CAMPBELL, THOMAS M. GROOME, JR., ROBERT J. DAVIS, MILTON H. QUINN, MAXINE S. WOOD, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROBERT V. WOOD, WINTON H. WILLIAMS, WILLIAM E. DENTON, BILLY CLARK, NORMAN W. SWANSON, WOODFORD T. MOSELEY, MARION B. ZOLLICOFFER, RAY HOMESLEY, DANIEL J. QUESENBERRY, RICHARD M. HERIOT, PAUL F. CHAVEZ, WILLIAM H. ADAMS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, JANICE FAULKNER, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 95CVS06625

JAMES H. POU BAILEY, DONALD L. SMITH, MILDRED GODWIN AS SURVIVING BENEFICIARY AND AS EXECUTRIX OF THE ESTATE OF A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON,

HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BRINKLEY, ROBERT L. BLEVINS, ELLIE L. BOYLES, CHANCEL T. BROWN AND JOAN W. BROWN, ELIZABETH S. BUTLER, DOROTHY T. CARMICHAEL, JOHN CARRICKER, HAROLD D. COLEY, SR., ANNA L. COOPER, CHARLES C. COOPER AND BERTIE S. COOPER, T.J. DUNCAN AND ESTHER P. DUNCAN, DAN R. EMORY, MARTIN W. ERICSON, FRED W. GENTRY, IVEY B. GORDON AND IZORIA S. GORDON, LOUIS N. GOSSELIN, EARL T. GREEN, BOB HAMMONS, DARIUS B. HERRING, RAY F. HOLCOMB, TILLE M. HOLCOMB, KAY C. HURT, JOHN I. KIGER AND MARIE A. KIGER, CLARENCE T. LEINBACH, WALTER G. LEMING AND BARBARA C. LEMING, YATES LOWE, HARRIETTE B. McCORMICK, VIRGINIA H. MICKEY, WILLIAM F. MORGAN, HARRIETTA B. McCORMICK, EARL RAY PARKER, CALVIN C. PEARCE, MICHAEL PELECH, DIANE S. PEOPLES, MILDRED R. POINDEXTER, WINNIE D. POTTS, PATSY M. REYNOLDS, GLENN D. RUSSELL, BLANCHE S. SHIPP, CLYDE R. SHOOK, HAROLD E. SIMPSON, SONNIE B. SIMPSON, LENORA S. SMITH, FRANCES J. SNOW, CHARLES A. SPEED, JUSTUS M. TUCKER, WALTER P. UPRIGHT, RALPH B. WALKER AND MARTHA M. WALKER, JEAN A. WATSON, ROBERT I. WEATHERSBEE, RUBY WEBSTER, HARRY LEE WILLIAMS, DANIEL W. WILLIAMS, ELIZABETH H. WILSON, WILBUR G. WILSON, ERNEST B. WOOD, THOMAS S. WORSHAM, W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMAN, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, JR., WILLIAM ELMER RIGGS, PAUL L. SALISBURY, JR., RICHARD A. SHARPE, NELSON LEROY SHEAROUSE, FRANCIS C. SIMMONS AND MARY E. SIMMONS, NED RAEFORD SMITH, G. VANCE SOLOMON AND EULALIA T. SOLOMON, THOMAS LASH TRANSOU AND WILBUR EUGENE YOUNG, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, JANICE FAULKNER, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND OFFICER *EX OFFICIO* OF THE RETIREMENT SYSTEMS, THE TEACHERS AND STATE EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 95CVS08230

JAMES H. POU BAILEY, DONALD L. SMITH, MILDRED GODWIN AS SURVIVING BENEFICIARY AND AS EXECUTRIX OF THE ESTATE OF A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BRINKLEY, ROBERT L. BLEVINS, ELLIE L. BOYLES, CHANCEL T. BROWN AND JOAN W. BROWN, ELIZABETH S. BUTLER, DOROTHY T. CARMICHAEL, JOHN CARRICKER, HAROLD D. COLEY, SR., ANNA L. COOPER, CHARLES C. COOPER AND BERTIE S. COOPER, T.J. DUNCAN AND ESTHER P. DUNCAN, DAN R. EMORY, MARTIN W. ERICSON, FRED W. GENTRY, IVEY B. GORDON AND IZORIA S. GORDON, LOUIS N. GOSSELIN, EARL T. GREEN, BOB HAMMONS, DARIUS B. HERRING,

RAY F. HOLCOMB, TILLE M. HOLCOMB, KAY C. HURT, JOHN I. KIGER AND MARIE A. KIGER, CLARENCE T. LEINBACH, WALTER G. LEMING AND BARBARA C. LEMING, YATES LOWE, HARRIETTE B. McCORMICK, VIRGINIA H. MICKEY, WILLIAM F. MORGAN, HARRIETTA B. McCORMICK, EARL RAY PARKER, CALVIN C. PEARCE, MICHAEL PELECH, DIANE S. PEOPLES, MILDRED R. POINDEXTER, WINNIE D. POTTS, PATSY M. REYNOLDS, GLENN D. RUSSELL, BLANCHE S. SHIPP, CLYDE R. SHOOK, HAROLD E. SIMPSON, SONNIE B. SIMPSON, LENORA S. SMITH, FRANCES J. SNOW, CHARLES A. SPEED, JUSTUS M. TUCKER, WALTER P. UPRIGHT, RALPH B. WALKER AND MARTHA M. WALKER, JEAN A. WATSON, ROBERT I. WEATHERSBEE, RUBY WEBSTER, HARRY LEE WILLIAMS, DANIEL W. WILLIAMS, ELIZABETH H. WILSON, WILBUR G. WILSON, ERNEST B. WOOD, THOMAS S. WORSHAM, W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMAN, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, JR., WILLIAM ELMER RIGGS, PAUL L. SALISBURY, JR., RICHARD A. SHARPE, NELSON LEROY SHEAROUSE, FRANCIS C. SIMMONS AND MARY E. SIMMONS, NED RAEFORD SMITH, G. VANCE SOLOMON AND EULALIA T. SOLOMON, THOMAS LASH TRANSOU AND WILBUR EUGENE YOUNG, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, JANICE FAULKNER, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND OFFICER *EX OFFICIO* OF THE RETIREMENT SYSTEMS, THE TEACHERS AND STATE EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, CONSOLIDATED JUDICIAL RETIREMENT SYSTEM AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEM OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 98CVS00738

DAN R. EMORY, E. MICHAEL LATTA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. 56PA00

(Filed 16 June 2000)

Pensions and Retirement— state, local, and federal government employees—taxation—class members

The class members of this consolidated class action, filed by state, local, and federal retiree plaintiffs arising from the taxation of their retirement income and benefits for tax years 1989 through 1997, include individuals, their estates, or other beneficiaries who, in fact, retired from a federal, North Carolina state,

or local government retirement system and received retirement benefits; and does not include persons who resigned, left government service for reasons other than retirement, or who were terminated from state, local, or federal government.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered on 10 September 1999 by Thompson, J., in Superior Court, Wake County. Heard in the Supreme Court 16 May 2000.

G. Eugene Boyce, Keith W. Vaughan, and W. David Edwards for plaintiff-appellees.

Michael F. Easley, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for defendant-appellants.

WAINWRIGHT, Justice.

This "exceptional case" results from consolidated class actions filed by state, local, and federal retiree plaintiffs arising from the taxation of their retirement income and benefits. On 10 September 1999, in Superior Court, Wake County, the Honorable Jack A. Thompson entered an "Order Regarding Class Membership" holding, in essence, that only federal, state, and local government retirees who meet the requirements of class membership are part of and may benefit from the settlement of this matter and that individuals other than retirees, their beneficiaries, or estates are not part of the class benefitting from the settlement. It is from this order that defendants appeal. For all background, procedural matters, and factual statements, refer to *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998) (*Bailey II*).

The question presented on appeal is a determination of who is and who is not a class member. Plaintiffs contend the settlement benefits of this action involving recovery of taxes paid apply only to those individuals, their estates, or their beneficiaries who, in fact, retired from a federal, North Carolina state, or local government retirement system and received retirement benefits. Defendants contend the settlement benefits to reimburse taxes paid also apply to nonretired former government employees who, upon their departure from public employment, received lump-sum return of contribution payments because they left government service for reasons other than retirement, such as voluntary resignation or involuntary termination. We agree with plaintiffs' position.

In *Bailey II*, we made multiple references to plaintiffs as being "retirees" and "retired government employees." *See id.* Nowhere in our decision did we imply that a person who left government employment by resignation, termination, or other than by becoming a retiree in one of the retirement systems is a class member.

In their original petition and complaint filed 2 October 1992, plaintiffs proposed the class as follows:

> All state and local government officials and employees (or beneficiaries, survivors, etc., of such officials and employees) who have heretofore *retired* or hereafter *retire* and qualify to receive pensions, benefits or monies which said benefits vested prior to 12 August 1989 pursuant to any of said Plans or any other Plan, and paid or who pay income tax on said pensions, benefits or monies and demanded or demand refunds as herein alleged.

(Emphasis added.)

On 10 June 1998, the parties entered into a "Consent Order" settling the consolidated lawsuits. The Consent Order provided, in pertinent part, that

> [t]he parties agree that the *persons entitled* to refunds for tax years 1989 through 1997 are those persons receiving *retirement* allowances by reason of five years creditable service in a federal government retirement system or a North Carolina state or local government retirement system as of August 12, 1989, or their surviving beneficiaries and estates. The parties further agree that, henceforth, these persons shall not be liable for North Carolina income tax on federal government or North Carolina state or local government *retirement* benefits. The parties reserve the right to continue to seek agreement, or in the alternative submit to the Court for its determination, the issue of "vesting" periods for purposes of tax liability on withdrawals from Deferred Compensation and 401-K Plans by federal and North Carolina state and local government *retirees*.

(Emphasis added.)

The Consent Order further expressly limited the claims released by the settlement to those "arising from the taxation of State, local and federal *retirement* income and benefits from 1989 through 1997 as to every State, local or federal retiree." (Emphasis added.) The

"Order Approving Class Action Settlement" filed 9 October 1998, approved the above-referenced Consent Order.

On 17 June 1998, Judge Thompson entered an "Order of Class Certification." He concluded as a matter of law and ordered the following:

> A. Plaintiffs' motions for class certification shall be and are hereby granted, and the plaintiff settlement class shall consist of (a) all persons who received, are receiving or will receive retirement allowances and who had five years creditable service in a federal government retirement system or a North Carolina state or local government retirement system as of August 12, 1989; (b) all persons who were "vested", to the extent that they were "vested", as of August 12, 1989, as determined by the Court, in Deferred Compensation or 401-K type plans offered to federal or North Carolina state or local government employees; and (c) all surviving beneficiaries and estates of such persons.
>
> B. The members of the class shall be given the best notice practicable under the circumstances.

The notices given to prospective class members by the court in June 1998 included what is referred to as "the long-form notice." The long-form notice, in a section titled "What are the lawsuits about?" provided as follows:

> Before the tax year 1989, retirement benefits of North Carolina state and local government retirees were exempt from state income tax in North Carolina. On August 12, 1989, the General Assembly enacted a law that repealed the tax exemption and substituted a partial exemption. The five state and local government retiree cases (designated as the Bailey or Emory cases) challenged the legality and constitutionality of the General Assembly's 1989 repeal of the statute exempting state and local government annuities and retirement benefits from state income taxation and sought refunds of taxes paid and interest. The state and local government *retiree cases* cover the past nine tax years, 1989 through 1997 . . . .
>
> Patton v. State of North Carolina, the federal retiree lawsuit, is the latest in a series of class action lawsuits by federal retirees which assert that North Carolina violated the U.S. Constitution by taxing *federal retirement benefits* in a manner different from

> North Carolina state and local government retiree plan benefits and that *federal government retirement benefits* should be treated no differently than state and local government *retirement benefits* . . . .
>
> Against this background, Class Counsel and representatives of the General Assembly negotiated a global settlement under the terms of which the General Assembly will authorize payment of $799 million in order *to resolve all retiree claims in these cases.*

(Emphasis added.)

Judge Thompson, in the "Order Regarding Class Membership" entered on 10 September 1999, ordered the following:

> 1. Only North Carolina State and local government *retirees* and federal government *retirees* who meet the requirements of *Class membership* are part of and may benefit from the Settlement. Individuals other than *retirees*, their beneficiaries or estates are *not part of* the Settlement and may not participate in distributions from the Claims Fund. Thus, for example, lump-sum distributions by included retirement systems on account of pre-retirement termination of employment (whether voluntary or involuntary) or pre-retirement death are not part of the Consent Order and the Order Approving Class Action Settlement because such payments have not been made to Class Members.
>
> 2. For the purposes of the Settlement, payments by included retirement systems following the pre-retirement death of a member of an included retirement plan to a surviving spouse or beneficiary which are treated as retirement allowances pursuant to a statutory election by the surviving spouse or beneficiary *are* covered by the Consent Order and Order Approving Class Action Settlement. Taxes paid on such retirement allowances shall be treated the same as taxes paid on other retirement allowances with respect to calculation of the Overpayment Amount for the purposes of participation in payouts from the Claims Fund.
>
> 3. Nothing in this Order shall affect the rights of taxpayers who are not retirees.

(Italics added.)

Notwithstanding the above, defendants contend "retirement benefits" *do* include the lump-sum refunds to individuals for return of

contributions. This group consists of those who did not formally retire from a retirement system but instead withdrew their retirement system contributions (or whose contributions were paid to their estates or beneficiaries upon their deaths prior to formal retirement). We conclude that a government employee who resigns, who is fired, or who dies before retiring is not a retiree. These categories of persons have never been party to these consolidated cases and have taken no timely steps to intervene. For purposes of clarity, we note that lump-sum payments for *eligible class members* from retirement plans *are* included in the calculation of settlement proceeds.

Defendants further contend several government retirement plans do not conveniently fit the requirement that a class member be a retiree. The purpose for including all the government retirement plans in previous orders of the trial court and our *Bailey II* decision, which might have been affected by the 1989 legislation, was to give anyone potentially qualified as a class member notice to participate in the settlement fund. The fact that certain benefits were distributed to nonretirees from the retirement plans does not affect the definition of the class receiving funds from this settlement.

We hold the Consent Order, the Order Approving Class Action Settlement, and the Order Regarding Class Membership, when read together, sufficiently reveal that persons who resigned; who left government service for reasons other than retirement; or who were terminated from state, local, or federal government employment, and who thereafter received a lump-sum reimbursement of their respective employee contributions to the retirement fund and who paid state income taxes on such lump-sum withdrawal of contributions are not government retirees and are not entitled to a pro-rata share of the settlement funds and interest earned thereon now being administered.

For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

BARBARA SAUNDERS, EMPLOYEE v. EDENTON OB/GYN CENTER, EMPLOYER AND STATE FARM FIRE & CASUALTY COMPANY, CARRIER

No. 469A99

(Filed 16 June 2000)

Workers' Compensation— disability—settlement agreements—presumption of total disability—terms of agreement controlling

Even though the Form 21 settlement agreement in a workers' compensation case provided plaintiff-employee with a weekly compensation rate fixed at a level equivalent to the amount payable for total disability under N.C.G.S. § 97-29 for a specified period of four weeks, the Court of Appeals erred in affirming the award of the full Industrial Commission, based on the erroneous conclusion that plaintiff was entitled to the continuing presumption of total disability, because: (1) it is the specific terms of the agreement which result in the ongoing presumption of continuing disability, rather than the Form 21 itself; (2) the presumption that plaintiff was temporarily partially disabled, and not totally disabled, was created through the parties' Form 26 supplemental agreement; and (3) the terms of the supplemental agreement are the final terms which became binding between the parties.

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, 134 N.C. App. 733, 527 S.E.2d 94 (1999), affirming an opinion and award entered by the North Carolina Industrial Commission on 15 July 1998. On 2 December 1999, this Court allowed defendants' petition for discretionary review as to additional issues. Heard in the Supreme Court 14 March 2000.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Joy H. Brewer, for defendant-appellants.

LAKE, Justice.

This case arises from proceedings before the North Carolina Industrial Commission (the Commission) and primarily raises the issues of whether, under the facts of this case, there was an ongoing

presumption of total disability in favor of plaintiff and, if so, whether defendants rebutted that presumption.

On 7 December 1992, plaintiff Barbara Saunders, an employee of Edenton Ob/Gyn Center (Edenton), was injured while attempting to break the fall of a patient who had fainted. Ms. Saunders stopped working on 31 December 1992 because of back pain resulting from her injury. The parties executed a Form 21, "Agreement for Compensation for Disability," on 28 January 1993, which the Commission approved on 19 March 1993. The agreement specified plaintiff had returned to work on 28 January 1993 and had received $231.68, the compensable amount applicable to plaintiff for total disability pursuant to N.C.G.S. § 97-29, for the four weeks she was out of work between 31 December 1992 and 28 January 1993. On 14 April 1993, the parties executed a Form 26, "Supplemental Memorandum of Agreement as to Payment of Compensation," which the Commission approved on 24 May 1993, reflecting that plaintiff did not actually return to work at Edenton until 8 March 1993, at which time her weekly earning power "was increased" from "$-0-" to "varies" for "necessary" weeks, and wherein the parties agreed that plaintiff had a disability of "temp. partial disability."

As of 2 June 1993, plaintiff's physician noted that plaintiff was working full time, although she was not performing any significant lifting and continued to experience pain and tightening in her neck. Plaintiff was assessed as having reached maximum medical improvement on 21 September 1993, and on 30 December 1993, Dr. Helen Harmon assigned a three percent permanent partial impairment rating to plaintiff's cervical spine.

Plaintiff worked full time until 20 October 1993, at which time she resigned from her position at Edenton because of pain from her injury and stress from the lack of sleep caused by her pain. Although plaintiff asked her office manager if there was a lighter-duty job in the Edenton office, the manager advised plaintiff that no such job was available.

In 1994, plaintiff worked as a secretary two to four hours per week for Saunders & Sons, Inc., a family-owned construction company, and earned $37.53 per week, for a total of $3,600.00 in 1994. After a year, she left that employment because the company could no longer afford to pay her, and on 5 May 1995, she found employment at Chowan Hospital as a ward secretary. Plaintiff worked thirty-six hours per week until she resigned on 17 September 1995 because of

the recurrence of symptoms associated with her 1992 back injury, including muscle spasms and pain and stiffness in her neck and back. Plaintiff earned a total of $4,180.24 working for Chowan Hospital.

On 29 March 1995, plaintiff filed a Form 33, "Request that Claim be Assigned for Hearing," indicating that she believed she was entitled to permanent total disability from the date of her resignation from Edenton on 20 October 1993. The case was heard by a deputy commissioner, who filed an opinion and award on 18 September 1997 concluding defendants had successfully rebutted the presumption of disability by showing that plaintiff's job with Edenton was suitable to her restrictions, that plaintiff resigned for reasons unrelated to her compensable injury, and that plaintiff obtained two other jobs which demonstrated her retention of wage-earning capacity. The deputy commissioner denied temporary total, temporary partial, and permanent total compensation claims and awarded nine weeks of permanent partial impairment compensation.

Plaintiff appealed to the full Commission. The Commission, with one commissioner dissenting, filed an opinion and award on 15 July 1998, finding, *inter alia*, that as a result of her traumatic incident on 7 December 1992, plaintiff was unable to earn wages in her former position or in any other employment except for the weeks she was employed by Saunders & Sons, Inc. and Chowan Hospital and that in those positions, plaintiff was capable of earning only reduced wages. The Commission concluded that the Form 21 agreement for compensation "created a presumption of continuing disability in plaintiff's favor" and that defendants had "not presented evidence sufficient to rebut the presumption of continued disability raised by the approved Form 21 Agreement." Based on their findings of fact and conclusions of law, the Commission reversed the holding of the deputy commissioner and awarded plaintiff the following: temporary total disability compensation from 20 October 1993, the date of her resignation from Edenton, through such time as she returns to work, with adjustment for the weeks in 1994 and 1995 that she was able to work for Saunders & Sons and Chowan Hospital; temporary partial disability for the weeks she was able to work for Saunders & Sons and Chowan Hospital; and all medical expenses.

Defendants appealed to the North Carolina Court of Appeals, which, with one judge dissenting, affirmed the opinion and award of the Commission. Defendants gave notice of appeal to this Court on the basis of the dissent from the Court of Appeals and petitioned for

discretionary review of additional issues, which was granted on 2 December 1999.

Defendants first contend the terms of the Form 21 and Form 26 agreements in the instant case do not establish a presumption of ongoing total disability. For the reasons stated hereinafter, we agree.

Settlement agreements between the parties, approved by the Commission pursuant to N.C.G.S. § 97-17, are binding on the parties and enforceable, if necessary, by court decree. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976). The Commission and the Court of Appeals correctly acknowledged precedent establishing that an approved Form 21 agreement is considered a settlement between the parties, which results in a rebuttable presumption of continuing disability. *See Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997); *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996); *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 283, 458 S.E.2d 251, 257, *disc. rev. denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995); *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). In all of the aforementioned cases, however, the presumption of continuing disability was established because the agreement between the parties stipulated that the disability would continue for "necessary weeks" or "for a period to be determined," as opposed to a limited or specified period of time. In each case, it was the specific terms of the agreement which resulted in the ongoing presumption, not the Form 21 itself. Although in the case *sub judice* the issue is whether plaintiff was presumptively entitled to permanent, temporary, partial or total disability and not necessarily the period of disability, resolution of the issue is determined by the terms of the agreement between the parties.

In the instant case, the Commission approved the Form 21 agreement and limited plaintiff's disability for a specified period of four weeks, with a return to work date of 28 January 1993. Although the Form 21 agreement did not specifically note the type of disability for which plaintiff was being compensated, the weekly compensation rate was fixed at a level equivalent to the amount payable for total disability under N.C.G.S. § 97-29. When plaintiff did not return to work on 28 January, the parties entered into a Form 26 supplemental

agreement which specified that plaintiff was entitled to a varied rate of compensation for "temp. partial disability" for "necessary" weeks. Based on the terms of the Form 26 agreement, the presumption that plaintiff was temporarily partially disabled, and not totally disabled, was created through plaintiff's agreement to, and the Commission's approval of, those terms. When plaintiff thereafter petitioned the Commission for a hearing and claimed entitlement to permanent total disability, a status substantially different in economic impact from partial disability, she bore the burden of proving total disability. *See Saums*, 346 N.C. at 763, 487 S.E.2d at 749 (claimant has burden of proving the existence of disability and its extent).

The Court of Appeals reasoned that plaintiff's stipulation that she was totally disabled for four weeks was not a stipulation that her total disability ended after those four weeks. However, it is unnecessary to theorize on the impact of the terms of the Form 21 agreement, as those terms were revised by the terms of the Form 26 supplemental agreement, which specified, with plaintiff's approval as evidenced by her signature, that her disability would extend for an ongoing period of "necessary" weeks, at a varied rate for "temp. partial disability." The terms of the supplemental agreement, entered into by the parties and approved by the Commission, are the final terms which became binding between the parties.

The Court of Appeals also reasoned that the inclusion of the word "partial" before "disability" does not amount to a rebuttal of the "presumption of disability" in favor of plaintiff. Although we agree that the presumption of disability was not lost, we disagree that the presumption of total disability was not lost through the subsequent agreement of "partial disability." While the inclusion of the word "varies" for plaintiff's compensation rate does indicate uncertainty regarding the extent of plaintiff's partial disability, it precludes coverage for total disability under N.C.G.S. § 97-29, unless plaintiff rebuts the presumption of partial disability through the presentation of evidence supporting total disability at a hearing before the Commission.

Although the findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), the Commission's conclusions of law are fully reviewable, *Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 86, 361 S.E.2d 575, 577 (1987). In the instant case, the Commission con-

cluded, and the Court of Appeals affirmed, that defendants had the burden of proof to present evidence sufficient to rebut the presumption of continued disability raised by the approved Form 21 agreement, that defendants had not met the burden of proof and that plaintiff was therefore entitled to the continuing presumption of total disability. Based on this conclusion, the Commission awarded plaintiff temporary total disability compensation from 20 October 1993 through the present and continuing until such time as she returns to work. The Commission's conclusions, and the resulting award, ignore the terms of the Form 26 agreement between the parties and were based on the incorrect impression that plaintiff was entitled to an ongoing presumption of total disability. Because the award was reached through the erroneous application of law, we therefore reverse the Court of Appeals' opinion affirming the award and remand to the Court of Appeals for further remand to the Commission for determination in accord with this opinion.

In light of our conclusion that there was no continuing presumption of total disability, we do not reach the question of whether defendants rebutted the presumption. Likewise, the dissent from the Court of Appeals questions the sufficiency of the Commission's findings of fact addressing the reason plaintiff left her employment with Saunders & Sons, Inc., and whether that employment should have been sufficient to rebut the presumption of disability. As the opinion of the Court of Appeals is reversed, and on remand to the Commission plaintiff will have the burden of rebutting an ongoing presumption of partial disability in her claim for total disability, it is unnecessary for us to address the issues raised by the dissent. Additionally, with respect to defendants' contention that the Commission relied on medical records not properly in evidence, after careful consideration of the record, briefs and oral arguments of the parties, specifically including the findings and conclusions of the Commission, we conclude discretionary review of this issue was improvidently allowed.

In summary, the Court of Appeals erred in affirming the decision of the Commission finding an ongoing presumption of total disability in favor of plaintiff. The Form 26 agreement between the parties established an ongoing presumption of "temp. partial disability," and plaintiff has the burden of rebutting that presumption in moving to establish a claim for total disability. Likewise, in order to rebut plaintiff's claim of ongoing partial disability, in the event such issue arises, defendants have the burden of proving " 'not only that suitable jobs

are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.' " *Saums*, 346 N.C. at 763-64, 487 S.E.2d at 749 (quoting *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). The opinion of the Court of Appeals is reversed and this case is remanded to that court for further remand to the North Carolina Industrial Commission for disposition in accordance with this opinion.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

GREGORY OSBURN AND JOY C. OSBURN v. DANEK MEDICAL, INC., SOFAMOR-DANEK GROUP, INC., WARSAW ORTHOPAEDIC, INC., KEITH M. MAXWELL, M.D., KEITH M. MAXWELL, M.D., P.A., AND ST. JOSEPH'S HOSPITAL

No. 549A99

(Filed 16 June 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 135 N.C. App. 234, 520 S.E.2d 88 (1999), finding no error in a judgment entered 29 August 1997 by Payne, J., in Superior Court, Buncombe County. Heard in the Supreme Court 18 May 2000.

Donald B. Hunt for plaintiff-appellants.

Young Moore and Henderson P.A., by Joseph W. Williford and Brian O. Beverly, for defendant-appellees Keith M. Maxwell, M.D., and Keith M. Maxwell, M.D., P.A.

Smith Helms Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr., on behalf of American Medical Association, North Carolina Medical Society, and American Academy of Orthopaedic Surgeons, amici curiae.

PER CURIAM.

AFFIRMED.

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

JUDY W. HALFORD v. CORA WRIGHT

No. 557A99

(Filed 16 June 2000)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 135 N.C. App. 630, 528 S.E.2d 407 (1999), affirming an order signed 23 June 1998 by Guice, J., in Superior Court, Rutherford County. Heard in the Supreme Court 17 May 2000.

Deaton & Biggers, P.L.L.C., by W. Robinson Deaton, Jr. and Lydia A. Hoza, for plaintiff-appellee.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, for defendant-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith and Colleen M. Crowley, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Greene, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Rutherford County, for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED.

TEW v. BROWN

[352 N.C. 145 (2000)]

ALLEN R. TEW, P.A. v. WILLIAM BROWN

No. 583PA99

(Filed 16 June 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 135 N.C. App. 763, 522 S.E.2d 127 (1999), affirming an order for summary judgment entered by Corbett, J., on 29 October 1998 in District Court, Johnston County. Heard in the Supreme Court 18 May 2000.

Tew & Atchison, P.A., by Allen R. Tew and Alexander R. Atchison, for plaintiff-appellee.

David S. Crump for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

TUCKER v. WESTLAKE

[352 N.C. 146 (2000)]

WILLIAM A. TUCKER, JR. AND JAMES P. ASHBURN, T.C. HOMESLEY, JR., AND WILLIAM Y. WILKINS, AS CO-ADMINISTRATORS OF THE ESTATE OF WILLIAM ARNOLD TUCKER, SR. V. ANNE STEWART WESTLAKE (AKA ANNE STUART HARLEY TUCKER WESTLAKE) AND HUSBAND, WILLIAM RICHARD WESTLAKE

No. 5A00

(Filed 16 June 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 136 N.C. App. 162, 523 S.E.2d 139 (1999), finding no prejudicial error in a judgment entered 30 September 1998 by McHugh, J., in Superior Court, Iredell County. Heard in the Supreme Court 16 May 2000.

Sharon Lowe for plaintiff-appellants.

Pope McMillan Kutteh Simon & Privette, P.A., by William H. McMillan and Ryan D. Bolick, for defendant-appellees.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in Judge Wynn's dissenting opinion.

REVERSED.

BAILEY v. STATE OF N.C.

No. 56PA00

Case below: Wake County Superior Court

Motion by plaintiffs to dismiss appeal for lack of subject matter jurisdiction denied 15 June 2000.

BOVIS CONSTR. CORP. v. WESTERN MASS. LIFE CARE CORP.

No. 130P00

Case below: 136 N.C.App. 669

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

CARRINGTON v. BROWN

No. 127P00

Case below: 136 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

CASH v. STATE FARM MUT. AUTO. INS. CO.

No. 203PA00

Case below: 137 N.C.App. 192

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 15 June 2000.

CLARK v. HOST MARRIOTT CORP.

No. 173P00

Case below: 137 N.C.App. 384

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

CRABTREE v. CITY OF DURHAM

No. 163P00

Case below: 136 N.C.App. 816

Petition by defendant (City of Durham) for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

FROST v. MAZDA

No. 582PA99

Case below: Forsyth County Superior Court

Motion by plaintiffs to withdraw motion to dismiss appeal allowed 15 June 2000.

HARRIS v. TOWN OF ATLANTIC BEACH

No. 158P00

Case below: 136 N.C.App. 847

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000. Petition by plaintiff for writ of certiorari to review the order of the North Carolina Industrial Commission denied 15 June 2000.

HOWELL v. WILSON

No. 188P00

Case below: 136 N.C.App. 827

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

MURAKAMI v. WILMINGTON STAR NEWS, INC.

No. 200P00

Case below: 137 N.C.App. 357

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

PARNELL v. HARTSELL, HARTSELL & WHITE, P.A.

No. 160P00

Case below: 136 N.C.App. 848

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 May 2000.

PIEDMONT TRIAD REG'L WATER AUTH. v. SUMNER HILLS, INC.

No. 86PA00

Case below: 136 N.C.App. 425

Petition by defendant (Sumner Hills, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 15 June 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 15 June 2000.

POPKIN BROS. ENTERS. v. BOARD OF ADJUST. OF JACKSONVILLE

No. 172P00

Case below: 137 N.C.App. 177

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

RUFF v. PAREX, INC.

No. 385P99

Case below: 131 N.C.App. 534

Petition by defendant (United States Gypsum Co.) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 23 May 2000. Petition by defendant (United States Gypsum Co.) for writ of supersedeas dismissed as moot 23 May 2000. Petition by defendant (W.R. Bonsal) for writ of supersedeas dismissed as moot 23 May 2000. Petition by defendant (W.R. Bonsal) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 23 May 2000. Petition by defendants (Parex, Inc., Sto Corp., Continental Stucco Products, Dryvit Systems, Inc.) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 23 May 2000. Petition by (Parex, Inc., Sto Corp., Continental Stucco Products, Dryvit Systems, Inc.) for writ of supersedeas dismissed as moot 23 May 2000.

SHANNONHOUSE v. WEYERHAEUSER CO.

No. 165P00

Case below: 136 N.C.App. 848

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

SHARPE v. WORLAND

No. 55P99-2

Case below: 137 N.C.App. 82

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

SHAUT v. CANNON

No. 161P00

Case below: 136 N.C.App. 834

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. BASDEN

No. 159A93-4

Case below: Duplin County Superior Court

Petition by defendant for a writ of certiorari to review the order of the Superior Court, Duplin County, denied 15 June 2000.

STATE v. BOYD

No. 547A88-3

Case below: Rockingham County Superior Court

Petition by defendant for a writ of certiorari to review the order of the Superior Court, Rockingham County, denied 15 June 2000.

STATE v. CALHOUN

No. 123P00

Case below: 136 N.C.App. 668

Petition by defendant pro se for a writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 June 2000.

STATE v. CATES

No. 204P00

Case below: 137 N.C.App. 385

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. CORRAL

No. 19P00

Case below: 135 N.C.App. 790

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. ELLIS

No. 359P99-2

Case below: 130 N.C.App. 596

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 June 2000.

STATE v. FERRELL

No. 90P00

Case below: 136 N.C.App. 668

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. GRADY

No. 178P00

Case below: 136 N.C.App. 394

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. HUNTER

No. 590A99-2

Case below: 135 N.C.App. 633

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 June 2000.

STATE v. INGRAM

No. 129P00

Case below: 136 N.C.App. 670

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. JARRETT

No. 187P00

Case below: 137 N.C.App. 256

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. JEFFREYS

No. 184P00

Case below: 137 N.C.App. 178

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. JENKINS

No. 209P00

Case below: 137 N.C.App. 367

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. JOHNSON

No. 128P00

Case below: 136 N.C.App. 670

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. JONES

No. 189P00

Case below: 137 N.C.App. 221

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. LEAZER

No. 175PA00

Case below: 137 N.C.App. 385

Motion by defendant to dissolve stay denied 15 June 2000. Petition by Attorney General for writ of supersedeas allowed 15 June 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 15 June 2000.

STATE v. LESANE

No. 202A00

Case below: 137 N.C.App. 234

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. McNEILL

No. 484A95-2

Case below: Cumberland County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 15 June 2000.

STATE v. OLLISON

No. 199P00

Case below: 137 N.C.App. 386

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. PENN

No. 100P94-2

Case below: 113 N.C.App. 423

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 June 2000.

STATE v. PICKETT

No. 226P00

Case below: 137 N.C.App. 588

Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000. Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 15 June 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. RICE

No. 110P00

Case below: 136 N.C.App. 668

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STATE v. ROWSEY

No. 490A93-3

Case below: Alamance Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Alamance County, denied 15 June 2000. Petition by defendant for writ of supersedeas denied 15 June 2000.

STATE v. SCANLON

No. 480A99

Case below: Durham Superior Court

Motion by defendant for appropriate relief allowed 15 June 2000 for the purpose of entering the following orders: Defendant's motion for appropriate relief is hereby remanded to the Superior Court, Durham County. It is further order that an evidentiary hearing be held on the aforesaid motion and that the resulting order containing the findings of fact and conclusions of law of the trial judge determining the motion be transmitted to this Court so that it may proceed with the appeal or enter an order terminating the appeal. Time periods for perfecting or proceeding with the appeal are tolled pending receipt of the order of disposition of the motion in the Trial Division.

STATE v. SMITH

No. 279A99

Case below: Buncombe Superior Court

Motion by defendant to remand denied 9 May 2000.

STATE v. VOLCY

No. 93P00

Case below: 136 N.C.App. 443

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 June 2000.

STATE v. WIGGINS

No. 159P00

Case below: 136 N.C.App. 735

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 June 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

STEPHENSON v. TOWN OF GARNER

No. 107P00

Case below: 136 N.C.App. 444

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

TART v. MARTIN

No. 174PA00

Case below: 137 N.C.App. 371

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 15 June 2000.

TREXLER v. POLLOCK

No. 581P99

Case below: 135 N.C.App. 601

Motion by defendant (Hugh Chatham Memorial Hospital, Inc.) to strike plaintiff's petition for rehearing on petition for discretionary review or in the alternative petition for writ of certiorari dismissed as moot 8 May 2000.

WALKER v. COBLE

No. 162P00

Case below: 136 N.C.App. 850

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

WHITAKER v. AKERS

No. 208P00

Case below: 137 N.C.App. 274

Petition by defendant (Akers) for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

WILLIAMS v. FAMILY DOLLAR STORES OF N.C.

No. 83P00

Case below: 136 N.C.App. 670

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 June 2000.

PETITIONS TO REHEAR

LOVELACE v. CITY OF SHELBY

No. 312A99

Case below: 351 N.C.458
133 N.C.App. 408

Petition by defendants to rehear pursuant to Rule 31 denied 15 June 2000.

THOMPSON v. WATERS

No. 267PA99

Case below: 351 N.C.462
133 N.C.App. 194

Petition by defendant (Lee County) to rehear pursuant to Rule 31 denied 15 June 2000.

STATE OF NORTH CAROLINA v. MICHAEL JEROME BRAXTON

No. 2A98

(Filed 13 July 2000)

1. Appeal and Error— preservation of issues—constitutional issues—failure to challenge at trial—jurisdictional issue

Although defendant did not challenge the constitutionality of the short-form murder indictment at trial, this issue is properly before the Court because a challenge to an indictment alleged to be invalid on its face that could deprive the trial court of jurisdiction may be made at any time.

2. Homicide— first-degree murder—short-form indictments—constitutionality

Although the short-form indictment used to charge defendant with first-degree murder did not allege the elements of premeditation, deliberation, and specific intent to kill, the trial court did not err in concluding the indictment was constitutional because defendant had notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected was death.

3. Criminal Law— capital trial—comments by trial court on appellate review

The trial court's references to appellate review before jury selection during a routine explanation of the court reporter's duties, and additional references to appellate review during jury voir dire, did not impermissibly imply to the jury that the Supreme Court would correct any errors the jury might make or relieve the jury of its responsibility.

4. Jury— selection—capital trial—subdividing into panels

The trial court did not err in a capital trial by subdividing the jury venire into panels of twenty-five people from which prospective jurors were called for individual voir dire because: (1) defendant never challenged the jury panel selection process and never informed the trial court of any objection to the alleged improper handling of the jury venires as required by N.C.G.S. § 15A-1211(c); and (2) even if the jury selection procedure violated the randomness requirement of N.C.G.S. § 15A-1214(a), defendant has not demonstrated on appeal how he was prejudiced by the procedure.

5. Jury— selection—capital trial—questions concerning death penalty

The prosecutor's repeated questioning about whether prospective jurors could be part of the "legal machinery" that could sentence defendant to the death penalty was not an impermissible attempt to "stake out" the jurors and did not dilute individual jurors' sense of responsibility for their sentencing decision because the prosecutor's question emphasized each juror's personal participation in the decision-making process.

6. Jury— selection—capital trial—previous criminal record—improper attempt to "stake out" jurors

The trial court did not abuse its discretion during voir dire of a capital trial by not allowing defendant to ask any prospective jurors whether they could be fair and impartial as to guilt or innocence knowing that defendant had previously been convicted of two first-degree murders and was serving two life sentences when he committed this murder, because the question improperly attempts to "stake out" what kind of verdict a juror would render under certain named circumstances not yet in evidence.

7. Jury— peremptory challenges—capital trial—not racial grounds

The trial court did not err in a capital trial by overruling defendant's objection to the State's use of seven consecutive peremptory challenges to strike from the jury seven black prospective jurors because defendant failed to establish a prima facie showing of purposeful discrimination in light of the prosecutor's minority acceptance rate of 47% at that point in the jury selection process.

8. Evidence— hearsay—no prejudicial error

Even if the trial court erred in a capital trial by admitting the hearsay testimony of the victim's mother and grandmother stating that the victim said he had been placed on lockup at a correctional center as a result of a back injury that prevented him from working, this error was not prejudicial because: (1) the prosecutor also elicited testimony from a police officer on direct examination that the victim had been placed on lockup for disrespecting an officer; (2) on cross-examination, another officer testified the victim was on lockup for not going to work; (3) both the prosecutor and defendant presented evidence to the jury regarding the actual reasons for the victim's lockup status; and (4)

defendant was not precluded from presenting additional evidence regarding the victim's status or from rebutting prosecutorial evidence of the victim's peaceful character.

9. Appeal and Error— preservation of issues—offer of proof

Although defendant contends the trial court erred in a capital trial by limiting an officer's testimony on cross-examination and excluding testimony that the victim was on lockup at a correctional unit for profanity and disrespect, defendant has failed to preserve this issue for appellate review under N.C.G.S. § 8C-1, Rule 103(a)(2) because: (1) an offer of proof was necessary since the substance of the excluded testimony was not necessarily apparent from the context of the question asked; and (2) an attempt by the Supreme Court to presume the substance or prejudicial effect of the excluded testimony would be speculation.

10. Criminal Law— bailiff—participation in courtroom demonstration

Although prejudice is conclusively presumed where a witness for the State acts as custodian or officer in charge of the jury in a criminal trial, the trial court did not violate defendant's right to a fair and impartial jury in a capital trial by allowing the bailiff to participate in a courtroom demonstration in the role of the murder victim because: (1) defendant cites no evidence in the transcript or record that supports the assertion that the bailiff was the sworn officer in charge of the jury, and mere presence in the courtroom is not sufficient; (2) the bailiff was not called to testify as a witness, and he did not convey any communication to the jury through his participation in the courtroom demonstration; and (3) the likelihood that the outcome of the trial would have been different had the bailiff not participated in the demonstration is de minimus.

11. Evidence— relevancy—screams, crime scene, and demeanor—state of mind—intent to kill

The trial court did not abuse its discretion in a capital trial by admitting the testimony of several officers about the victim's screams during the murder, the appearance of the crime scene, and defendant's behavior and demeanor immediately following the murder, because the testimony was relevant under N.C.G.S. § 8C-1, Rule 402 to negate defendant's claim of self-defense, as well as to establish his state of mind and intent to kill.

12. Evidence— lay opinion—shorthand statements of fact

The testimony of several officers in a capital trial about the victim's screams during the murder, the appearance of the crime scene, and defendant's behavior and demeanor immediately following the murder, did not amount to improper lay opinion under N.C.G.S. § 8C-1, Rule 701 because the testimony of these witnesses was admissible as shorthand statements of fact.

13. Evidence— duplicative testimony—availability of weapons in prison

The trial court properly exercised its discretion under N.C.G.S. § 8C-1, Rule 611(a) in a capital trial when it excluded testimony from defendant and two other witnesses regarding the general availability of weapons at the correctional center to assist defendant's claim of self-defense for a murder committed in prison because: (1) an officer already testified that he did not know how frequently the victim's cellblock was searched and that he could not recall whether he or any other officers had ever found knives during a search of the victim's cellblock, and the trial court expressly stated defendant could present other evidence that tended to establish the availability of weapons in the prison; (2) defendant had already testified about the availability of knives and the dangerousness of the inmates at the correctional unit, and any further testimony from defendant would have been duplicative; and (3) the witness who was a former North Carolina Prison Legal Services attorney was in no better position than the jury to give his opinion about the prevailing conditions in the correctional unit at the time of the murder.

14. Evidence— hearsay—state of mind exception

The trial court did not commit prejudicial error in a capital trial by allowing a statement from one inmate to another inmate that he was going to approach defendant about straightening out the victim's debt, because the statement was not hearsay since it was admissible under N.C.G.S. § 8C-1, Rule 803(3) as evidence of that inmate's then-existing intent to engage in a future act.

15. Evidence— hearsay—initially allowed—subsequently excluded

The trial court did not commit prejudicial error in a capital trial by allowing testimony of an inmate, stating that an anonymous inmate asked defendant why he killed the victim, because the trial court's initial overruling of defendant's objection to this

hearsay testimony was subsequently corrected, and the inadmissible hearsay was properly excluded by the trial court.

16. Evidence— hearsay—not truth of matter asserted—subsequent conduct

The trial court did not commit prejudicial error in a capital trial by allowing testimony of an inmate's statement to defendant shortly before the murder that the victim was in the shower, because the statement was not hearsay since it was not offered to prove the truth of any matter asserted, but instead to explain the subsequent conduct of defendant in walking toward the shower area.

17. Evidence— hearsay—not testifying to any statements—motive

The trial court did not commit prejudicial error in a capital trial by allowing testimony of an inmate about the victim's $17.00 debt owed to defendant because the statement did not constitute hearsay since the inmate did not testify to any statements made by the victim, and the testimony was relevant to establish a possible motive for the murder.

18. Evidence— corroboration—self-defense claim—no right in advance of testimony of a witness

The trial court did not err by initially excluding evidence that an inmate told defendant that he had given a knife to the victim, and that the same inmate also told another inmate that he had given a knife to the victim, because: (1) there is no right to corroboration evidence of a self-defense claim in advance of the testimony of a witness; and (2) defendant was not precluded from presenting evidence that corroborated his self-defense claim after defendant testified he believed the victim had a knife at the time of the murder and that he killed the victim in self-defense, nor can he show he suffered any prejudice.

19. Evidence— prior convictions—defendant—cross-examination

The trial court did not err in a capital trial by allowing the prosecutor to cross-examine defendant about the details of his prior convictions because: (1) evidence which would otherwise be inadmissible may be permissible on cross-examination to correct inaccuracies or misleading omissions in defendant's testimony or to dispel favorable inferences arising therefrom, and

defendant's testimony on direct examination tended to minimize the seriousness of his criminal involvement; and (2) the prosecutor did not improperly ask defendant about tangential circumstances of the crimes.

20. Evidence— prior convictions—defense witness—cross-examination

The trial court did not err in a capital trial by allowing the prosecutor to cross-examine a defense witness about the details of his prior convictions because: (1) the prosecutor's questions related to the factual elements of the crime, rather than the tangential circumstances of the crime; (2) the witness was not completely forthright and accurate in testifying about his prior convictions on direct examination; (3) the prosecutor asked only about weapons, not about other circumstances of the crimes, and thereby clarified the nature of the crimes the witness tended to minimize; (4) even if the questions exceeded the proper scope of inquiry under N.C.G.S. § 8C-1, Rule 609(a), any error was not prejudicial since the questions were asked of a defense witness and not the defendant; and (5) no reasonable possibility exists that a different result would have been reached at trial absent the alleged error.

21. Evidence— prison infractions—character—untruthfulness

The trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 608(b) in a capital trial by allowing the prosecutor to cross-examine defendant with respect to his prison infractions for weapon possessions, provoking an assault, disobeying an order and fighting, and making a verbal threat, because: (1) the record reveals the purpose of the prosecutor's inquiry was to show defendant's character for untruthfulness; (2) the probative value of the first infraction for weapon possession was not substantially outweighed by the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403; and (3) defendant is not entitled to review of the other prison infractions by plain error analysis since he did not object to the prosecutor's questions and he did not argue plain error.

22. Evidence— prison infractions—character—no plain error

Even if the prosecutor's questions about a defense witness's prison infractions, including stabbing someone with a pen, disobeying an order, three separate occasions for fighting, and provoking a fight, exceeded the permissible scope of impeachment

under N.C.G.S. § 8C-1, Rule 608(b), defendant failed to object during this testimony and admission of this testimony did not rise to the level of plain error.

23. Witnesses— expert testimony—defendant's state of mind

The trial court did not err in a capital trial by not allowing defendant's expert to give his opinion as to defendant's state of mind at the time of the homicide, to negate the elements of premeditation and deliberation based on the effect of the long-term imprisonment of defendant, because: (1) the expert was in no better position than the jury to determine the reasonableness of defendant's apprehension; and (2) the testimony would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. N.C.G.S. § 8C-1, Rule 702.

24. Evidence— cross-examination—following attempt to withdraw testimony

The trial court did not err in a capital trial by permitting the prosecutor to cross-examine the defense expert, after defendant attempted to withdraw the expert as a witness when the trial court sustained the prosecutor's objection to the expert's testimony regarding defendant's alleged "prison psychosis," because: (1) the expert had already testified about matters other than his credentials as an expert; and (2) the prosecutor properly impeached the expert's credibility without asking any questions or eliciting any testimony that related to the evidence excluded by the trial court.

25. Criminal Law— prosecutor's argument—characterization of defense expert's testimony as incomplete

The trial court did not abuse its discretion in failing to intervene ex mero motu in a capital trial during the prosecutor's closing argument, based on the characterization of the defense expert's testimony as incomplete, because the evidence was conflicting concerning defendant's intent and state of mind at the time of the murder, and counsel is allowed wide latitude in the argument of hotly contested cases.

26. Criminal Law— defendant's argument—court's reversal of ruling

The trial court did not abuse its discretion during a capital trial by prohibiting defense counsel from informing the jury during closing arguments that the trial court had reversed its earlier

ruling in which it refused to instruct on the lesser-included offenses of second-degree murder and voluntary manslaughter, and by denying defendant's motion for a mistrial, because: (1) the trial court acted appropriately to ensure that its decision to instruct on the lesser-included offenses would not affect the proceedings or result in the appearance of partiality; (2) the trial court reversed its ruling in ample time for defendant to revise his closing argument in order to avoid drawing attention to the disparities between the two arguments; and (3) defendant cannot show he suffered any prejudice under N.C.G.S. § 15A-1443(c) since the trial court instructed the jury on the lesser-included offenses according to defendant's request.

27. Criminal Law— prosecutor's argument—comment on defendant's self-defense claim

The trial court did not commit prejudicial error by failing to intervene ex mero motu during the prosecutor's closing arguments in a capital trial because the prosecutor's assertion that defendant's self-defense claim is "vomit on the law of North Carolina" constitutes a permissible expression of the State's position that the jury's determination that defendant acted in self-defense would be an injustice in light of the overwhelming evidence of defendant's guilt.

28. Criminal Law— prosecutor's argument—characterization of defendant

The trial court did not commit prejudicial error by failing to intervene ex mero motu during the prosecutor's closing arguments in a capital trial, based on the prosecutor's characterization of defendant as "this thing" and "cowardly," because: (1) the prosecutor's comments regarding defendant's cowardice were connected to the evidence which suggested that the victim was physically smaller and weaker than defendant, and the victim was naked and defenseless at the time of the killing; and (2) the prosecutor's one-time isolated description of defendant as "that thing" was not grossly improper.

29. Criminal Law— prosecutor's argument—advocate for State and victim

The trial court did not commit prejudicial error by failing to intervene ex mero motu during the prosecutor's closing arguments in a capital trial, based on the prosecutor arguing he spoke for the State and for the victim, because: (1) the Supreme Court

has previously found no gross impropriety when a prosecutor has argued that he speaks for the victim; and (2) the prosecutor's argument merely reminded the jurors that he was advocating for both the State and the victim.

30. Homicide— instruction—shank as dangerous weapon

The trial court did not err in a capital trial by instructing the jury that a shank was a dangerous weapon as a matter of law because: (1) the Supreme Court has previously rejected this same argument, which alleged that the instruction creates a conclusive presumption on an element of the offense relieving the State of its burden of proof; and (2) defendant failed to bring forth any new argument.

31. Evidence— prior crimes—lack of remorse—officer's testimony

The trial court did not commit plain error in a capital sentencing proceeding by allowing an officer to testify about defendant's demeanor and alleged lack of remorse during a prior investigation resulting in defendant's two prior convictions for murder, because: (1) the testimony was based on the officer's personal observation of defendant during the investigation for a period of "five or six hours"; and (2) the officer's opinion that defendant demonstrated no remorse for his previous crimes is competent, relevant evidence of defendant's mental condition.

32. Sentencing— capital—mitigating circumstances—childhood difficulties, caring relationship with sister, psychological trauma

The trial court did not err in a capital sentencing proceeding by excluding evidence from defendant's younger sister concerning defendant's childhood difficulties, his caring relationship with his younger sister, and the psychological trauma caused by his biracial background, because: (1) defendant failed to preserve this issue for appellate review under N.C.G.S. § 8C-1, Rule 103(a)(2) since he did not make an offer of proof to the witness' possible answers to the objectionable questions and the "essential content" and "significance" of the excluded testimony is not obvious; and (2) even if the issue had been properly preserved, the trial court did not prohibit defense counsel from asking defendant's sister about what defendant did for her as a father figure in her life and about her personal observations of defendant's reactions to biracial incidents during his childhood.

33. Sentencing— capital—mitigating circumstances—childhood psychological abuse and self-hatred

The trial court did not abuse its discretion in a capital sentencing proceeding by restricting testimony from defendant's mother concerning defendant's childhood psychological abuse and self-hatred as a result of being biracial, because the trial court merely restricted the testimony to the witness' personal observations of defendant's reactions and emotional state as a child, rather than allowing her to testify about defendant's feelings.

34. Discovery— expert testimony—exclusion—failure to comply with discovery order

The trial court did not err in a capital sentencing proceeding by excluding the testimony of an expert witness at the sentencing hearing concerning defendant's mental condition at the time of the offense, because: (1) defendant violated a discovery order requiring defendant to disclose, five working days in advance of testimony, mental examination reports prepared by witnesses whom defendant planned to call to testify; (2) defendant had two other mental health experts available, whose testimony would have been fully admissible at the sentencing proceeding; and (3) defendant cannot show he was prejudiced when he made a tactical decision not to disclose the report until after the guilty verdict.

35. Evidence— expert testimony—offer of proof—report in evidence

The trial court did not improperly refuse to allow defendant to make an offer of proof of the proposed testimony of an expert witness during a capital sentencing proceeding, because: (1) the trial court admitted the expert's report of her complete psychological assessment of defendant; (2) the trial court gave defendant ample opportunity on voir dire to question the expert about the substance of her report for a complete offer of proof as required by N.C.G.S. § 8C-1, Rule 103(a)(2); and (3) defendant was not prejudiced since the records would have been admissible independently of her testimony as relevant evidence of defendant's character.

36. Sentencing— capital—failure to submit mitigating circumstance—mental or emotional disturbance

The trial court did not err in a capital sentencing proceeding by failing to submit the mitigating circumstance under N.C.G.S. § 15A-2000(f)(2) that the murder was committed while defendant was under the influence of mental or emotional disturbance, because: (1) the reasons defendant offered to show why he carried a knife revealed a rational state of mind as opposed to a mind oppressed by extreme paranoia and fearfulness; and (2) sheer anger or the inability to control one's temper is neither mental nor emotional disturbance as contemplated by this mitigator.

37. Sentencing— capital—failure to submit mitigating circumstance—capacity to appreciate criminality or conform conduct

The trial court did not err in a capital sentencing proceeding by failing to submit the mitigating circumstance under N.C.G.S. § 15A-2000(f)(6) that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, because: (1) the record is devoid of any evidence that defendant's paranoia and fear of violence from the prison environment so impaired him as to prevent his understanding the criminality of his conduct or that it affected his ability to control his actions; (2) defendant testified he completed a psychological course and had obtained a "4.0" grade; (3) defendant owned and operated a canteen, card games, and a loan business, all of which were illegal or against prison regulations; and (4) the evidence that defendant pulled a knife in the shower when he approached the victim, since he had previously been told the victim had been given a knife, does not show that defendant had a mental disorder to the degree that it affected his ability to understand and control his actions at the time he committed the murder.

38. Criminal Law— prosecutor's argument—capital sentencing—biblical references

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing arguments, based on the prosecutor's use of biblical references, because: (1) the prosecutor properly emphasized at the beginning of his closing argument that defendant's sentence

would be recommended based upon the "law of North Carolina, not biblical law," (2) the prosecutor's argument that "I hope nobody has the gall to stand up here and tell you that the law of North Carolina is against the Bible" does not improperly imply that the Bible required death upon a determination that a murder occurred; (3) the prosecutor's statement that "defendant by his own conduct has determined his fate" does not diminish the jury's responsibility in recommending the death sentence, but instead informs the jury of its duty to consider the evidence supporting the aggravating and mitigating circumstances as well as defendant's conduct; and (4) as anticipated by the prosecutor, defense counsel also made biblical references during his closing argument.

39. Sentencing— capital—prosecutor's argument—mitigating circumstances

Although the prosecutor misstated the law in a capital sentencing proceeding during his closing argument when he informed the jurors that it was their duty to determine whether any of the "29 so-called mitigating circumstances" had any mitigating value, since the submitted statutory mitigating circumstance of age would have mitigating value as a matter of law if it was found by the jury to exist, the sentencing hearing was not so infected with unfairness by the prosecutor's comments as to violate defendant's due process rights because his subsequent comments accurately reflected the distinction between statutory and nonstatutory mitigating circumstances.

40. Criminal Law— defendant's argument—quoting secular sources—relevancy

The trial court did not err in a capital sentencing proceeding by prohibiting defense counsel from quoting from secular sources during his closing argument, specifically from a letter written by Reverend Jesse Jackson to the "Faith Community" in South Carolina making a moral appeal for the life of a woman who murdered her two young children and blamed a black man, because the trial court afforded counsel ample opportunity to argue using ideas and quotes from secular sources and properly prohibited counsel from arguing the facts of other cases since those facts are not pertinent to any evidence in this case and are, thus, improper for jury consideration.

41. Sentencing— capital—mitigating circumstances—defendant's age—mitigating value

The trial court did not commit plain error in a capital sentencing proceeding by failing to instruct the jury that the statutory mitigating circumstance of age has mitigating value because the trial court's instructions properly distinguished between statutory and nonstatutory mitigating circumstances, and informed the jurors of their duty under the law.

42. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death penalty in a first-degree murder case because: (1) defendant was convicted of premeditated and deliberated murder; (2) the jury found aggravators pertaining to two previous capital felonies and five previous violent felonies; and (3) the facts show defendant repeatedly stabbed a totally defenseless man in the prison shower for money owed him.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Wright, J., on 20 November 1997 in Superior Court, Halifax County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 May 2000.

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

David G. Belser for defendant-appellant.

PARKER, Justice.

Defendant Michael Jerome Braxton was indicted on 30 September 1996 for first-degree murder in the killing of victim Dwayne Maurice Caldwell. 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 the sentence of death for the murder; and the trial court entered judgment accordingly.

The State's evidence at trial tended to show that in August of 1996 defendant and the victim were both inmates in block A of unit 4 at Caledonia Correctional Center ("Caledonia") in Tillery, Halifax County, North Carolina. Defendant owned the illegal canteen operation in block A. Defendant also owned and operated card games and

a loan business in violation of prison regulations. In August of 1996 the victim owed defendant $17.00 for items charged at defendant's canteen. Michael Thomason, another inmate, testified that, three days prior to the killing, defendant harassed the victim for the money owed. Thomason and other inmates pooled their money to pay the victim's debt. Thomason gave the money to defendant, but defendant gave it back. According to Thomas McCombs, another inmate, defendant would not accept the money because "it was a principle thing." McCombs also testified defendant told him that he was going to "hurt [the victim]."

On the afternoon of 18 August 1996, the unit 4 inmates were released to the prison yard for exercise. While the others were in the prison yard, Officer Roy W. Brown, Jr. escorted the victim, who had been confined to his cell on administrative lockup, to the shower. Officer Brown searched the victim and the shower area and found no contraband or weapons. Officer Brown left the victim alone while he showered.

At the same time, defendant and other inmates were outside in the prison yard playing a card game. As they were playing, inmate Ronald Moore took defendant aside and told him "that guy" was in the shower. Shortly thereafter, defendant left the card game and headed toward block A. Inmate McCombs testified that before defendant went into block A, he saw defendant reach down and pull up his sock, where he had a "blade." McCombs saw defendant step into the shower and stab the victim "like a mad man" approximately eighteen to twenty times, using a second knife he had hidden in the waistband of his pants. Inmate Thomason testified that he saw defendant stab the victim two more times with both hands on the knife after the victim was down.

After leaving the victim in the shower for approximately twelve to fifteen minutes, Officer Brown heard screams from the shower area. Officer Brown entered the shower and sprayed pepper mace on both defendant and the victim. Officer Brown testified that he saw defendant, who was wearing work gloves, stabbing the victim with a homemade knife known as a "shank." After the victim fell out of the shower, defendant then kicked him repeatedly in the head and chest area and stabbed him in the chest and abdomen. Even though defendant's vision was impaired by the pepper spray, he felt around for the victim's body with his left hand and continued to stab the victim. Defendant eventually stopped his assault on the victim, threw the

shank down, and ran out of the shower area. At the infirmary, the victim showed no signs of life. A medical examination of defendant revealed no apparent injuries on his body. Corrections Officer Horace Aycock testified that he and other officers, including Officer Brown, conducted a search for weapons in unit 4. They found a shank in the shower area, a pair of work gloves on the floor near the control room to block A, and a second shank wrapped in a wet towel in the light fixture of the open bathroom cell.

Dr. Louis A. Levy, a pathologist and medical examiner, performed the autopsy on the victim's body. He testified that the victim had thirteen separate stabs and cuts on both sides of his chest, both arms, the index finger of his right hand, his right wrist, and his mouth. All of the victim's flexor tendons had been severed in the right wrist; and the victim's lungs, heart, and liver had been punctured. Dr. Levy opined that the cause of death was stab wounds to the heart and lungs and subsequent exsanguination. Dr. Levy further opined that the wounds were caused by two different weapons: The slicing of the right wrist was consistent with a knife that was sharpened on both sides, while the wound in the right shoulder was consistent with a weapon that was sharpened at the point but dull on both sides.

Defendant testified at trial as follows: Although defendant and the victim had argued about the money owed, defendant eventually told the victim on several occasions that he forgave the debt. However, the victim, while confined to his cell in administrative lockup, tried to provoke defendant into an argument and flashed a knife at him. Defendant testified that, on the afternoon of 18 August 1996, he was playing cards in the prison yard; and he had a knife "just in case an argument [broke] out at the game." Defendant stated that most inmates carry a knife in prison and that he always carried his knife in his glove, especially to card games, as a safety measure. While playing cards, another inmate told defendant that the victim had been given a knife. Defendant then entered block A and heard someone in the shower make an obscene comment to him. Defendant recognized the person in the shower as the victim. Defendant testified that he told the victim, "I'm about burned out on your mouth"; and the victim told defendant to "come on up here and get some then. I got something for you anyway." After defendant stepped into the shower and saw the victim with a towel in his hand, defendant pulled his knife out of one of his gloves, which were in his back pocket. Defendant "[felt]

like that [the victim] must have had a knife in his hand" since he had been told earlier that someone had given the victim a knife. However, defendant admitted that he never actually saw the victim with a knife.

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

JURISDICTIONAL ISSUE

[1] Defendant contends that the charges against him should have been dismissed for the reason that the short-form murder indictment was constitutionally insufficient to charge him with first-degree murder. We initially address whether this issue is properly before this Court. Defendant did not contest the murder indictment at trial. Constitutional questions "not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). A defendant waives an attack on an indictment when the validity of the indictment is not challenged in the trial court. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.* Therefore, this issue is properly before this Court.

[2] Citing *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), defendant argues that the short-form indictment was unconstitutional since it failed to allege all the elements of first-degree murder, namely, "premeditation, deliberation, and specific intent to kill." Defendant also argues that without an allegation of premeditation and deliberation, the indictment failed to allege facts necessary to impose the maximum penalty for murder.

The indictment against defendant for murder contained the following language:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Michael Jerome Braxton] unlawfully, willfully and feloniously and of malice aforethought did kill and murder DWAYNE MAURICE CALDWELL.

The indictment also stated: "Offense in violation of G.S. 14-17." This indictment complied with N.C.G.S. § 15-144, which provides for a short-form version of an indictment for murder as follows:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; . . . and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

N.C.G.S. § 15-144 (1999). An indictment that complies with the requirements of N.C.G.S. § 15-144 will support a conviction of both first-degree and second-degree murder. *See State v. King*, 311 N.C. 603, 608, 320 S.E.2d 1, 5 (1984). In *Apprendi v. New Jersey*, — U.S. —, —, — L. Ed. 2d —, —, 2000 WL 807189, at *7 (June 26, 2000) (No. 99-478), the United States Supreme Court, in examining the procedural safeguards necessary to protect a criminal defendant's constitutional right to due process when charged with violation of a state criminal statute, recently held that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Id.* at —, — L. Ed. 2d at —, 2000 WL 807189, at *7 (No. 99-478) (quoting *Jones*, 526 U.S. at 243 n.6, 143 L. Ed. 2d at 326 n.6). Defendant contends that premeditation and deliberation must be alleged in the short-form indictment as facts that would increase the maximum penalty from life imprisonment for second-degree murder to the death penalty for first-degree murder. However, this Court has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 638 (1996); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985). This Court has also held that the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories, including premeditation and deliberation, set forth in N.C.G.S. § 14-17, which is referenced on the short-form indictment. *See State v. Leroux*, 326

N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990); *State v. Brown*, 320 N.C. 179, 192, 358 S.E.2d 1, 11, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *Avery*, 315 N.C. at 14, 337 S.E.2d at 793. The crime of first-degree murder and the accompanying maximum penalty of death, as set forth in N.C.G.S. § 14-17 and North Carolina's capital sentencing statute, are encompassed within the language of the short-form indictment. We, therefore, conclude that premeditation and deliberation need not be separately alleged in the short-form indictment. Further, the punishment to which defendant was sentenced, namely, the death penalty, is the prescribed statutory maximum punishment for first-degree murder in North Carolina. Thus, no additional facts needed to be charged in the indictment. Given the foregoing, defendant had notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected was death. Moreover, under the law of this State, whenever a defendant is charged with murder, questions of fact related to guilt or innocence and to capital sentencing must be determined by the jury; and the State has the burden of proving all elements of the crime and aggravating circumstances beyond a reasonable doubt. Nothing in *Apprendi*, in our judgment, alters this prior case law. Accordingly, we overrule this assignment of error.

JURY SELECTION

[3] In his first assignment of error, defendant contends that the trial court's repeated references to appellate review violated defendant's rights under the Eighth Amendment to the Constitution of the United States by diluting the responsibility of the jury. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 86 L. Ed. 2d 231, 239 (1985).

Prior to jury selection, the trial court instructed the prospective jurors about court procedures as follows:

> The court reporter this week is Mark Garvin of Nash County. Mr. Garvin will be taking down and transcribing as he is at this time everything that I say in the courtroom, during the trial and the hearing of various motions. And should a mistake or question be made so the Supreme Court of North Carolina can review it. This is also true so that I may review it, should I wish to hear something that a witness or an attorney said.

The trial court later referred to appellate review several times during jury *voir dire* by saying "[l]et the record reflect for appellate review" or "for the appellate record." After defendant objected to these refer-

ences, the trial court told the jurors with regard to appellate review, "I want to make that perfectly clear. That's only should things go adverse to the defendant. There may be no appellate review in this case."

In *State v. McKoy*, 323 N.C. 1, 8, 372 S.E.2d 12, 15 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), the trial court explained to the jury that the court reporter "can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County." Similarly, in *State v. Gray*, 347 N.C. 143, 163, 491 S.E.2d 538, 544 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998), the trial court explained that the court reporter had a duty "to take down and transcribe everything that's said in the courtroom during the trial and the hearing of motions so that the judge can review, or should it be appealed, any matter to the Supreme Court in Raleigh." In both cases we rejected the defendants' arguments that the instructions violated their constitutional rights. *See id.*; *McKoy*, 323 N.C. at 12, 372 S.E.2d at 17. We concluded in each case that the trial court's "brief comment—at the outset of the trial and in the context of an explanation of the court reporter's duties—could not have influenced, adversely to defendant, the jury's perception of its responsibility for its decisions." *McKoy*, 323 N.C. at 12, 372 S.E.2d at 17.

Similarly, in this case the trial court's statements, made by the judge before jury selection did not impermissibly imply to the jury that this Court would correct any errors the jury might make or relieve the jury of its responsibility. *See Gray*, 347 N.C. at 163, 491 S.E.2d at 544. The trial court's passing references to appellate review and the curative statement, made during *voir dire*, likewise do not invalidate defendant's death sentence. *See McKoy*, 323 N.C. at 13, 372 S.E.2d at 18. Therefore, this assignment of error is overruled.

[4] Next, defendant contends that the trial court erroneously subdivided the jury venire into panels from which prospective jurors were called for individual *voir dire*. Defendant contends that this violated the provisions of N.C.G.S. § 15A-1214 and entitles him to a new trial. We disagree.

The North Carolina jury selection statute provides, in pertinent part, as follows:

> (a) The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection

> which precludes advance knowledge of the identity of the next juror to be called. When a juror is called and he is assigned to the jury box, he retains the seat assigned until excused.

N.C.G.S. § 15A-1214(a) (1999). In this case, the trial court subdivided the large venire into smaller panels of twenty-five people. These panels were determined by the courtroom clerk calling the names, at the judge's instruction, by "lot or random." The trial court then directed the clerk to call prospective jurors to the jury box randomly from within a panel. Defendant argues this procedure resulted in advance knowledge of the identity of the next juror to be called when only one prospective juror remained in each panel. Further, defendant contends the trial court erred by assigning prospective jurors Alnita Simmons, Walter Arrington, Jamal Robinson, and Dennis Carter to panel G rather than simply excusing these jurors after they provided excuses regarding potential time and work conflicts.

"When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, ___ S.E.2d ___, ___, (2000); *see also State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). However, a defendant's challenge to the jury panel must satisfy the requirements of N.C.G.S. § 15A-1211, which provides that a challenge:

> (1) May be made only on the ground that the jurors were not selected or drawn according to law.
>
> (2) Must be in writing.
>
> (3) Must specify the facts constituting the ground of challenge.
>
> (4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c) (1999). In this case, defendant never followed this specific procedure. The record reveals that defendant never challenged the jury panel selection process and never informed the trial court of any objection to the allegedly improper handling of the jury venires. *See State v. Workman*, 344 N.C. 482, 499, 476 S.E.2d 301, 310 (1996). In light of defendant's failure to follow the procedures clearly set out for jury panel challenges and his failure to alert the trial court to the challenged improprieties, we hold that defendant failed to preserve this issue for appellate review. *See State v. Atkins*, 349 N.C. 62, 102-03, 505 S.E.2d 97, 122 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999).

Moreover, even if it be assumed *arguendo* that the jury selection procedure violated the randomness requirement of N.C.G.S. § 15A-1214(a), defendant has not demonstrated on appeal how he was prejudiced by the procedure. This assignment of error is overruled.

[5] Defendant next assigns error to the prosecutor's repeated questioning about whether prospective jurors could be part of the "legal machinery" that would sentence defendant to the death penalty. Defendant claims this questioning constituted an impermissible attempt to "stake out" the jurors. Defendant also argues that the term "legal machinery" diluted the individual jurors' sense of responsibility for their sentencing decision in violation of *Caldwell*, 472 U.S. at 328-29, 86 L. Ed. 2d at 239, and *State v. Jones*, 296 N.C. 495, 500, 251 S.E.2d 425, 429 (1979).

In *State v. Willis*, 332 N.C. 151, 182, 420 S.E.2d 158, 173 (1992), and *State v. Porter*, 326 N.C. 489, 503, 391 S.E.2d 144, 154 (1990), this Court held that such questions did not minimize the importance of the jury or diminish the jury's responsibility for the decision to impose death. We explained that "the prosecutor's question emphasized each juror's personal participation in the decision-making process." *Porter*, 326 N.C. at 503, 391 S.E.2d at 154. Thus, in light of our previous holdings, we cannot conclude that the prosecutor's use of the term "legal machinery" was improper. This assignment of error is without merit and is, therefore, overruled.

[6] Next, defendant contends that the trial court abused its discretion during *voir dire* by not allowing him to ask any prospective jurors whether they could be fair and impartial as to guilt or innocence knowing that defendant had previously been convicted of two first-degree murders and was serving two life sentences when he committed this murder. Defendant argues that he should have been permitted the opportunity to determine whether the jurors would follow the trial court's instruction to consider defendant's prior convictions only as impeachment evidence. Defendant contends that this question was permissible under *Morgan v. Illinois*, 504 U.S. 719, 733, 119 L. Ed. 2d 492, 506 (1992), because the question "inquired into whether a juror could be fair and impartial and whether predetermined views regarding the death penalty would substantially impair that prospective juror's ability to serve." *State v. Kandies*, 342 N.C. 419, 441, 467 S.E.2d 67, 79, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). After a careful review of the transcript of *voir dire*, we find this assignment to be without merit.

"Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980); *see also 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); *State v. Yelverton*, 334 N.C. 532, 541-42, 434 S.E.2d 183, 188 (1993). The question posed in this case does not amount to a proper inquiry into whether the juror could follow the law as instructed by the trial judge. *See Robinson*, 339 N.C. at 273, 451 S.E.2d at 202. Rather, the question is an attempt to determine what kind of verdict a juror would render under certain named circumstances not yet in evidence, namely, two prior convictions of first-degree murder and two life sentences. *See id.*; *State v. Skipper*, 337 N.C. 1, 23, 446 S.E.2d 252, 264 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). We have previously held that "staking out" what the jurors' decision will be under a particular set of facts is improper. *See State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996); *Skipper*, 337 N.C. at 23-24, 446 S.E.2d at 264. Thus, we find this assignment of error to be without merit.

[7] Defendant next assigns error to the trial court's overruling of defendant's objection to the State's alleged impermissible use of peremptory challenges to strike from the jury seven black prospective jurors solely on account of their race. Article I, Section 26 of the Constitution of North Carolina prohibits the use of peremptory challenges for racially discriminatory reasons, *see State v. Fletcher*, 348 N.C. 292, 312, 500 S.E.2d 668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999), as does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *see Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986).

In *Batson* the United States Supreme Court established a three-part test to determine if the prosecutor has engaged in impermissible racial discrimination in the selection of jurors. *See Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 405 (1991) (citing *Batson*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-89). First, the defendant must establish a *prima facie* case that the State has exercised a peremptory challenge on the basis of race. *See id.* Second, once the *prima facie* case has been established by the defendant, the burden shifts to the State to rebut the inference of discrimination by offering a race-neutral explanation for attempting to strike the juror in question. *See*

id. at 358-59, 114 L. Ed. 2d at 405; *State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). The explanation must be clear and reasonably specific, but " 'need not rise to the level justifying exercise of a challenge for cause.' " *Porter*, 326 N.C. at 498, 391 S.E.2d at 151 (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). The prosecutor is not required to provide a race-neutral reason that is persuasive or even plausible. *See Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680. The issue at this stage is the facial validity of the prosecutor's explanation; and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. *See State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Our courts also permit the defendant to introduce evidence at this point that the State's explanations are merely a pretext. *See Gaines*, 345 N.C. at 668, 483 S.E.2d at 408.

Third, and finally, the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination. *See Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405; *Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680. As this determination is essentially a question of fact, the trial court's decision of whether the prosecutor had a discriminatory intent is to be given great deference and will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous. *See Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680; *Kandies*, 342 N.C. at 434-35, 467 S.E.2d at 75. " 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985)).

In the cases since *Batson* addressing the issue of peremptory challenges, this Court has described the factors relevant to determining whether a defendant established a *prima facie* showing of purposeful discrimination. Among the relevant factors are "[t]he race of the defendant, the victims, and the key witnesses." *Porter*, 326 N.C. at 498, 391 S.E.2d at 150-51. This Court has also considered "questions and statements made by the prosecutor during voir dire . . . and in exercising his peremptor[y] [challenges] which may either lend support to or refute an inference of discrimination." *State v. Robbins*, 319 N.C. 465, 489, 356 S.E.2d 279, 293, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Another consideration is whether the prosecu-

tor engaged in a pattern of strikes or used a disproportionate number of peremptory challenges to strike jurors of a particular race. *See State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991); *Robbins*, 319 N.C. at 490-91, 356 S.E.2d at 294. "[O]ne factor tending to refute an allegation of discriminatory use of peremptor[y] [challenges] is the acceptance rate of black jurors by the State." *Smith*, 328 N.C. at 121, 400 S.E.2d at 724. This Court has previously emphasized that the frequency with which a prosecutor accepts black jurors is relevant to the issue of whether he is purposefully discriminating against blacks. *See State v. Allen*, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (minority acceptance rate of 41% failed to establish *prima facie* case of purposeful discrimination), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Abbott*, 320 N.C. 475, 481, 358 S.E.2d 365, 369-70 (1987) (acceptance rate of 40% failed to establish *prima facie* case).

Defendant contends that the trial court erroneously concluded its analysis upon finding that defendant failed to establish a *prima facie* showing of purposeful discrimination in the prosecutor's use of seven consecutive peremptory challenges to strike seven black prospective jurors. Defendant argues that the trial court should have required the prosecutor to state his reasons for challenging prospective jurors Alice Leonard, Alexis Whitaker, Kevin Wiggins, Sherman Daniel, Geraldine Kinney, Marjorie Whitaker, and Johnny Wills. Defendant further argues that the trial court erroneously focused on the racial composition of the jurors already selected and of the entire jury pool in determining that defendant had not established a *prima facie* showing of discrimination.

In this case, the prosecutor objected to defendant's exercise of a peremptory challenge removing white prospective juror West Jenkins. The prosecutor argued that six of the nine peremptory challenges exercised by defendant at that point were used to remove white male prospective jurors, thereby establishing a pattern of purposeful racial discrimination. In response to the prosecutor's challenge, defendant asked the trial court, in ruling whether the prosecutor had established a *prima facie* case of purposeful discrimination, to consider the prosecutor's use of six consecutive peremptory challenges to remove black prospective jurors Leonard, Whitaker, Wiggins, Daniel, Kinney, and Whitaker. The trial court denied the prosecutor's challenge without ruling whether the prosecutor had made a *prima facie* showing of discrimination.

Jury selection proceeded until the prosecutor attempted to exercise a peremptory challenge to remove black prospective juror Wills. Defendant argued that the prosecutor's exercise of seven consecutive peremptory challenges against black prospective jurors established purposeful racial discrimination by the prosecutor. The trial court heard arguments regarding the prosecutor's reverse-*Batson* challenge and defendant's *Batson* challenge. The trial court then reviewed the factors enunciated by this Court as relevant in determining whether a party has established a *prima facie* showing of purposeful discrimination.

The trial court ultimately concluded that, according to the jury questionnaires, the pool of prospective jurors was composed of 53% black jurors, 42% white jurors, and 5% American Indian jurors. At that time, the State had passed eight black prospective jurors and nine white prospective jurors to defendant. Five of the eight jurors already seated on the jury were African-American, resulting in a jury composed of 63% minority jurors. After noting that the racial composition of the jury at that point closely matched the racial composition of the entire jury pool, the trial court expressed its concern that the racial composition of the jury would become skewed if the prosecutor and defendant continued to strike jurors according to the peremptory patterns that had evolved during jury selection. The trial court then ruled that all further peremptory challenges must be made outside the presence of the individual juror and that the challenging party must articulate race-neutral reasons for removing that juror. Thereafter, defendant did not make another *Batson* challenge, and the final composition of the jury panel was eight black jurors and four white jurors. Three alternates were selected, one of whom was black and two of whom were white.

Assuming *arguendo*, as defendant contends, that the trial court failed to find a *prima facie* case, we conclude based on the record that the trial court carefully applied the correct criteria. We further conclude that, in light of the prosecutor's minority acceptance rate of 47%, the trial court did not err in finding that defendant failed to establish a *prima facie* showing of purposeful discrimination at that point in the jury selection process.

GUILT-INNOCENCE PHASE

[8] In his next assignment of error, defendant contends that the trial court erroneously admitted into evidence at trial hearsay statements attributed to the victim. At trial, the victim's mother and grandmother

testified over defendant's objection that the victim had been placed "on lock-up" at Caledonia as a result of a back injury that prevented him from working. The trial court allowed the testimony after explicitly acknowledging that the statements constituted hearsay. Defendant argues that he was prejudiced by this inadmissible hearsay in that the trial court instructed the jury to consider the victim's physical strength in deciding whether defendant killed the victim in self-defense. We disagree.

Assuming *arguendo* that the victim's statements about his lockup status were inadmissible hearsay, any error in admitting them did not prejudice defendant. In addition to the testimony from the victim's mother and grandmother that the victim could not work due to a back injury, the prosecutor also elicited testimony from Officer Donald Gentry on direct examination that the victim had been placed on lockup for disrespecting an officer. On cross-examination, Sergeant Michael Johnson testified that the victim was on lockup for "not going to work." Thus, both the prosecutor and defendant presented evidence to the jury regarding the actual reasons for the victim's lockup status. Defendant was not precluded from presenting additional evidence regarding the victim's status or from rebutting prosecutorial evidence of the victim's peaceful character. In light of the overwhelming evidence of defendant's guilt, defendant cannot show that there is a reasonable possibility that the outcome of his trial would have been different if the trial court had excluded the testimony at issue. *See* N.C.G.S. § 15A-1443(a) (1999); *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 559 (1999).

[9] Defendant also contends that the trial court's erroneous admission of the victim's hearsay statements was compounded by its error in excluding testimony that the victim was on lockup for profanity and disrespect. The trial court limited prosecution witness Officer Gentry's testimony on cross-examination as follows:

> Q. Other than the tag or flag that was on the control switch for [the victim's] individual cell, did you have any personal knowledge or report knowledge of why he was on lock-up?
>
> A. No.
>
> Q. And you don't know when he went into that status?
>
> A. No, sir.

Q. Do you know whether or not that he was subject to that process was to terminate on the 18th day of August, 1996?

A. No, I wouldn't know anything of that nature.

Q. What is the average approximate time of someone being on individual lock-up for profane language or disobeying an order?

A. The average time for what?

Q. Average time that person would be kept on lock-up.

A. I do not know that.

Q. Period of punishment is what I'm talking about.

A. I wouldn't know the average time for that.

. . . .

Q. Were you aware that [the victim] was put on lock-up on July 31, 1996, for profane language and disrespect?

[PROSECUTOR]: Objection

THE COURT: Sustained and don't—

[PROSECUTOR]: I'd ask for an instruction to counsel.

THE COURT: And don't consider counsel's question. Next question.

Defendant did not make an offer of proof to show what the witness' response to the question would have been. Accordingly, defendant has failed to preserve this issue for appellate review under the standard set forth in N.C.G.S. § 8C-1, Rule 103(a)(2). *See Atkins*, 349 N.C. at 79, 505 S.E.2d at 108. The substance of the excluded testimony was not necessarily apparent from the context within which the question was asked; therefore, an offer of proof was necessary to preserve this issue for appeal. *See id.*; *State v. Geddie*, 345 N.C. 73, 96, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997). Officer Gentry had already testified on cross-examination that he did not know when the victim was placed on lockup. Further, Officer Gentry had testified during direct examination that the victim was put on lockup status for disrespecting an officer. Nothing in the record on appeal suggests that the victim was also being punished for the additional infraction of "profane language." The witness may well have answered that he was not aware of the facts contained in counsel's question. Thus, an attempt by this Court to presume the sub-

stance or prejudicial effect of Officer Gentry's excluded testimony would be speculation.

[10] Next, defendant contends that the trial court violated his constitutional right to a fair and impartial jury by allowing Bailiff Overton to participate in a courtroom demonstration in the role of the murder victim. During trial, prosecution witness Officer Roy Brown described the manner in which he searched the victim for contraband before escorting the victim into the shower on the day of the murder. Bailiff Overton acted as the victim, over defendant's objection, during Officer Brown's demonstration of the search. The trial court gave a limiting instruction that the jury should consider the demonstration "for illustration only."

This Court has consistently held that "where a witness for the State acts as custodian or officer in charge of the jury in a criminal trial, prejudice is conclusively presumed, and the defendant must have a new trial." *State v. Jeune*, 332 N.C. 424, 431, 420 S.E.2d 406, 410 (1992). To determine whether the witness acted as the officer in charge of the jury, this Court "look[s] to factual indicia of custody and control and not solely to the lawful authority to exercise such custody or control." *State v. Mettrick*, 305 N.C. 383, 386, 289 S.E.2d 354, 356 (1982).

In this case, defendant asserts that Bailiff Overton had "constant contact" with the jury and presumes that Bailiff Overton was the sworn officer in charge of the jury. However, defendant cites no evidence in the transcript or record that supports these assertions and thus offers no basis on which this Court could determine that Bailiff Overton was, in fact, the custodian of the jury. Mere presence in the courtroom is not sufficient. *See Jeune*, 332 N.C. at 432-33, 420 S.E.2d at 411. Additionally, Bailiff Overton was not called to testify as a witness; and he did not convey any communication to the jury through his participation in the courtroom demonstration. Therefore, we conclude that defendant is not entitled to a presumption of prejudice as a result of Bailiff Overton's conduct. *See, e.g., State v. Brown*, 315 N.C. 40, 57, 337 S.E.2d 808, 822 (1985) (declining to presume prejudice where the officer in charge of the jury seated himself behind the prosecutor and was never called to testify as a witness), *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). The likelihood that the outcome of the trial would have been different had Bailiff Overton not participated in the demonstration is *de minimus*.

Accordingly, any constitutional error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b). This assignment of error is overruled.

[11] In two separate arguments, defendant contends that the trial court erred by admitting impermissible opinion evidence. First, without objection from defendant, Officer Brown testified during direct examination that, at the time of the murder, he heard "shrill screaming" that sounded "like somebody is fearing for their life." Second, Officer Brown testified on direct examination over defendant's objection that the crime scene was worse than any hog killing he had ever seen. Third, Officer Alonzo Clark testified during direct examination over defendant's objection that he searched defendant because defendant "looked guilty" as he came out of the shower area holding his hands in the air. Finally, State witnesses Captain Grady Massey and Assistant Superintendent J.C. Wilson repeatedly testified over defendant's objection that defendant appeared calm and relaxed immediately following the murder, as though he had no problems or as if nothing unusual had happened. Further, Captain Massey testified at one point that defendant showed no remorse for killing the victim. Defendant argues that this testimony was unfairly prejudicial, speculative, and beyond the lay opinion permitted by N.C.G.S. § 8C-1, Rule 701.

Relevant evidence is generally admissible, *see* N.C.G.S. § 8C-1, Rule 402 (1999), except where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," N.C.G.S. § 8C-1, Rule 403 (1999). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992); *see also State v. Elliott*, 344 N.C. 242, 272, 475 S.E.2d 202, 215 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). We conclude that the trial court did not abuse its discretion by permitting Officer Brown, Officer Clark, Captain Massey, and Assistant Superintendent Wilson to testify about the victim's screams during the murder, the appearance of the crime scene, and defendant's behavior and demeanor immediately following the murder. This testimony was relevant to negate defendant's claim of self-defense as well as to establish his state of mind and intent to kill.

[12] Having concluded that the testimony was not unfairly prejudicial to defendant, we next consider whether Officer Clark's and

Officer Brown's testimony amounted to improper lay opinion. N.C.G.S. § 8C-1, Rule 701 provides:

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

N.C.G.S. § 8C-1, Rule 701 (1999); *accord State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987). This rule permits evidence which can be characterized as a "shorthand statement of fact."

> This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts.

State v. Spaulding, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975) (quoting *State v. Skeen*, 182 N.C. 844, 845-46, 109 S.E. 71, 72 (1921)), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *accord State v. Johnston*, 344 N.C. 596, 609, 476 S.E.2d 289, 296 (1996); *Williams*, 319 N.C. at 78, 352 S.E.2d at 432. Officer Brown's testimony that the victim's screaming sounded like somebody fearing for his life and that the crime scene was worse than a hog killing represented instantaneous conclusions based on his observation of a variety of facts. Similarly, Officer Clark's testimony that defendant looked guilty was based on his observation that, as defendant saw Officer Clark approaching, defendant immediately raised his hands. Finally, Captain Massey's and Assistant Superintendent Wilson's testimony that defendant appeared calm, relaxed, and without remorse represented instantaneous conclusions based on their observations of defendant's demeanor following the murder. Thus, we conclude that the testimony of these witnesses may be characterized as admissible shorthand statements of fact. The trial court did not err in admitting this testimony of these witnesses, and defendant's due process right to a fair trial was not violated. These assignments of error are overruled.

[13] In two other separate arguments defendant contends that the trial court erred in excluding testimony from defendant and from two other witnesses regarding the general availability of weapons at

Caledonia. Defendant argues that the excluded evidence was relevant to his claim of self-defense in that the testimony supported the reasonableness of his belief that he was about to be injured or killed. Defendant further contends that the trial court's erroneous rulings violated his constitutional right to due process and resulted in a death sentence imposed in violation of the Eighth Amendment to the United States Constitution. We disagree.

Where a defendant claims that he killed the victim in self-defense, "a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *State v. Johnson*, 270 N.C. 215, 219, 154 S.E.2d 48, 52 (1967). In *State v. Spaulding*, 298 N.C. 149, 159, 257 S.E.2d 391, 397 (1979), this Court held that a defendant charged with committing a murder in prison "should be permitted to present to the jury his evidence of the availability of weapons both to rebut the state's evidence and to assist in establishing his claim of self-defense."

In this case, the trial court first excluded testimony from State witness Officer Brown, who testified on direct examination that he searched the shower area and the victim immediately prior to the time of the murder. The trial court permitted defendant to cross-examine Officer Brown about the security of the shower area and the adjoining sally port and about the possibility that another inmate could have reached into the shower and given the victim a knife. However, the trial court excluded any further cross-examination regarding searches of or weapons found in the victim's cell block. We conclude that the trial court properly excluded Officer Brown's testimony.

Under N.C.G.S. § 8C-1, Rule 611(a), the trial court properly exercised its discretion "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). Officer Brown had already testified that he did not know how frequently the victim's cell block was searched and that he could not recall whether he or any other officers had ever found knives during a search of the victim's cell block. Thus, this witness could not provide any further testimony regarding the general availability of weapons in the victim's cell block; and any further questioning of Officer Brown on this subject

would have been futile. Additionally, although the trial court excluded further cross-examination of Officer Brown, the trial court expressly stated that defendant could present other evidence that tended to establish the availability of weapons in the prison. Thus, consistent with *Spaulding*, 298 N.C. at 159, 257 S.E.2d at 397, defendant was not precluded from presenting such evidence and did in fact present such evidence.

Second, the trial court excluded defendant's response to a question during direct examination regarding his knowledge of the availability of knives at Caledonia. The trial court sustained the prosecutor's objection on the basis that defendant had already testified about the availability of knives and the dangerousness of the inmates at Caledonia. We conclude that the trial court properly exercised its discretion under N.C.G.S. § 8C-1, Rule 611(a) in sustaining the prosecutor's objection. Defendant had already testified extensively regarding frequent violence among the inmates and that "everybody at Caledonia, everybody has a knife." Defendant also testified that, during a cell-block search following a violent incident, officers discovered knives in twenty of the twenty-four cells in his and the victim's cell block. Therefore, any further testimony from defendant regarding the availability of knives would have been duplicative of defendant's earlier testimony.

Finally, the trial court excluded testimony from defense witness Marvin Sparrow, a former North Carolina Prisoner Legal Services attorney, regarding the dangerousness of the prisoners at Caledonia. The trial court ruled that Sparrow was not qualified to testify to prison conditions at the time of the murder. In *Spaulding*, 298 N.C. at 159-60, 257 S.E.2d at 397-98, this Court held competent and admissible the testimony of Lee Bounds, former Director of Prisons, about prevailing prison conditions. The Court based its conclusion on Bounds' "extensive experience" in North Carolina's prisons and his knowledge of the prison conditions at the time of the murder. *Id.* at 159, 257 S.E.2d at 397. In contrast, Sparrow based his opinion exclusively on prisoner complaints and on visits to Caledonia for the purpose of interviewing prisoners. Further, Sparrow last visited Caledonia in the summer of 1995 approximately one year prior to this murder which occurred in August 1996. Therefore, we conclude that Sparrow was in no better position than the jury to give his opinion about the prevailing conditions in Caledonia at the time of the murder; and the trial court did not abuse its discretion in excluding Sparrow's testimony. These assignments of error are without merit.

[14] Next, defendant contends that the trial court erred in allowing testimony from several inmates that defendant went to the shower area intending to kill the victim over money that the victim allegedly owed to defendant. Defendant argues that the statements were hearsay not falling within any hearsay exception. He further argues that any probative value of these statements was outweighed by the danger of unfair prejudice to defendant. We reject defendant's arguments for the following reasons.

Inmates Ronnie Sawyer and Michael Thomason testified that another inmate, Ronald Moore, told defendant "that guy" was in the shower and that defendant then walked toward the shower area. Both Sawyer and Thomason also testified that, shortly thereafter, defendant stabbed the victim to death in the shower.

Thomason additionally testified that another inmate asked defendant as he was being taken from the cell block after the murder why he killed the victim. Thomason gave further testimony that he had talked with the victim before the murder about the $17.00 that the victim owed to defendant.

Inmate Thomas McCombs testified that, after the victim went into the shower area, Moore told McCombs that he was going to approach defendant about straightening out the alleged debt owed by the victim.

Defendant argues that these statements constituted inadmissible and prejudicial hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1999). "[W]henever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15-16, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984).

Rule 803(3) of the North Carolina Rules of Evidence provides that a statement by a declarant as to the declarant's then-existing state of mind is not excludable under the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1999). In interpreting Rule 803(3), this Court has held that the rule allows the admission of a hearsay statement of a then-existing intent to engage in a future act. *See State v. Sneed*, 327 N.C. 266, 271, 393 S.E.2d 531, 534 (1990); *State v. McElrath*, 322 N.C. 1, 17-18, 366 S.E.2d 442, 451 (1988). Therefore, Moore's statement to McCombs

that he was going to approach defendant about straightening out the victim's debt was admissible as evidence of Moore's then-existing intent to engage in a future act.

[15] The trial court properly excluded as impermissible hearsay Thomason's testimony that an anonymous inmate asked defendant why he killed the victim. Although the trial court initially overruled defendant's objection to this testimony, following an immediate *voir dire* of the witness and arguments by both parties, the trial court ruled that Thomason could testify that an inmate asked a question but could not testify as to what the inmate actually asked or how defendant responded. Thus, the trial court's initial error in overruling defendant's objection was subsequently corrected; and the inadmissible hearsay testimony was properly excluded.

[16],[17] With regard to the remaining testimony of which defendant complains, the trial court properly ruled that the statements did not constitute impermissible hearsay. Moore's statement to defendant shortly before the murder about "that guy" being in the shower was not offered to prove the truth of any matter asserted therein. Instead, the statement was offered to explain the subsequent conduct of defendant in walking toward the shower area. *See State v. Morston*, 336 N.C. 381, 399, 445 S.E.2d 1, 11 (1994). Thus, the statement was not hearsay and was properly admitted into evidence. Likewise, Thomason's testimony about the victim's $17.00 debt owed to defendant did not constitute hearsay. Thomason did not testify to any statements made by the victim. Rather, Thomason testified that he was aware of the debt and that he had talked with the victim about the debt. Therefore, this testimony was relevant to establish a possible motive for the murder and was properly admitted into evidence. Further, in light of the overwhelming evidence of defendant's guilt, none of the statements admitted into evidence were unfairly prejudicial to defendant. These assignments of error are without merit.

[18] In his next assignment of error, defendant contends that the trial court erred by excluding relevant evidence on the basis that the statements constituted unreliable and inadmissible hearsay. The trial court excluded defendant's proffered testimony that inmate Mack Cheatam told defendant that he had given a knife to the victim. The trial court also excluded inmate Ronald Moore's testimony that Cheatam told Moore that he had given a knife to the victim. Defendant argues that these statements did not constitute hearsay in that the statements were offered to show his state of mind and in

support of his self-defense claim, not to prove the truth of the matters asserted therein.

Although the excluded statements were properly admissible as corroborative of defendant's self-defense claim, this Court has held that "[t]here is no right to corroboration in advance" of the testimony of a witness. *State v. Hinson*, 310 N.C. 245, 256, 311 S.E.2d 256, 264, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984). In this case, after defendant testified that he believed the victim had a knife at the time of the murder and that he killed the victim in self-defense, the trial court properly allowed defendant to introduce other corroborative evidence that the victim possessed a knife. As noted earlier, defendant testified extensively about the availability of weapons and the frequency of prisoner violence in Caledonia. Additionally, both defendant and Moore testified about their conversation in which Moore told defendant that Cheatam had given the victim a knife. Thus, defendant was not precluded from presenting evidence that corroborated his self-defense claim; and defendant cannot show that he suffered any prejudice from the trial court's initial exclusion of the corroborative evidence. *See* N.C.G.S. § 15A-1443(a); *see also State v. Ball*, 324 N.C. 233, 237-38, 377 S.E.2d 70, 73 (1989) (holding that the defendant was not prejudiced by the order in which he was required to present corroborative evidence).

[19] Next, defendant contends in two separate arguments that the trial court should not have allowed the prosecutor to cross-examine defendant and inmate Moore about the details of their prior convictions and prison infractions. Defendant argues that the prosecutor's questions concerning prior convictions exceeded the scope of proper inquiry under N.C.G.S. § 8C-1, Rule 609(a) as interpreted by this Court in *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). Defendant further argues that the prosecutor's questions regarding prison infractions were unfairly prejudicial and exceeded the scope of permissible impeachment under N.C.G.S. § 8C-1, Rule 608(b).

The prosecutor asked defendant the following questions about his prior convictions: (i) whether defendant had "placed a belt around this officer's neck at Polk Youth Center while other inmates beat him"; (ii) whether defendant was transferred from Polk Youth Center "before or after you strangled [the officer]"; (iii) what kind of weapon defendant used, the name of the victim, and how much money defendant stole during the commission of an armed robbery; (iv) whether defendant had committed any other murders; and (v) whether defendant had committed the other murders "in sequence."

Evidence of a witness' prior convictions is admissible for the purpose of impeaching the witness' credibility. *See* N.C.G.S. § 8C-1, Rule 609(a) (1999). This Court held in *Lynch*, 334 N.C. at 410, 432 S.E.2d at 353, that a cross-examiner can elicit only "the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial." The Court further noted, however, that evidence which would otherwise be inadmissible may be permissible on cross-examination "to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom." *Id.* at 412, 432 S.E.2d at 354. In this case defendant testified on direct examination that he had been convicted of two counts of first-degree murder, four counts of robbery with a dangerous weapon, second-degree kidnapping, larceny of a motor vehicle, assault with a deadly weapon, and numerous misdemeanors such as "traffic offenses, stuff like simple assault, misdemeanor breaking and entering." Defendant indicated he could not recall all the misdemeanor offenses. Thereafter, defendant characterized the attack on the officer at Polk Youth Center as "[getting] into some trouble." Further, in describing the dangerousness of the prisoners at Caledonia, defendant used serial killers as an example of dangerous inmates that might reside in defendant's cell block.

On cross-examination the prosecutor questioned defendant about the misdemeanors and in an effort to jog defendant's memory, mentioned factual details. The prosecutor also asked if the assault on the officer at Polk Youth Center was what defendant meant by "getting into trouble" and whether this was the incident that caused defendant to be transferred from Polk Youth Center to Blanch, a more restrictive facility which defendant had described on direct examination. In response to a question by the prosecutor concerning when he started the cycle of being continuously in and out of prison, defendant volunteered information about stealing a car; and the prosecutor then asked him who the victim was and if he was charged with stealing a car. Defendant responded that he stole a cab and that he was charged with larceny of a motor vehicle and robbery. The prosecutor asked what kind of robbery it was in order to clarify that it was armed robbery and then asked what type of weapon defendant used. The prosecutor also cross-examined defendant about the sequence and timing of the other murders that defendant had committed.

Considering defendant's testimony on direct examination which tended to minimize the seriousness of his criminal involvement, we conclude the prosecutor did not exceed the scope of proper exami-

nation. The prosecutor did not improperly ask defendant about "tangential circumstances of the crime[s]." *State v. King*, 343 N.C. 29, 49, 468 S.E.2d 232, 245 (1996). The questioning "related to the factual elements of the crime[s]" and to necessary detail intended to jog defendant's memory. *Id.*

[20] Similarly, on direct examination Moore testified that he had been convicted of assault and two robberies. On cross-examination Moore again testified that he had been convicted of two robberies; and in response to the prosecutor's question asking what kind of robberies, Moore stated "stick-ups." Moore then admitted the robberies were armed robberies, and the prosecutor asked Moore what type of weapon he had used to commit each offense. Moore then admitted that he was convicted of assault with a deadly weapon inflicting serious injury; the prosecutor asked Moore what weapon he used, and Moore indicated a gun. We conclude that the prosecutor's questions related to the factual elements of the crime rather than the tangential circumstances of the crime. We held in *Lynch*, 334 N.C. at 410, 432 S.E.2d at 353, that similar questions by the prosecutor exceeded the permissible scope of impeachment under Rule 609(a). However, the prosecutor in that case not only asked the defendant about the weapons used to commit each crime but also cross-examined the defendant "about his living arrangements with [the shooting victim], words he spoke to her when he entered her home, his confusion about the circumstances, his confusion about whether he pled guilty . . . , and the fact that he was in a blackout at the time." *Id.* at 408, 432 S.E.2d at 352. Moreover, unlike the defendant in *Lynch*, Moore was not completely forthright and accurate in testifying about his prior convictions on direct examination. *See id.* at 412-13, 432 S.E.2d at 354. The prosecutor here asked only about weapons, not about other circumstances of the crimes, and thereby clarified the nature of the crimes which Moore had tended to minimize. Thus, the prosecutor's questions were within the scope of proper impeachment. Even if the questions in this instance did exceed the proper scope of inquiry, any error was not prejudicial in that the questions were asked of a defense witness, not of defendant. *See King*, 343 N.C. at 50, 468 S.E.2d at 245. Further, in light of the overwhelming evidence of defendant's guilt, no reasonable possibility exists that a different result would have been reached at trial absent the alleged error. *See* N.C.G.S. § 15A-1443(a); *King*, 343 N.C. at 50, 468 S.E.2d at 245.

[21] Defendant additionally argues that the trial court erred by allowing the prosecutor to cross-examine defendant and Moore with

respect to their prison infractions. Defendant argues that the prosecutor's questions related to specific instances of conduct which were not probative of truthfulness and that the inquiry violated N.C.G.S. § 8C-1, Rule 608(b). Defendant also argues that the evidence of defendant's and Moore's prison infractions was unfairly prejudicial in that the prosecutor portrayed both witnesses as violent and not credible.

Rule 608(b) provides that specific instances of conduct of a witness may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness." N.C.G.S. § 8C-1, Rule 608(b) (1999).

> Rule 608(b) of the North Carolina Rules of Evidence governs the admissibility of specific acts of misconduct where (i) the purpose of the inquiry is to show conduct indicative of the actor's character for truthfulness or untruthfulness; (ii) the conduct in question is in fact probative of truthfulness or untruthfulness; (iii) the conduct in question is not too remote in time; (iv) the conduct did not result in a conviction; and (v) the inquiry takes place during cross-examination. *See State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986). "Among the types of conduct most widely accepted as falling into this category are 'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *Id.* at 635, 340 S.E.2d at 90 (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)).

State v. Bell, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995).

Defendant argues that the prosecutor exceeded the scope of Rule 608(b) by eliciting from defendant on cross-examination information about the following prison infractions: (i) placed on lockup on 4 January 1994 for weapon possession; (ii) disciplined on 10 November 1993 for provoking an assault; (iii) disciplined on 26 May 1996 for disobeying an order and fighting; (iv) disciplined on 3 July 1996 for profane language, disobeying an order, and making a verbal threat; and (v) disciplined on 6 August 1996 for weapon possession. Defendant contends that these prison infractions do not inherently involve dishonesty and that nothing in the context of the challenged questions suggested that defendant's prison infractions were probative of his

truthfulness or untruthfulness. The transcript discloses that the prosecutor's questions were directed at testimony given by defendant on direct examination that was indicative of defendant's character for untruthfulness. Defendant testified on direct examination about the living conditions that he endured while on lockup and while on maximum security but never explained why he was confined in this manner. However, the prosecutor's questions about the 4 January 1994 incident revealed that defendant was not mistreated by the prison system but, in fact, was placed on lockup as punishment for his misconduct. Therefore, we conclude that the purpose of the prosecutor's inquiry was to show defendant's character for untruthfulness and that the trial court did not abuse its discretion under Rule 608(b) by allowing the inquiry.

Further, we cannot say that the probative value of the 4 January 1994 incident was "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992). Most evidence tends to prejudice the party against whom it is offered. However, "to be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995). In light of defendant's extensive testimony on direct examination regarding the amount of time that defendant was confined to lockup at various institutions throughout the prison system, we conclude that the probative value of defendant's 4 January 1994 prison infraction was not substantially outweighed by the dangers of unfair prejudice.

In regard to defendant's other prison infractions, we note that defendant failed to object to the prosecutor's questions. Therefore, defendant may not raise the issue on appeal. N.C. R. App. P. 10(b)(1); *State v. Call*, 349 N.C. 382, 414-15, 508 S.E.2d 496, 516 (1998). By failing to properly preserve this issue, defendant is entitled to review only for plain error. However, defendant fails to argue plain error with respect to his remaining prison infractions, thereby waiving appellate review. *See* N.C. R. App. P. 10(c)(4); *Call*, 349 N.C. at 415, 508 S.E.2d at 516.

[22] Defendant also argues that the prosecutor exceeded the scope of Rule 608(b) by eliciting the following prison infractions from Moore on cross-examination: (i) placed on segregation for stabbing someone with a pen, (ii) disciplined for disobeying an order, (iii) disciplined on three separate occasions for fighting, and (iv) disciplined for provoking a fight. Defendant failed to object at any point to the

prosecutor's impeachment of Moore based on his prison infractions. Therefore, defendant is entitled to review only for plain error. *See* N.C. R. App. P. 10(c)(4); *Call*, 349 N.C. at 414-15, 508 S.E.2d at 516. 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. *See State v. Fleming*, 350 N.C. 109, 132, 512 S.E.2d 720, 736, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 274 (1999); *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

Assuming *arguendo* that the prosecutor's questions about Moore's prison infractions exceeded the permissible scope of impeachment under N.C.G.S. § 8C-1, Rule 608(b), we hold that admission of the evidence did not rise to the level of plain error. To prevail on plain error review, defendant must show that (i) a different result probably would have been reached but for the error or (ii) the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *See State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). As defendant has failed to make the necessary showing, these assignments of error are overruled.

[23] In his next assignment of error, defendant contends that the trial court erred in not allowing defendant's expert witness to give his opinion as to defendant's state of mind at the time of the homicide. Defendant argues that the excluded testimony of Dr. Nathan Strahl tended to show that defendant was not in a cool state of mind and that defendant suffered from diminished capacity at the time of the killing. Thus, defendant argues that this evidence was relevant to show that defendant did not premeditate and deliberate the killing and to show the reasonableness of defendant's belief that he was in physical danger at the time of the killing.

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 than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). Any relevant evidence is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rules 402, 403 (1999); *State v. Lawrence*, 352 N.C. at 17, —— S.E.2d at ——; *State v. Eason*, 328 N.C. 409, 421, 402 S.E.2d 809, 814 (1991). Expert testimony is admissible under N.C.G.S. § 8C-1, Rule 702, "if it will assist the 'trier of fact to understand the evidence or to determine a fact in issue.' " *State v.*

Weeks, 322 N.C. 152, 164, 367 S.E.2d 895, 903 (1988) (quoting N.C.G.S. § 8C-1, Rule 702 (1986)). In determining the admissibility of expert opinion, the test is "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978).

In the present case, defense counsel sought a ruling from the trial court on the admissibility of Dr. Strahl's opinion concerning the effect of long-term maximum-custody lockup at Caledonia on defendant's behavior. On *voir dire*, Dr. Strahl stated that he had an opinion as to the effect of long-term lockup and testified as follows:

> [Defendant] was incarcerated under a lock-up condition for a total of 21 months, partly at the Blanch and partly at Caledonia. And medically speaking in terms of mental health issues, long term lock-up produces a medical condition known as prison psychosis, which is a paranoid personality change that comes on a person who has been put in a reclusive secluded environment over a long period of time.

Dr. Strahl further explained that defendant "would have a hard time distinguishing between appropriate fears and inappropriate fears" and that defendant may overreact in nondangerous situations.

In *Spaulding*, 298 N.C. at 160, 257 S.E.2d at 398, this Court held that the trial court properly excluded expert testimony about the effect of imprisonment on the defendant on the basis that the expert was in no better position than the jury to determine the reasonableness of the defendant's apprehension. Similarly, in this case, we are not convinced that Dr. Strahl was in any better position than the jury to determine that, as the result of long-term imprisonment, certain legal standards had not been met, namely, that defendant did not premeditate and deliberate and that defendant was responding to a threat he genuinely perceived. Having the expert testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue. *See Weeks*, 322 N.C. at 167, 367 S.E.2d at 904. Therefore, we conclude that the trial court did not err in refusing to admit this testimony.

[24] Next, defendant contends that the trial court erred in permitting the prosecutor to cross-examine defense expert Dr. Strahl after defendant attempted to withdraw Dr. Strahl as a witness. Defendant

further argues that the trial court permitted the prosecutor to mock and attack Dr. Strahl's credibility by characterizing Dr. Strahl's testimony as incomplete during closing arguments. Defendant contends that these errors deprived him of a fair trial and due process of law. We disagree.

Generally, when a witness, including a defense witness in a criminal trial, takes the stand and testifies, the opposing party has an absolute right to cross-examine the witness. *See State v. Burgin*, 313 N.C. 404, 406, 329 S.E.2d 653, 656 (1985). In this case, Dr. Strahl testified on direct examination regarding his qualifications as an expert witness. However, Dr. Strahl also gave the following substantive testimony:

> I believe at Caledonia that the atmosphere of the prison system is very rigorous, very extensive, very demanding, and at times, overwhelming. Inmates live in a very difficult environment with a great deal of violence and a great deal of fear of violence.
>
> And the reactivity to that is actually molded by the environment itself. That is, in my medical opinion, the facility of the prison actually molds the behavior of inmates who live within it.

Dr. Strahl further testified that he interviewed defendant at Caledonia on two separate occasions and that he had reviewed several reports and records concerning prison violence and prison searches at Caledonia. After the trial court sustained the prosecutor's objection to Dr. Strahl's testimony regarding defendant's alleged "prison psychosis," defense counsel attempted to withdraw Dr. Strahl as a witness. However, contrary to defendant's contentions, Dr. Strahl had already testified about matters other than his credentials as an expert witness. Therefore, we conclude that the trial court properly permitted the prosecutor to cross-examine Dr. Strahl. Further, after a thorough review of the transcript, we conclude that the prosecutor properly impeached Dr. Strahl's credibility without asking any questions or eliciting any testimony that related to the evidence excluded by the trial court.

[25] With respect to the prosecutor's closing argument, we conclude that the argument did not violate the scope of permissible prosecutorial conduct. During closing argument the prosecutor argued as follows:

> And the defendant's so-called expert, Nathan Strahl, M.D., PhD, the only thing of merit—well, I'll let you determine what he said, if he said anything of merit. But he comes in and he says prison molds people.

The prosecutor later argued:

> Nathan Strahl wants to tell us that prison molds inmates. Where's the rest of it, Dr. Strahl, M.D., PhD?

Preliminarily, we note that defendant in this case did not object to the prosecutor's closing argument. Where a defendant fails to object, an appellate court reviews the prosecutor's arguments to determine whether the argument was "so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). As we have stated previously, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996).

When viewed in context of the conflicting evidence concerning defendant's intent and state of mind at the time of the murder, we conclude that it was not a "gross impropriety" to argue that Dr. Strahl's testimony was incomplete. This Court has consistently held that " 'counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case.' " *State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988) (quoting *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976)). Here, the prosecutor in his closing argument properly referred to Dr. Strahl's direct testimony that prison molds the behavior of inmates. Further, the prosecutor's comment, "[w]here's the rest of it, Dr. Strahl, M.D., PhD?" when taken in context, does not refer to Dr. Strahl's excluded testimony. Just before this rhetorical question, the prosecutor has commented on conditions at Caledonia and had suggested that it was a miracle more incidents did not occur with the six or seven hundred of the worst inmates. The prosecutor further noted that of all the infractions committed at Caledonia over the past several years, only one murder was committed. Thus, the prosecutor implied that, if prison

actually molds inmate behavior as Dr. Strahl testified, more prisoners, not just defendant, would have committed more serious offenses at Caledonia.

In light of Dr. Strahl's direct testimony that prison molds inmate behavior, we cannot conclude that the prosecutor's inference was so grossly improper as to require the trial court to intervene *ex mero motu* when, at trial, defense counsel apparently did not believe the argument was prejudicial. *See State v. Murillo*, 349 N.C. 573, 606, 509 S.E.2d 752, 771 (1998), *cert. denied*, — U.S. —, 145 L. Ed. 2d 87 (1999); *State v. Campbell*, 340 N.C. 612, 630, 460 S.E.2d 144, 153 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996). This assignment of error is overruled.

[26] Next, defendant contends that the trial court erred by prohibiting counsel from informing the jury during closing arguments that the trial court had reversed its earlier ruling in which it refused to instruct on the lesser-included offenses of second-degree murder and voluntary manslaughter. Defendant further contends that the trial court erred by denying defendant's motion for a mistrial. We disagree.

During the charge conference, the trial court denied defendant's request for jury instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter. After the prosecutor and defense counsel completed their initial arguments but prior to final closing arguments, the trial court reversed its earlier ruling and informed the parties that it would instruct the jury as requested by defendant. The trial court permitted both parties to reopen their initial arguments after strongly cautioning that neither party would be allowed to mention the trial court's ruling. The trial court then denied defendant's motion for a mistrial.

Although counsel is given wide latitude during closing arguments, "the conduct of arguments of counsel to the jury must necessarily be left largely to the sound discretion of the trial judge." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). Further, "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1999).

We find nothing in the record to suggest that the trial court abused its discretion by reopening arguments and prohibiting mention of its ruling rather than declaring a mistrial. The trial court acted appropriately to ensure that its decision to instruct the jury on the

lesser-included offenses would not affect the proceedings or result in the appearance of partiality. Additionally, the trial court reversed its ruling in ample time for defendant to revise his closing argument in such a way as to avoid drawing attention to the disparities between the two arguments. Upon reviewing the transcript, we note that defense counsel transitioned smoothly from his first argument, in which he argued the elements of first-degree murder and self-defense, into his second argument, in which he reminded the jury of his first argument before continuing with the elements of second-degree murder and voluntary manslaughter. Finally, the trial court reversed its ruling and instructed the jury on lesser-included offenses according to defendant's request. Thus, defendant cannot show that he suffered any prejudice. *See* N.C.G.S. § 15A-1443(c). Having concluded that defendant was not prejudiced as the result of the trial court's rulings, we further conclude that the trial court properly denied defendant's motion for mistrial. *See* N.C.G.S. § 15A-1061 (1999). This assignment is without merit and is, therefore, overruled.

[27] In his next assignment of error, defendant contends that the trial court committed prejudicial constitutional error in failing to intervene *ex mero motu* at several points during the prosecution's closing argument. We disagree.

Where a defendant fails to object to the closing 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." *Davis*, 349 N.C. at 23, 506 S.E.2d at 467.

In this case, the prosecutor first argued to the jury as follows:

> And then you move to the third element of what this cowardly bully has to have to come in here and hang his hat on a valid principle of law of self-defense, and it besmirches and degrades self-defense. It's spitting in the eye of the law. It's vomit.
>
> It's vomit on the law of North Carolina for this man to try to use self-defense because he's got to show, in addition to the other two, that he was not the aggressor.

Defendant maintains that the prosecutor impermissibly expressed his personal opinion about the falsity of defendant's self-defense claim.

Under N.C.G.S. § 15A-1230, "[d]uring a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record." N.C.G.S. § 15A-1230(a) (1999). In *State v. Pittman*, 332 N.C. 244, 262, 420 S.E.2d 437, 447 (1992), this Court held that the prosecutor did not improperly assert his personal beliefs when he argued that "justice in Halifax County will be dead" if the defendant was found not guilty. Instead, we explained that "[t]his argument was a hyperbolic expression of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice." *Id.* Similarly, in this case, the prosecutor's assertion that defendant's self-defense claim is "vomit on the law of North Carolina" constitutes a permissible expression of the State's position that, in light of the overwhelming evidence of defendant's guilt, the jury's determination that defendant acted in self-defense would be an injustice. Therefore, we conclude that the prosecutor's statement was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[28] Second, the prosecutor made the following argument to the jury:

> A man was taking a shower when this thing came up in that shower and hacked him to death and turned him from this young man right here (indicating on photo) to this right here[] (indicating on photo)[.]

Defendant also contends that the prosecutor repeatedly referred to defendant as "cowardly." Defendant argues that the prosecutor's characterizations of defendant as "this thing" and as "cowardly" constitute abusive and impermissible references to defendant.

This Court has stated that it is improper to compare "criminal defendants to members of the animal kingdom." *Richardson*, 342 N.C. at 793, 467 S.E.2d at 697. However, in this instance the prosecutor never compared defendant to an animal. Instead, the prosecutor's comments regarding defendant's cowardice were connected to the evidence which suggested that the victim was physically smaller and weaker than defendant and that the victim was naked and defenseless at the time of the killing. In context the use of the word "cowardly" to describe defendant, while not complimentary, was not disparaging. *See State v. Warren*, 348 N.C. 80, 125-26, 499 S.E.2d 431, 457 (holding that the prosecutor's description of the defendant as a

"coward" was not disparaging in light of evidence that the defendant preyed on weak victims), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998).

Likewise, the prosecutor's one-time description of defendant as "that thing" was not so improper as to require action by the trial court *ex mero motu*. In *State v. Perkins*, 345 N.C. 254, 286, 481 S.E.2d 25, 40, *cert. denied*, 522 U.S. 837, 139 L. Ed. 2d 64 (1997), the prosecutor called the defendant "sorry" and said that "describ[ing] him as a man is an affront to all of us." We emphasized that the remarks were isolated in holding that the trial court properly overruled the defendant's objection to them. *See id.* at 287, 481 S.E.2d at 40. Further, this Court has previously held that a trial court did not commit reversible error by failing to intervene *ex mero motu* where the prosecutor's description of the defendant was more disparaging than the prosecutor's one reference to defendant as "that thing" in this case. *See, e.g., State v. Trull*, 349 N.C. 428, 454, 509 S.E.2d 178, 195 (1998) (referring to the defendant as a "predator"), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80 (1999); *State v. Reeves*, 337 N.C. 700, 733, 448 S.E.2d 802, 817 (1994) (describing the defendant as a "predator"), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995); *State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984) (describing the defendant as an "animal" and referring to his environment as a "jungle"). Therefore, we conclude that the prosecutor's statements were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[29] Finally, the prosecutor argued to the jury as follows:

> And in this case I speak for the State. I can't run from that duty. I can't give it over to anybody else. I speak for the State.
>
> I also sit on the tombstone of [the victim], and I speak for [the victim] because he doesn't have the privilege of putting his hand on the Bible and coming in here and testifying himself.

Defendant contends that the prosecutor's argument blatantly urged the jury to return a death sentence on behalf of the victim.

This Court has previously found no gross impropriety requiring intervention *ex mero motu* when a prosecutor has argued that he speaks for the victim. *See Trull*, 349 N.C. at 454, 509 S.E.2d at 195; *Elliott*, 344 N.C. at 275, 475 S.E.2d at 217. Since the prosecutor's argument in this case merely reminded the jurors that he was advocating for both the State and the victim, we overrule this assignment of error.

[30] By his next assignment of error, defendant argues that the trial court erred in instructing the jury that a shank was a dangerous weapon as a matter of law in that the instruction created a conclusive presumption on an element of the offense and relieved the State of its burden of proof in violation of defendant's right to due process of law. This Court has previously rejected this argument in *State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 472, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986), and in *State v. DeCastro*, 342 N.C. 667, 700, 467 S.E.2d 653, 671, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996). As defendant failed to offer any new argument, we overrule this assignment of error.

SENTENCING PROCEEDING

[31] Next, defendant contends that the trial court erred by allowing during the capital sentencing proceeding the improper testimony of Officer Malley Bissett concerning defendant's demeanor and alleged lack of remorse during a prior investigation. We disagree. Officer Bissett had investigated defendant's prior convictions for the murders of Emmanuel Oguayo and Donald Ray Bryant. Officer Bissett had been with defendant for approximately "five or six hours" during that investigation. The prosecutor in this case asked Officer Bissett the following question:

> Q. During that time, did this defendant express any sorrow or any remorse for his crime?
>
> A. Not really. At one point—the only—I recall that the only thing he said was I wish it hadn't happened, but that's the only—actually, no remorse, but he said he wished it hadn't happened.

Officer Bissett also testified that he never saw defendant shed a tear or become emotional.

Defendant did not object to the prosecutor's question at that time. Having failed to object, defendant is entitled to relief based on this assignment of error only if he can demonstrate plain error. "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In capital sentencing proceedings, "[a]ny competent, relevant evidence which wil[l] substantially support the imposition of the death penalty may be introduced at this stage." *State v. Bond*, 345 N.C. 1, 31,

478 S.E.2d 163, 179 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). Regarding the admissibility of lay opinions, this Court recently stated:

> Although the Rules of Evidence do not apply in sentencing proceedings, they may be helpful as a guide to reliability and relevance. *See Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980). Under those rules, a lay witness may testify in the form of an opinion if the opinion is "(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 (1986). We have held that the mental condition of another is an appropriate subject for lay opinion. In *State v. Strickland*, 321 N.C. 31, 361 S.E.2d 882 (1987), we noted that " '[a] lay witness, from observation, may form an opinion as to one's mental condition and testify thereto before the jury.' " *Id.* at 38, 361 S.E.2d at 886 (quoting *State v. Moore*, 268 N.C. 124, 127, 150 S.E.2d 47, 49 (1966)).

Bond, 345 N.C. at 31, 478 S.E.2d at 179.

Officer Bissett's testimony is based on his personal observation of defendant during the investigation for a period of "five or six hours." Officer Bissett's opinion that defendant demonstrated no remorse for his previous crimes is competent, relevant evidence of defendant's mental condition. Further, Officer Bissett's testimony is favorable to defendant in that it is consistent with defendant's testimony regarding this murder that "I regret that all of this has ever happened." Therefore, we conclude that the trial court did not commit error, much less plain error, in allowing Officer Bissett's testimony of defendant's mental condition. This assignment of error is overruled.

[32] In three separate assignments of error, defendant next contends that the trial court erred by excluding potential mitigating evidence presented by his younger sister and mother. The testimony concerned his childhood difficulties, his caring relationship with his younger sister, and the psychological trauma caused by his biracial background. Defendant argues that the excluded testimony was essential to support corresponding nonstatutory mitigating circumstances. We disagree.

The trial court limited defendant's sister's testimony as follows:

> Q. Can you describe the relationship that you had with your brother?

A. He was kind of like a fatherly figure, real—kind of a take-charge person. He looked out for me. We talked a lot. He, I guess you could say, schooled me on how boys were. You know, just trying to look out for me and make sure I did the right things and he still does.

. . . .

Q. You said he would talk to you?

A. Yes.

Q. Talk about things with you?

A. Yes.

Q. Would you give us an example and tell us what kind of things he would talk with you about?

[PROSECUTOR]: Well, objection as to relevance, Your Honor.

THE COURT: Sustained.

Q. In reference to the relationship that you say you had with him and the type of things that—you say he was a father figure—

A. Yes.

Q. —Can you explain to me the type things he would do concerning being a father figure to you?

A. Well, just the things that a father would do. If I felt bad or—you know, he would come and talk with me and tell me it's okay. He would look out for me and make sure I made the right decisions, do the right things.

Q. What effect, if any, if you know, did being biracial have upon [defendant]?

[PROSECUTOR]: Well, objection, as to what effect it had on [defendant].

THE COURT: Sustained.

Q. Were you around him when there were any racial incidents involving [defendant]?

A. Yes.

Q. Can you tell me some of the things that you heard that was said to him?

[PROSECUTOR]: Well, object.

THE COURT: Sustained.

Q. Did you see any of his reactions after you were around when there were incidents or racial incidents said to him?

A. Yes.

Q. Can you tell me how [defendant] reacted?

A. Well, we had a neighbor which would call us niggers or my mother a nigger-lover. And I mean, we all had thoughts about it, but, you know—my mom would usually say, well, don't worry about it; it's just ignorance of other people.

Defendant made no offer of proof to the witness' possible answers to the objectionable questions. Therefore, defendant has failed to preserve this issue for appellate review. *See* N.C.G.S. § 8C-1, Rule 103(a)(2) (1999); *Atkins*, 349 N.C. at 79, 505 S.E.2d at 108. However, defendant argues that the "significance of this evidence is obvious from the record" and that the excluded general information is "discernible from subsequent answers and the context of the questioning." This Court has allowed appellate review even in the absence of an offer of proof where "the 'essential content' of the excluded testimony and its significance are obvious." *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992). Here, we conclude that the "essential content" and "significance" of the excluded testimony is not "obvious" since it is impossible to determine whether the excluded testimony would have been reliable and relevant.

Regarding the admissibility of evidence at capital sentencing proceedings, our capital sentencing statute provides in pertinent part:

> Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

N.C.G.S. § 15A-2000(a)(3) (1999). The trial judge's authority to rule on the admissibility of evidence is not impaired by the language of this statute. *See State v. Cherry*, 298 N.C. 86, 98, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980).

Assuming *arguendo* that this issue has been properly preserved, we conclude that the trial court did not abuse its discretion in exclud-

ing the testimony. Our review of the transcript reveals that the trial court did not prohibit defense counsel from asking defendant's sister about what defendant did for her as a father figure in her life and about her personal observations of defendant's reactions to biracial incidents during his childhood. The trial court properly sustained defense counsel's general question of "what kind of things [defendant] would talk with you about" on the ground of relevance. The trial court also properly prohibited defense counsel from asking defendant's sister what effect being biracial had on defendant since this question related to defendant's own personal thoughts and feelings of which his sister lacked personal knowledge and, in effect, would have elicited unreliable testimony.

[33] Defendant also argues that the trial court improperly restricted defense counsel's inquiry of his mother regarding his childhood psychological abuse and self-hatred as a result of being biracial. The trial court limited defendant's mother's testimony as follows:

> Q. Did [defendant] ever display—during his formative years or younger years, did he ever display any feelings of self-hatred?
>
> [PROSECUTOR]: Well, objection.
>
> THE COURT: Well, sustained.
>
> Q. What type of feelings, if any, as a young boy growing up did [defendant] display?
>
> [PROSECUTOR]: Objection as to what feelings.
>
> THE COURT: Well, it's awfully broad.

Outside the presence of the jury, the prosecutor objected to the witness being asked about defendant's feelings rather than her observations about defendant's behavior; and the trial court sustained the objection. After a rephrasing of the questions and a *voir dire* of the witness, the trial court allowed the testimony. Thereafter defendant's mother testified without objection about defendant's emotional conflict as a child as a result of being biracial. We conclude that the trial court did not abuse its discretion in restricting the testimony to the witness' personal observations of defendant's reactions and emotional state as a child. These assignments of error are overruled.

[34] Defendant next contends that the trial court erred in completely excluding the testimony of Dr. Claudia Coleman at the sentencing hearing. Defendant called Dr. Coleman to testify about defendant's

mental condition at the time of the offense. Defendant argues that the trial court acted under a misapprehension of the law, abused its discretion, and deprived defendant of his due process rights by excluding the testimony for defendant's failure to disclose Dr. Coleman's report to the prosecutor in advance of her testimony as required by the trial court's 14 October 1997 order. We disagree.

During jury selection the prosecutor requested that defendant furnish him with a written report of any expert witness in reciprocal discovery pursuant to N.C.G.S. § 15A-905. Defendant stated that he "[understood] his obligation to produce those reports to the State once a determination, once the report is prepared and once the determination has been made that these witnesses will be called." Later, during jury selection, the prosecutor again asked for the reports of defendant's mental health witnesses. After much discussion over proposed deadlines for disclosure, the trial court ruled that defendant must furnish such reports within five working days of the witness' testimony and told defense counsel to let it know if the deadline became "onerous."

On Wednesday, 19 November, the day after the State concluded its sentencing proceeding evidence, the prosecutor advised the trial court that he received a fax of Dr. Coleman's two-page psychological assessment after 5:00 p.m. the previous evening. Defense counsel informed the trial court that he had received a fax of Dr. Coleman's report the previous morning, Tuesday, 18 November, and that defendant had not decided to call Dr. Coleman as a witness until Monday, 17 November, after the guilty verdict. According to Dr. Coleman, the report was prepared in September and counsel had contacted her on 17 November to inform her that she would be needed as a witness and to request that the report be faxed to them. After hearing the *voir dire* testimony of Dr. Coleman, viewing the report, and hearing from opposing counsel, the trial court denied the testimony of Dr. Coleman based on its 14 October 1997 disclosure order, stating the following:

> I have reviewed her report. I've heard some of her—some of the things she has to say, but I've looked at her report. I see nothing that has basically not almost been touched on by other witnesses, and so I see no, so to speak, heroic, unusual, or out of the ordinary testimony that's not ordinary in these kind of matters, but even if they were, I believe it would be appropriate to do what I am now doing, and that is denying based on my earlier order testimony by this witness. Too late.

> The pretrial discovery statute, in pertinent part, provides:
>
> [T]he court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations . . . made in connection with the case . . . within the possession and control of the defendant *which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial,* when the results or reports relate to his testimony.

N.C.G.S. § 15A-905(b) (1999) (emphasis added). Even after trial is underway, the trial court, "[t]o insure that truth is ascertained and justice served, . . . must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence." *State v. Hardy*, 293 N.C. 105, 125, 235 S.E.2d 828, 840 (1977); *see also State v. Warren*, 347 N.C. 309, 324-25, 492 S.E.2d 609, 618 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). During a capital sentencing proceeding, where the Rules of Evidence are not enforced, the trial court has the discretion to admit evidence "as to any matter that the court deems relevant to sentence." N.C.G.S. § 15A-2000(a)(3). Moreover, the trial court must allow the State "to present any competent evidence supporting the imposition of the death penalty." *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).

Based on the foregoing principles, we conclude that the trial court properly exercised its inherent authority to order disclosure of defendant's mental examination reports prepared by witnesses whom defendant planned to call to testify five working days in advance of testimony. Defendant violated the discovery order by failing to furnish Dr. Coleman's report within the prescribed time. Defendant argues that the trial court's ruling prohibiting Dr. Coleman's testimony violated his due process rights by depriving him of any opportunity to fully present relevant evidence in mitigation. This argument is without merit. Defendant had two other mental health experts available, whose testimony would have been fully admissible at the sentencing proceeding, through which to introduce mitigation evidence. Further, defendant's assertion that the disclosure of Dr. Coleman's report to the prosecutor would have allowed the prosecutor to call Dr. Coleman as a witness to testify that defendant possessed the capacity to form the specific intent to kill is unfounded. Dr. Coleman assessed defendant's mental state more than a year after

the murder, and her assessment concentrated only on mitigation. Defendant clearly made a tactical decision not to disclose Dr. Coleman's report until after the guilty verdict; therefore, he cannot show that he was prejudiced by the trial court's ruling. Accordingly, we conclude that the trial court did not abuse it discretion in excluding Dr. Coleman's testimony. This assignment of error is overruled.

[35] By his next assignment of error, defendant contends that the trial court erred in refusing to allow him to make a complete offer of proof of the proposed testimony of Dr. Coleman. Specifically, defendant argues that the trial court, while allowing Dr. Coleman's two-page report, refused to allow "a lengthy testimony" about the records Dr. Coleman relied upon in reaching her conclusions and opinions. We disagree.

The trial court admitted into evidence Dr. Coleman's report of her complete psychological assessment of defendant. The trial court also directly examined Dr. Coleman "on voir dire for appellate purposes" regarding "procedural matters." Thereafter, defense counsel asked Dr. Coleman on *voir dire* to identify her report and then introduced the report into evidence. After the prosecutor cross-examined Dr. Coleman on *voir dire*, the trial court gave defendant the opportunity to question Dr. Coleman further; but defendant asked no other questions. After the trial court disallowed Dr. Coleman's testimony as a result of defendant's discovery order violation, the following exchange occurred between the trial court and defense counsel:

> [DEFENSE COUNSEL]: Judge, we need to make a proffer for the record as to what [Dr. Coleman's] testimony would be.
>
> THE COURT: Well, that's on Exhibit 28. What further thing would you do. You're welcome—
>
> [DEFENSE COUNSEL]: There's some—
>
> THE COURT: You're welcome to do it. I just—
>
> [DEFENSE COUNSEL]: There's some other records that she used in reaching the conclusions and the opinions that she reached.

The trial court sustained the prosecutor's objection to the admission of the records. The trial court also told defense counsel that it would allow "a lengthy testimony" by Dr. Coleman only if defense counsel could cite an appellate rule or case requiring it.

In order to preserve for appellate review the exclusion of evidence, a party must provide "a specific offer of proof . . . unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). An offer of proof is essentially "the *substance* of the evidence." N.C.G.S. § 8C-1, Rule 103(a)(2) (emphasis added). The State argues, and we agree, that this rule does not contemplate an extensive offer of proof. Defendant has not cited, nor does our research disclose, a case or any other rule requiring a more extensive offer of proof, namely, Dr. Coleman's entire testimony, than that allowed by the trial court. The record reveals that the trial court gave defendant ample opportunity on *voir dire* to question Dr. Coleman about the substance of her report. Dr. Coleman described the records which defendant sought to admit as follows:

> I was provided with birth records and prior medical records, the medical and mental health records from Central Prison, some—an initial draft of life chronology, and some other family history from Ms. [Deborah] Keith [defendant's mitigation expert]. I received the forensic evaluation report from Dorothea Dix Hospital. I also had some letters that [defendant] had written to his mother that had been collected.

We conclude that this excerpt constitutes a sufficient showing of the substance of the records for a complete offer of proof as required by N.C.G.S. § 8C-1, Rule 103(a)(2). Further, defendant was not prejudiced by the exclusion of Dr. Coleman's testimony since the records would have been admissible independently of her testimony as relevant evidence of defendant's character. This assignment of error is overruled.

[36] Defendant next contends that the trial court erred by failing to submit the 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). Defendant argues that sufficient evidence existed, even absent the excluded testimony of Dr. Strahl and Dr. Coleman, upon which a jury could have reasonably found this mitigating circumstance to exist. We disagree.

A trial court must submit "to the jury any statutory mitigating circumstances which the evidence would support regardless of whether the defendant objects to it or requests it." *State v. Zuniga*, 348 N.C. 214, 216, 498 S.E.2d 611, 612 (1998). Defendant has the burden to produce " 'substantial evidence' tending to show the existence of a miti-

gating circumstance before that circumstance will be submitted to the jury." *State v. Rouse*, 339 N.C. 59, 100, 451 S.E.2d 543, 566 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

Here, the evidence does not support defendant's contention that he suffered from a mental or emotional disturbance at the time of the murder. Defendant testified that he had become "real paranoid" after being on lockup for almost two years. Defendant was then transferred to a bunk in the common area of block E where he became "real nervous" about his personal property being stolen. Defendant was finally given a single cell in block A and was assigned to work in the fields picking vegetables. Defendant also testified that he always carried a knife for his personal safety and to enforce order at his card games. The State argues, and we agree, that the reasons for which defendant carried a knife suggested a rational state of mind as opposed to a mind oppressed by extreme paranoia and fearfulness. Defendant further testified that, earlier in the day of the murder, the victim had tried to provoke defendant into an argument and had flashed a knife at him. When defendant entered the shower area, the victim made an obscene comment to defendant. Defendant told the victim, "I'm about burned out on your mouth"; and the victim told defendant to "come on up here and get some then. I got something for you anyway." Sheer anger or the inability to control one's temper "is neither mental nor emotional disturbance as contemplated by this mitigator." *State v. Strickland*, 346 N.C. 443, 464, 488 S.E.2d 194, 206 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). Defendant further testified that he attacked the victim with his knife since he had previously heard that the victim himself had a knife; defendant testified "I felt like if I didn't try to do something, then I'd have been in the situation where I would have been stabbed up, and I probably been dead." Contrary to defendant's contention, this explanation reveals that defendant did not possess a mental or emotional disturbance at the time of the murder; rather, defendant was in a rational, calculating state of mind. Taking all the evidence as a whole, we conclude that the trial court did not err in declining to submit the (f)(2) mitigating circumstance to the jury.

[37] Defendant also contends that the trial court erred by not submitting the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6). Again, we disagree.

The (f)(6) mitigating circumstance "has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions." *State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). The record is devoid of any evidence that defendant's paranoia and fear of violence from the prison environment so impaired him as to prevent him from understanding the criminality of his conduct or that it affected his ability to control his actions. To the contrary, defendant testified that he had completed a psychology course and had obtained a "4.0" grade. Defendant also owned and operated a canteen, card games, and a loan business, all of which were illegal or against prison regulations. On the afternoon of the murder, defendant had been playing a card game. Defendant testified that he pulled his knife in the shower when he approached the victim since he had previously been told that the victim had been given a knife. This evidence does not show that defendant had a mental disorder "to the degree that it affected the defendant's ability to understand and control his actions" at the time he committed the murder. *Id.* Therefore, we conclude that the trial court did not err in declining to submit the (f)(6) mitigating circumstance. These assignments of error are overruled.

In his next argument defendant contends that the trial court erred by failing to intervene *ex mero motu* when the prosecutor made grossly improper closing arguments. We disagree. Defendant did not object to these arguments at trial. When a defendant fails to object to an allegedly improper closing argument, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *See Trull*, 349 N.C. at 451, 509 S.E.2d at 193. In a capital trial, the prosecutor is given wide latitude during jury arguments, *see Warren*, 348 N.C. at 124, 499 S.E.2d at 456, and has a duty to vigorously present arguments for the sentence of death using every legitimate method, *see State v. Daniels*, 337 N.C. 243, 277, 446 S.E.2d 298, 319 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). We now address each argument in turn.

[38] Defendant first argues that the prosecutor's use of biblical references diminished the jury's sense of responsibility for recommending the death sentence. The prosecutor argued, in pertinent part, as follows:

> Let me tell you, ladies and gentlemen, that this case, just like the verdict in this case, the sentence that is recommended in this case will be recommended by the law of North Carolina, not biblical law, but the law of North Carolina.
>
> But the Holy Book is always a good place to go for guidance in serious matters. And when I stand before people who quite possibly might know the Bible better than I do, it's a little intimidating.
>
> But because of the order of arguments, ladies and gentlemen, we cannot presume what the defendant's lawyers may say to you. As a matter of fact, we can't worry about it. And I will not stand up here and tell you what the defendant's lawyers are going to say, and I hope that they would afford me the same courtesy.
>
> But it may be said to you, ladies and gentlemen, that in the twentieth chapter of Exodus, it says thou shalt not kill. You may hear that. And you may know that it's in the Holy Book.

The prosecutor then proceeded to quote various verses of the Bible to support his argument that the Bible does not prohibit the death penalty. The prosecutor continued as follows:

> So I hope nobody has the gall to stand here and tell you that the law of North Carolina is against the Bible. I want to assure you again that this case, and luckily for this defendant, this case will not be decided by biblical law. Even the order of arguments . . . in this case is as his Honor has said this morning, as is by law provided.
>
> So are you now saying—ladies and gentlemen, are you saying to yourself, well, we are now determining the defendant's fate? That is, the law has given us the duty to determine the defendant's fate? The answer to that is no. The defendant by his own conduct has determined his fate.
>
> Once you listen to the aggravating circumstances in this case and the mitigating circumstances which will be advanced to you, it will determine [sic] that it's the defendant who has determined his own fate.

Regarding biblical references in closing arguments, we recently stated:

> 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.* 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. 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 [its] sole and exclusive duty to apply secular law.

State v. Williams, 350 N.C. 1, 27, 510 S.E.2d 626, 643 (citations omitted), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 162 (1999). "This Court has distinguished as improper remarks that state law is divinely inspired . . . or that law officers are 'ordained' by God." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

The prosecutor properly emphasized at the beginning of his closing argument that defendant's sentence would be recommended based upon the "law of North Carolina, not biblical law." Also, defendant's argument that the prosecutor improperly implied that the Bible required death upon a determination that a murder occurred is without merit. In *State v. Oliver*, 309 N.C. 326, 359, 307 S.E.2d 304, 326 (1983), we held that the prosecutor's argument that the death penalty of North Carolina was consistent with the Bible was permissible. As in *Oliver*, the prosecutor here made a similar argument, stating, "I hope nobody has the gall to stand here and tell you that the law of North Carolina is against the Bible." Defendant further argues that the prosecutor's argument diminished the jury's responsibility in recommending the death sentence by stating that "defendant by his own conduct has determined his fate." To the contrary, the statement, taken in context, informs the jury of its duty to consider the evidence supporting the aggravating and mitigating circumstances as well as defendant's conduct. Moreover, we have found such arguments proper. *See, e.g.*, *State v. Anderson*, 350 N.C. 153, 189, 513 S.E.2d 296, 318 (argument that defendant "signed her own death warrant" was not improper), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 326 (1999).

We note that, as anticipated by the prosecutor, defense counsel in his closing argument stated the following:

> What would Jesus do? He was a victim of capital punishment at the hands of the State. He said as he was hung on the cross, Father, forgive them, for they know not what they do.
>
> What would Jesus say? Would Jesus pull the switch or administer the lethal injection? I don't think so on the basis of what he taught. He taught blessed are the merciful, for they shall obtain mercy.
>
> When the State engages in capital punishment, it assumes a god-like posture. And, again, my Bible tells me you should not have no other gods [sic] before me.
>
> Only God should have the power to give and take life and that in due season and according to his own plan.

Defendant also used ideas from a letter from Reverend Jesse Jackson and quoted from a letter by Mrs. Coretta Scott King regarding the death of her husband, Dr. Martin Luther King. Accordingly, we conclude that the trial court did not err in failing to intervene *ex mero motu* to prevent the prosecutor's biblical references. *See Daniels*, 337 N.C. at 279, 446 S.E.2d at 320-21; *Oliver*, 309 N.C. at 359-60, 307 S.E.2d at 326.

[39] Defendant also contends that the prosecutor misstated the law on four separate occasions during his closing argument by informing the jurors that it was their duty to determine whether any of the "29 so-called mitigating circumstances" had mitigating value. Defendant further argues that the prosecutor made no distinction between the statutory mitigating circumstance of defendant's age, the catchall circumstance, and the twenty-seven nonstatutory mitigating circumstances. The thrust of defendant's argument is that the jury may not have understood that the statutory mitigating circumstance of age has mitigating value as a matter of law. We disagree.

Referring to the twenty-nine mitigating circumstances at the beginning of his argument, the prosecutor stated:

> It is for you to determine, number one, whether these circumstances in fact mitigate, and number two, whether they even exist. That's your job as by law provided.

Discussing the evidence supporting the mitigating circumstances, the prosecutor stated:

> The first one, though, I must say is a statutory mitigating circumstance, that is, the age of [defendant] at the time of the crime. But this doesn't mean his chronological age. This means his age and his life experience.

The prosecutor then argued extensively that the evidence did not support this statutory mitigating circumstance. Thereafter, referring to the nonstatutory mitigating circumstances, the prosecutor stated, "Now we move to the creative ones." Thus, the prosecutor informed the jury of the difference between the statutory mitigating circumstance and the nonstatutory mitigating circumstances.

The prosecutor's first comment was a misstatement of the law; however, the subsequent comments accurately reflected the distinction between statutory and nonstatutory mitigating circumstances. We are not persuaded that the sentencing hearing was so infected with unfairness by the prosecutor's comments as to violate defendant's due process rights. *See Daniels*, 337 N.C. at 276, 446 S.E.2d at 318-19 (defining gross impropriety requiring *ex mero motu* intervention). Moreover, the trial court properly instructed the jury regarding its consideration of both the statutory and nonstatutory mitigating circumstances. Accordingly, these assignments of error are overruled.

[40] In his next assignment of error, defendant contends that the trial court erred by prohibiting defense counsel from quoting from secular sources in his closing argument. Specifically, defendant argues that the trial court acted under a double standard by allowing the prosecutor to quote the Bible while prohibiting defense counsel from quoting from Reverend Jesse Jackson. We disagree.

Defense counsel stated as follows:

> I want you to remember the same death penalty law that was applied in Fayetteville, North Carolina, when you had those two people, those two Marine army enlistees that went out and killed those African American people.
>
> [PROSECUTOR]: Objection to arguing facts not in evidence, Your Honor.
>
> THE COURT: Don't do that, counsel. Move along. Go ahead.

Defense counsel continued as follows:

> Well, I know that once upon a time there were certain laws on our books that prohibited us from doing certain things, laws that were sanctioned by the same State of North Carolina that's here asking you to consider and give the death penalty.
>
> And the laws that I'm talking about are those laws that required that we sit at the back of the bus, some of our citizens, and those laws that required that some of us couldn't serve on jury duty. That's the same law I'm talking about, the same law that said certain schools we couldn't attend.
>
> I'm talking about the same State of North Carolina that's asking that—that enforced those particular laws are asking you to enforce the death penalty law.
>
> Do you want to know the funny thing about those other laws justified on the Bible? Somewhere in there it was mandated that the races should be apart.

The prosecutor objected, and the trial court sustained the objection. Outside the presence of the jury, the trial court admonished defense counsel to "not argue anything—evidence, cases, ideology, anything like that—that is a factual or legal matter outside of this case." Defense counsel then informed the trial court that he planned to read a letter written by Reverend Jesse Jackson to the "Faith Community" in South Carolina making a moral appeal for the life of Susan Smith, a woman who murdered her two young children and initially blamed a black man. Outside the presence of the jury, defense counsel read the letter to the trial court. The trial court ruled as follows:

> If you wish to quote Reverend Jackson or if you wish to quote Jesus Christ and it's general statements—I'm referring now to Reverend Jackson—you may do that. You may do that with the Savior.
>
> However, you may not read that letter. You may not refer to the events of Burmeister, of Susan Smith's murder of her children, what the jury did or didn't do, of people caught or not caught, or of people executed or not executed, because it's not this case.
>
> Now, do you want to take a five-minute break and get your thoughts together and find out if there's one or two quotes and

run them by me of Reverend Jackson's? If they're fine, I'll allow it. If not, you're going to have to summarize it the best you can and move on to another topic.

Thereafter, defense counsel told the trial court that he would use ideas from the letter, not any quotes.

Defense counsel further argued the following:

Coretta Scott King, the wife of Dr. Martin Luther King, knew that adding violence to violence would not bring relief. She indicated that although my husband was assassinated and my mother-in-law was murdered, I refuse to accept the cynical judgment—

[PROSECUTOR]: The State would have to object. He's arguing facts not in evidence.

THE COURT: Finish it. Overruled. Finish the quote.

[DEFENSE COUNSEL]: I refuse to accept the cynical judgment that killers deserve to be executed. To do so would perpetrate the tragic cycle of violence that feeds upon itself.

THE COURT: I sustain the part of comparing this case with her husband's case. I overrule her views of capital punishment that you're quoting.

. . . Proceed.

[DEFENSE COUNSEL]: To do so will perpetrate the tragic cycle of violence that feeds upon itself. It will be a disservice to all that the Bible stands for and all that we live for to ask that you take a life for the fact that a life had been taken.

"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*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). "[C]ounsel 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." *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986). Control of the jury argument remains within the sound discretion of the trial court. *See State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992).

Based on the foregoing principles, we conclude that the trial court afforded defense counsel ample opportunity to argue using ideas and quotes from secular sources and properly prohibited counsel from arguing the facts of other cases. The facts of the other cases are not pertinent to any evidence presented in this case and are, thus, improper for jury consideration. *See Guevara*, 349 N.C. at 257, 506 S.E.2d at 721. Accordingly, we overrule this assignment of error.

[41] By another assignment of error, defendant contends that the trial court erred by failing to clearly instruct the jury that statutory mitigating circumstances have mitigating value. Defendant argues that "in its initial instructions about the statutory circumstances, the trial court was completely silent about whether those circumstances were deemed by law to have mitigating value." Defendant further argues that the instructions given did not impress upon the jury that the statutory mitigating circumstance of age should be considered differently from the catchall or the remaining twenty-seven nonstatutory mitigating circumstances. We disagree.

Defendant did not object to the instructions at trial; therefore, our review is limited to plain error. N.C. R. App. P. 10(b)(2). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

"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). However, that "does not mean that the trial court is required to instruct that statutory mitigating circumstances have value as a matter of law." *Davis*, 349 N.C. at 55, 506 S.E.2d at 485.

Defendant cites *Jaynes*, 342 N.C. at 286, 464 S.E.2d at 470, to support his position. However, the trial court's instructions here are different from the instructions in *Jaynes*, where this Court found error in the trial court's instructions that, in effect, told the jurors that "they could elect to give no weight to statutory mitigating circumstances they found to exist." *Id.* We stated that such instruction was

"contrary to the intent of the statute and settled case precedent." *Id.* Further, this Court has considered and rejected an argument similar to defendant's in *Davis*, 349 N.C. at 57, 506 S.E.2d at 485-86.

Here, the trial court instructed the jury with regard to the statutory mitigating circumstance of age, in part, as follows:

> I charge you on that that the mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence.
>
> . . . .
>
> If one or more of you find[] by a preponderance of the evidence that the 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.

With respect to all of the nonstatutory mitigating circumstances, the trial court instructed the jury, in part, as follows:

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

The trial court also gave a virtually identical instruction after setting out each nonstatutory mitigating circumstance.

With respect to the statutory catchall mitigating circumstance, the trial court instructed the jury as follows:

> Finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value.
>
> . . . .

> So if one or more of you so find[] by a preponderance of the evidence, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.
>
> If none of you find any such circumstance to exist, you would so indicate by having your foreperson write "no" in that space.

As we noted in *Davis*, "[t]hese instructions properly distinguished between statutory and nonstatutory mitigating circumstances and informed the jurors of their duty under the law." 349 N.C. at 56, 506 S.E.2d at 485. We conclude the same in this case. Accordingly, the trial court did not commit error, much less plain error, in the instructions; and we overrule this assignment.

PRESERVATION ISSUES

Defendant raises nine additional issues that have previously been decided contrary to his position by this Court: (i) whether the trial court erred by using the term "may" in sentencing Issues Three and Four; (ii) whether the death penalty statute is unconstitutionally vague and overbroad and imposed in a discretionary and discriminatory manner; (iii) whether the trial court erred in removing prospective jurors for cause who could fairly and impartially decide the case without allowing defendant an opportunity to ask further questions; (iv) whether the trial court erred in allowing death-qualification of the jury by excusing for cause certain jurors who expressed an unwillingness to impose the death penalty; (v) whether the trial court erred in using the word "satisfy" in the jury instructions for defining defendant's burden of proof applicable to mitigating circumstances; (vi) whether the trial court erred when it instructed the jury that it was to decide whether any of the nonstatutory mitigating circumstances had mitigating value; (vii) whether the trial court erred in instructing the jury on an unconstitutionally narrow definition of mitigation; (viii) whether the trial court erred when instructing the jury on Issues Three and Four that it "may" consider mitigating circumstances that it found to exist in Issue Two; and (ix) whether the trial court erred when it instructed the jury that it must be unanimous to answer "no" at Issues One, Three, and Four.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings and also for the purpose of preserving the issues for any possible further judicial review. We have consid-

ered 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, this Court has the exclusive statutory duty in capital cases to review the record and determine (i) whether the record supports the aggravating circumstances found by the jury; (ii) whether the death sentence was entered 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. N.C.G.S. § 15A-2000(d)(2). Having thoroughly reviewed the record, the transcripts, and the parties' briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no suggestion that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. Accordingly, we turn to our final statutory duty of proportionality review.

The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation. At defendant's capital sentencing proceeding, the jury found the eight aggravating circumstances submitted: that the murder was committed by a person lawfully incarcerated, N.C.G.S. § 15A-2000(e)(1); that defendant had been previously convicted of the first-degree murder of Emmanuel Oguayo, N.C.G.S. § 15A-2000(e)(2); that defendant had been previously convicted of the first-degree murder of Donald Ray Bryant, N.C.G.S. § 15A-2000(e)(2); that defendant had been previously convicted of robbery with a dangerous weapon of Susan Indula, N.C.G.S. § 15A-2000(e)(3); that defendant had been previously convicted of robbery with a dangerous weapon of Lindanette Walker, N.C.G.S. § 15A-2000(e)(3); that defendant had been previously convicted of robbery with a dangerous weapon of Emmanuel Oguayo, N.C.G.S. § 15A-2000(e)(3); that defendant had been previously convicted of robbery with a dangerous weapon of Donald Ray Bryant, N.C.G.S. § 15A-2000(e)(3); and that defendant had been previously convicted of second-degree kidnapping of Donald Ray Bryant, N.C.G.S. § 15A-2000(e)(3).

Two statutory mitigating circumstances were submitted but not found: (i) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (ii) the catchall, N.C.G.S. § 15A-2000(f)(9). Of

the twenty-seven nonstatutory mitigating circumstances submitted, the jury found that four 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. We have determined the death penalty 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, *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

[42] Several characteristics in this case support the determination that the imposition of the death penalty was not disproportionate. Defendant was convicted of premeditated and deliberated murder. We have noted that "the finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506. Further, "[i]n 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. Peterson*, 350 N.C. 518, 538, 516 S.E.2d 131, 143 (1999), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 1087 (2000). "The jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate." *State v. Lyons*, 343 N.C. 1, 27, 468 S.E.2d 204, 217, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). In this case, the jury found aggravators pertaining to two previous capital felonies and five previous violent felonies. Further, the facts show that defendant repeatedly stabbed a totally defenseless man in the prison shower for money owed him.

In carrying out this statutory duty, we also consider cases in which this Court has found the death penalty proportionate; however, "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. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Specifically noting defendant's violent past history, we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in

which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

We conclude, therefore, that defendant's death sentence was not excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Accordingly, the judgment of death is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. PATRICK JOSEPH STEEN

No. 530A98

(Filed 13 July 2000)

1. **Appeal and Error— findings of fact—support by evidence—general contention**

The North Carolina Supreme Court would not review a trial court's findings of fact in the denial of a motion to suppress where defendant made only a general contention that the findings were not supported by the evidence.

2. **Search and Seizure— investigatory stop—erratic bicycle riding**

Observation of the manner and place in which defendant was riding his bicycle was sufficient to raise a reasonable suspicion for an investigatory stop where the officers observed defendant weaving in heavy traffic, so that his operation of the bicycle constituted a traffic offense. Additionally, defendant agreed to speak with the officers when they pulled him over.

3. **Search and Seizure— consent—voluntary**

The trial court in a first-degree murder prosecution properly determined that defendant's consent to a search following a traffic stop was voluntary where the court found that defendant had had experience with the criminal justice system, agreed to speak with the officers, the officers noticed an odor of alcohol about defendant and that his eyes appeared dilated, the officers asked if they could search defendant and he agreed, and one of the officers noticed blood spots on defendant's shirt and person.

4. Search and Seizure— clothing—following arrest

A search of a first-degree murder defendant's clothing was not unconstitutional or otherwise unlawful where he was arrested for possession of drug paraphernalia and stolen credit cards, his clothing was taken and a jumpsuit issued on his arrival at the jail, he became the focus of a murder investigation while he was in jail, an officer told him that he was a suspect in an armed robbery investigation and defendant gave consent for his clothes to be examined, and blood and glass particles were found. Defendant was in custody and the effects in his possession could be searched without a warrant; his consent is irrelevant. Furthermore, he had previously consented to a search of his person, which included his clothing, the glass did not compare with the glass at the victim's home, and the blood was defendant's rather than the victim's.

5. Confessions and Incriminating Statements— statements—voluntary—not incriminating—not admitted

The trial court in a first-degree murder prosecution properly determined that defendant's statements to the police were voluntary and not in violation of Miranda where defendant acknowledged in his brief that none of his statements were admitted into evidence, the trial court found that no incriminating statement was made, a review of the record by the Supreme Court did not reveal the slightest hint of coercion or police impropriety, and defendant was given his Miranda rights when he was first placed in custody.

6. Search and Seizure— hair and saliva samples—six hours after arrest

The trial court did not err in a first-degree murder prosecution by concluding that neither a court order nor a search warrant was necessary for the police to take hair and saliva samples from defendant six hours after he was taken into custody. There is no indication of intervening events which broke the continuity between defendant's arrest and the collection of the samples; furthermore, taking hair and saliva samples as long as one day following arrest has been approved on the basis of being in police custody rather than on the basis of the taking being incident to arrest.

7. Search and Seizure— statements in warrant application—good faith

The trial court did not err in a first-degree murder prosecution by concluding that officers who had applied for a search warrant had acted in good faith where defendant contended that information in the application was false.

8. Jury— selection—capital trial—death penalty questions

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by permitting the prosecutor to make statements and ask questions which barely mentioned mitigating circumstances. The record reflects that the purpose of the questions was to determine whether a prospective juror had the ability to vote for the death penalty and, even if the prosecutor minimized the role of mitigating circumstances, defendant explained the significance of mitigating circumstances during voir dire and the court cured any adverse effect from the prosecutor's questions in the instructions at the conclusion of the penalty phase.

9. Jury— selection—capital sentencing process—requested instructions

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by denying defendant's requested instructions on the capital sentencing process and giving an instruction essentially in accordance with North Carolina's pattern jury instructions.

10. Jury— selection—capital trial—individual voir dire—juror sequestration

The trial court did not abuse its discretion in a capital first-degree murder prosecution by refusing to allow individual voir dire and juror sequestration.

11. Jury— selection—capital trial—rehabilitation

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's motion for rehabilitation of each juror challenged for cause where the court stated that further questions would be allowed on a juror-by-juror basis if there was some equivocation in the responses.

12. Appeal and Error— preservation of issues—failure to object

A capital first-degree murder defendant did not preserve for appellate review the issue of whether the trial court sufficiently inquired into an alleged improper contact between a juror and a third party where defense counsel's ultimate request was for the court to select two more alternate jurors and to instruct all of the jurors not to discuss the case with anyone. There was no indication that defendant objected to the trial court's response or requested that the court inquire into the matter further.

13. Appeal and Error— plain error rule—issues within trial court's discretion

The plain error rule has not been and is not applied to issues which fall within the trial court's discretion. N.C. R. App. P.10(b)(2).

14. Sentencing— capital—mitigating circumstances—defendant's age

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance of defendant's age, N.C.G.S. § 15A-2000(f)(7), where defendant had suffered a head injury which caused organic brain damage, borderline mental retardation, and severe memory impairment; he was 26 at the time of the murder; he was gainfully employed and able to perform his job duties proficiently; he functioned adequately in society; and there was substantial evidence that he had the mental capacity to premeditate and plan his crime.

15. Sentencing— capital—mitigating circumstances—peremptory instructions

The trial court did not err during a capital sentencing proceeding by denying defendant's request for peremptory instructions on the mitigating circumstances of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and impaired capacity to appreciate the criminality of conduct, N.C.G.S. § 15A-2000(f)(6). Defendant's evidence of the statutory circumstances was controverted and, even though the court determined that there was sufficient evidence to warrant a peremptory instruction on the nonstatutory mitigating circumstances that defendant's brain injury affected his ability to function on a daily basis and affected his personality, the focus of the mitigating circumstances differed.

16. Appeal and Error— denial of peremptory instructions—no assessment of evidence—issue abandoned

An assignment of error to the trial court's denial of defendant's requested peremptory instruction on certain nonstatutory mitigating circumstances in a capital sentencing proceeding was deemed abandoned where defendant merely referred the Supreme Court to the statement of facts in his brief and did not assess the evidence as to each of the asserted circumstances or point out the evidence he believes is uncontroverted and manifestly credible.

17. Sentencing— capital—instructions—statutory and nonstatutory mitigating circumstances

The trial court did not err in a capital sentencing proceeding in its instructions on capital and noncapital mitigating circumstances where the instructions were consistent with the pattern jury instructions. Although defendant argued that repeating the nonstatutory instruction nineteen times could lead a reasonable juror to apply that instruction to both nonstatutory and statutory mitigating circumstances, the number of times a jury is instructed on nonstatutory mitigating circumstances necessarily parallels the number of nonstatutory circumstances requested and submitted.

18. Sentencing— capital—instructions—neutral phrasing

The trial court did not err in a capital sentencing proceeding by giving an instruction on mitigating circumstances with a neutral, conditional phrase beginning with "whether," rather than the declarative contention requested by defendant, to which jurors could have indicated their agreement with a "yes" or "no." The court instructed the jury in accordance with the pattern jury instructions, the jurors understood that the questions called for a yes or no answer, and they answered accordingly.

19. Sentencing— capital—instructions—nonstatutory mitigating circumstance—circumstance found—no plain error

There was no plain error in a capital sentencing proceeding where defendant contended that the court's instruction on a nonstatutory mitigating circumstance was confusing, but at least one juror found the circumstance to exist and to have value.

20. Sentencing— capital—instructions—mitigating circumstances—unanimity

A trial court's instruction in a capital sentencing proceeding requiring unanimity in finding mitigating circumstances was merely a lapsus linguae. It is clear from a review of its other instructions that the court understood that the law does not require the jury to find mitigating circumstances unanimously, and the instructions overall made it clear that each juror could find any mitigating circumstance and that unanimity is not required.

21. Jury— selection—capital trial—parole—questioning of prospective jurors

The trial court did not err in a capital first-degree murder trial by denying defendant's request to question prospective jurors on their understanding of parole eligibility. N.C.G.S. § 15A-2002 does not apply to the jury selection process.

22. Sentencing— capital—parole—instructions on changes in the law

The trial court did not err in a capital sentencing proceeding by refusing to instruct jurors on changes in the law regarding parole. The jury was repeatedly and clearly instructed that defendant would either receive a sentence of death or life imprisonment without parole.

23. Sentencing— capital—instructions—parole—pattern jury instructions

Although the better practice would be to charge the jury using the precise language found in N.C.G.S. § 15A-2002, the trial court did not err in a capital sentencing proceeding by reading from the pattern jury instructions on parole eligibility.

24. Criminal Law— defendant's argument—capital sentencing—life without parole

The trial court did not abuse its discretion in a capital sentencing proceeding by not allowing defendant to argue to the jury changes in the parole laws and that there would be no parole in this case. Defendant was, in fact, permitted to argue that defendant should be sentenced to life imprisonment without parole and the jury was clearly made aware that life imprisonment meant life imprisonment without parole.

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

The trial court did not abuse its discretion during a capital sentencing proceeding by allowing the prosecutor to argue future dangerousness; even though parole has been eliminated in capital cases, it is permissible to argue the possibility of future dangerousness to prison staff and inmates.

26. Criminal Law— prosecutor's argument—capital sentencing—escape

The trial court did not abuse its discretion in a capital sentencing proceeding by denying a mistrial after giving a curative instruction to the prosecutor's argument that defendant might escape from prison. Defendant failed to show that the curative instruction was insufficient to erase any potential prejudice.

27. Criminal Law— prosecutor's argument—grand jury indictment

There was no plain error in a capital sentencing proceeding in the prosecutor's argument concerning a changed date on the grand jury indictment. The argument was proper to refute defendant's attack on the procedure used in charging defendant and the instruction that being charged or indicted was not evidence of guilt was sufficient to eliminate any confusion or false impression the jury might have had.

28. Sentencing— capital—death sentence—not arbitrary

The record fully supported the aggravating circumstances 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 factor.

29. Sentencing— capital—death penalty not disproportionate

A sentence of death for a first-degree murder was not disproportionate where defendant was convicted of a premeditated and deliberate murder committed in the victim's home, the jury found the especially heinous, atrocious or cruel aggravating circumstance, and the case was more similar to cases in which the sentence of death was found proportionate than to those in which it was found disproportionate. Based upon the entire record, the sentence was not excessive or disproportionate.

STATE v. STEEN

[352 N.C. 227 (2000)]

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 Downs, J., on 28 August 1998 in Superior Court, Mecklenburg County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 31 August 1999. Heard in the Supreme Court 17 April 2000.

Michael F. Easley, Attorney General, by William B. Crumpler and Robert C. Montgomery, Assistant Attorneys General, for the State.

Paul M. Green for defendant-appellant.

LAKE, Justice.

On 12 January 1998, defendant was indicted for first-degree murder and for felonious breaking and entering and common law robbery as a habitual felon. On 16 March 1998, he was also indicted for first-degree rape. Defendant was tried capitally to a jury at the 20 July 1998 Mixed Session of Superior Court, Mecklenburg County. Prior to the jury's consideration of the charges, the first-degree rape charge was reduced to attempted first-degree rape. On 21 August 1998, 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 felonious breaking and entering and common law robbery, but the jury found defendant not guilty of attempted first-degree rape. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. The jury also found defendant guilty of being an habitual felon upon both the breaking and entering and robbery convictions. On 28 August 1998, the trial court sentenced defendant to death. The trial court also sentenced defendant to consecutive sentences of 145 to 183 months' imprisonment for the breaking and entering conviction and 145 to 183 months' imprisonment for the common law robbery conviction. Defendant appeals his conviction for first-degree murder and his sentence of death to this Court as of right. On 31 August 1999, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the remaining convictions.

At trial, the State's evidence tended to show that on 29 February 1996, shortly before 4:00 p.m., Officer Gordon Ogilvie of the Charlotte-Mecklenburg Police Department responded to a report of a

broken window at 2626 Tanglewood Lane. The victim, eighty-year-old Virginia Frost, had resided at the residence for forty years. When Officer Ogilvie arrived at Mrs. Frost's residence, a neighbor, Susan Bankson, met him. She explained that her children had been playing in Mrs. Frost's yard and found some broken glass. Ms. Bankson went to Mrs. Frost's house and saw that the glass door leading to the sunroom was shattered. Ms. Bankson called Mrs. Frost's daughter, Ann Copeland, and also the police.

Officer Richard Stahnke also arrived at the scene. The officers entered the victim's house to determine if a break-in had occurred. Once inside, the officers noticed that the house appeared to have been ransacked. The officers then observed the lifeless body of Virginia Frost lying in a bathroom. Mrs. Frost was nude except for a shirt pulled up around her neck. The officers also observed what appeared to be dried blood on Mrs. Frost's face and on one of her hands. There was a pool of blood around her head, and there appeared to be an indentation on her head as though she had been struck with some object. A pair of pantyhose was underneath Mrs. Frost's body.

An autopsy performed on 1 March 1996 revealed contusions over the bridge of the victim's nose, around her left eye and over the left side of her cheek; a laceration on the right side of her scalp; bruising over her head, neck, left arm, shoulder, chest and buttocks; and a broken tooth. The autopsy also revealed areas of hemorrhage around the brain, swelling and bruising of the brain, sixteen separate fractures to ten different ribs, and small tears in the inner lining of the chest. The autopsy report described the head injuries as blunt-trauma injuries caused when the body was impacted by something blunt. The report also stated that none of the blows would have been immediately fatal, and that Mrs. Frost would have survived for three to four hours. The cause of Mrs. Frost's death was determined to be blunt-trauma injuries to her head due to an assault.

On the same day that the police discovered Mrs. Frost's body, Officers A.J. Mullis and P.M. Ensminger of the Charlotte-Mecklenburg Police Department responded to a call concerning a man on a bicycle weaving on Randolph Road, which is less than two miles from the victim's residence. The officers discovered the defendant, Patrick Joseph Steen, on a bicycle on the roadway, weaving back and forth through heavy traffic. The officers pulled defendant over on the side of the road and observed a large contusion running across defendant's forehead and what appeared to be dried blood on his left cheek.

The officers also noticed an odor of alcohol about defendant. After obtaining consent to search defendant, the officers found a driver's license issued to a William H. Maynard and numerous credit cards with the same name. The officers also found a crack pipe and a marijuana pipe on defendant's person. The officers arrested defendant for possession of drug paraphernalia and theft of the credit cards. Officer Mullis subsequently sent information about defendant to a homicide investigator looking into the murder of Mrs. Frost.

On 6 March 1996, defendant gave written consent for the search of the clothes he was wearing when he was arrested. Defendant was released from custody on 14 March 1996. On 16 March 1996, two of the murder investigators went to his home and asked defendant to accompany them to the Law Enforcement Center. Defendant was told he was not under arrest and was questioned about his whereabouts from 26 February to 29 February 1996. Defendant was subsequently placed under arrest for Mrs. Frost's murder and was advised of his *Miranda* rights.

At trial, Henrietta Doster, an acquaintance of defendant's, testified that in late February 1996, defendant showed her and her boyfriend, Charlie Davis, a small red television. Defendant also emptied the contents of a small blue tote bag which contained coins, buttons and a lady's wallet. Doster looked at the wallet and saw an elderly lady's driver's license with the name "Virginia" on it. Davis gave defendant thirty dollars for the television.

Ann Copeland testified that on 10 March 1996, she was allowed to enter her mother's residence. She noticed that a small red television that she had given her mother was missing from the kitchen. Ann Copeland identified the red television collected from Charlie Davis as the one she had given her mother. Mrs. Copeland also identified pieces of silverware collected from Davis as belonging to her mother.

In his first assignment of error, defendant contends that the trial court erred in denying defendant's motion to suppress evidence. Prior to trial, defendant filed a motion to suppress several categories of evidence. Defendant subsequently filed an amendment to that motion. From 20 July 1998 to 24 July 1998, the trial court conducted a suppression hearing on defendant's motion and the amendment. During jury selection on 31 July 1998, the trial court ruled that the "motion to suppress is denied in each and every respect." On 28 August 1998, the trial court stated its findings and conclusions in sup-

port of its denial of defendant's motion to suppress. Because defendant challenges on various grounds the trial court's rulings for several separate categories of evidence under this single assignment of error, we will separately address the trial court's findings and conclusions for each individual category of evidence.

As a preliminary matter, we note that this Court has long held that the following rules apply when reviewing a trial court's ruling on a motion to suppress evidence:

> When the competency of evidence is challenged and the trial judge conducts a *voir dire* to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. *State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975). If there is a material conflict in the evidence on *voir dire*, he must do so in order to resolve the conflict. *State v. Smith*, 278 N.C. 36, 178 S.E.2d 597, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971). If there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. *State v. Ladd*, 308 N.C. 272, 302 S.E.2d 164 (1983); *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980); *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976); *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976). In that event, the necessary findings are implied from the admission of the challenged evidence. *State v. Whitley*, 288 N.C. 106, 215 S.E.2d 568 (1975).

State v. Vick, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995). Furthermore, a trial court's resolution of a conflict in the evidence will not be disturbed on appeal, *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996), and its findings of fact are conclusive if they are supported by the evidence, *State v. Robinson*, 346 N.C. 586, 596, 488 S.E.2d 174, 181 (1997). Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task "is to determine whether the trial court's conclusion[s] of law [are] supported by the findings." *State v. Hyde*, 352 N.C. 37, ——, —— S.E.2d ——, —— (2000).

[1] Defendant first contends that the trial court erred in denying his motion to suppress evidence obtained from the stop and seizure of defendant on 29 February 1996. Defendant argues that, under the totality of the circumstances, the police did not have a reasonable and articulable suspicion that defendant was engaged in criminal

activity and, therefore, defendant's stop was unconstitutional. Defendant also argues that the trial court's conclusion that the stop was justified is erroneous and based upon inadequate factual findings. We disagree.

First, we will address defendant's contention that the trial court based its conclusion upon inadequate findings of fact. However, defendant has failed to specify in what respect the findings are inadequate or which findings are not supported by the evidence. This Court will not review a trial court's findings of fact when defendant merely makes a general contention that the trial court's findings are not supported by the evidence. *State v. Cheek*, 351 N.C. 48, 520 S.E.2d 545 (1999), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 2000 WL 366308 (June 19, 2000) (No. 99-8913). In *Cheek*, this Court addressed a similar contention as follows:

> In this assignment of error, defendant has failed to specifically except to any of the trial court's findings of fact relating to this motion. Defendant has additionally failed to identify in his brief which of the trial court's . . . findings of fact are not supported by the evidence. Therefore, this Court's review of this assignment of error is limited to whether the trial court's findings of fact support its conclusions of law.

Id. at 63, 520 S.E.2d at 554.

[2] Because defendant has assigned error to the trial court's findings only in a general fashion, the focus of our analysis is whether the trial court's findings overall support its conclusion that the stop of defendant was constitutional. This Court has held:

> An investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).
>
> A court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. [*Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)]; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907,

62 L. Ed. 2d 143 (1979). The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch." *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989).

State v. Watkins, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994). In the case *sub judice*, we have carefully reviewed the trial court's findings as to this issue, and we hold the trial court did not base its conclusion upon inadequate findings of fact. The police in this case observed that defendant operated the bicycle in "an erratic and reckless manner" by weaving in heavy traffic, and that defendant's dangerous operation of the bicycle constituted a "motor traffic offense." Additionally, the trial court found that when the officers pulled defendant over on the bike, they asked defendant if they could speak to him, and defendant agreed. We therefore conclude that the officers' observation of the manner and place in which defendant was riding his bicycle was sufficient to raise "a reasonable suspicion to make an investigatory stop" under the above standards.

[3] With regard to the search of his person subsequent to the stop, defendant argues that this was illegal because his consent to the search was involuntary. It appears that defendant bases this argument solely on the ground that Officers Mullis and Ensminger illegally detained him. As noted above, we have already concluded that the trial court properly found that the stop was justified by reasonable and articulable suspicion and that it was thus a valid stop. Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop. *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 334 (1984).

The trial court in the instant case found "that the defendant had prior experiences with the criminal justice system, having been previously arrested and convicted of felonies on three separate occasions." In addition, the trial court found that after defendant agreed to speak with the officers, the officers noticed that defendant had an odor of alcohol about him and that his eyes appeared to be dilated. The trial court also found that after making these observations, the officers asked defendant if they could search him, and again defendant agreed. One of the officers then observed what appeared to be blood spots on defendant's shirt and person. Defendant does not dispute these findings of fact. N.C.G.S. § 15A-221(b) provides that a con-

sent to a search requires a voluntary statement to the officer giving the officer permission to make a search. " '[T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances.' " *State v. Brown*, 306 N.C. 151, 170, 293 S.E.2d 569, 582 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973)), *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). Based on our review of the trial court's findings in this regard, we conclude that the trial court properly determined that defendant voluntarily consented to the search of his person.

[4] Defendant next contends that the search and seizure of his clothing on 6 March 1996 was unlawful and unconstitutional. The trial court made extensive findings of fact, based on its four-day hearing, including the following: that defendant was arrested and taken to jail on 29 February 1996; that defendant's clothing was taken upon his arrival at the jail; that defendant was issued a standard jail jumpsuit; that defendant's clothing was available to him only upon his release from jail; that on 6 March 1996, Officer H.L McMillian went to the jail to obtain defendant's clothes for analysis of blood and glass particles; that Officer McMillian did not inform defendant that he was a suspect in the murder investigation; that Officer McMillian gained written consent from defendant by telling defendant that he was a suspect in an armed robbery investigation; and that defendant subsequently gave consent for Officer McMillian to take his clothes for examination.

The trial court then concluded

> [t]hat the clothes that were taken from the defendant for analysis, . . . that was a valid exercise of police power in view of the fact, regardless of reasons that were given to the defendant for the taking of the clothes, because they were in the process of taking and analyzing clothes that were already in their possession, nothing being taken from him, and the defendant had no privacy rights in clothes that he didn't even have on him at the time that they were obtained for those particular purposes.

Defendant argues that this conclusion is erroneous and based upon inadequate factual findings. Specifically, defendant argues that the warrantless search and seizure is not valid because it was not closely related to the reason defendant was arrested. *State v. Farmer*, 333 N.C. 172, 189, 424 S.E.2d 120, 130 (1993). Defendant was first arrested

for possession of drug paraphernalia and stolen credit cards, not for suspicion of murder, and while in custody on these charges, he became a focus of the investigation of the murder in this case.

Defendant also contends that the clothes that were taken at the jail were not in the possession of the police and that the search of those clothes does not constitute a "search incident to arrest." Defendant asserts that the jail served only as a custodian of his property. Further, defendant asserts that officers used false pretenses to obtain his consent to the search of his clothes. These arguments are without merit.

"It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination." *State v. Dickens*, 278 N.C. 537, 543, 180 S.E.2d 844, 848 (1971). Also, the United States Supreme Court has held that

> once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.

United States v. Edwards, 415 U.S. 800, 807, 39 L. Ed. 2d 771, 778 (1974), *quoted in State v. Payne*, 328 N.C. 377, 396, 402 S.E.2d 582, 593 (1991). In the instant case, because defendant was in police custody pursuant to a valid arrest, and the clothing in question had already been administratively taken from defendant's possession, the trial court correctly determined that the officers were well within their authority in obtaining defendant's clothing, regardless of the reasons the officers used for the consent. Since defendant was lawfully in custody and even "the effects in his possession . . . may lawfully be searched and seized without a warrant," the question of defendant's consent at this point is irrelevant. Further, as we have noted above, defendant had already voluntarily consented to the search of his person, which included his clothing. Accordingly, we conclude that the search of defendant's clothing was not unconstitutional or otherwise unlawful. Additionally, we note that the analysis of the glass particles and blood found in and upon defendant's clothes showed the glass did not compare with the glass at the victim's home and the blood was not the victim's, but rather was defendant's.

[5] Defendant next contends that the statements he made on 16 March 1996 were involuntary and that they were tainted by police coercion. Defendant argues that the trial court's conclusion to the contrary was erroneous and based upon inadequate factual findings. Because defendant does not specify which of the trial court's findings of fact he contends are inadequate, we will limit our review to whether the trial court's findings of fact support its conclusions of law. *State v. Cheek*, 351 N.C. at 63, 520 S.E.2d at 554.

We note at the outset of our analysis here that defendant acknowledges in his brief that none of his statements were admitted into evidence, and we further note that the trial court made a specific finding that "no incriminating statement was made." The trial court made extensive findings of fact with respect to each of defendant's interviews and exchanges with the investigating officers, and our review of the record relating to all of these interviews and exchanges does not reflect the slightest hint of coercion or any police impropriety. Further, the record at this point shows that defendant was properly given his *Miranda* rights at the appropriate time, when he was first placed in custody. The record supports the trial court's findings of fact, and the findings of fact support the conclusions of law. Accordingly, we conclude these arguments are without merit, and the trial court properly determined that defendant's statements to the police were voluntary and were not in violation of *Miranda*.

[6] Next, defendant contends that the police unlawfully took hair and saliva samples from him on 16 March 1996, following his arrest for the murder. Defendant argues that the trial court erroneously concluded that the police did not need a court order or a search warrant to obtain samples of his hair and saliva because "they were taken while the defendant was in custody incident to arrest." We disagree and affirm the trial court's conclusion.

Defendant does not dispute the trial court's finding of fact that defendant was in police custody when the hair and saliva samples were taken from him. This Court has approved warrantless seizures of hair and saliva samples from a defendant incident to his arrest. *State v. Cobb*, 295 N.C. 1, 19-20, 243 S.E.2d 759, 769-70 (1978). Our review of the record in this case reveals that defendant was in custody approximately six hours prior to the taking of samples of his hair and saliva. There is no indication that there were any intervening events which broke the continuity between defendant's arrest and the collection of hair and saliva samples. Furthermore, this Court has

approved the taking of samples of a defendant's hair and saliva as long as one day following a defendant's arrest and upon the basis of the defendant's being in police custody, rather than on the basis of the taking being incident to arrest. *State v. Thomas*, 329 N.C. 423, 437-38, 407 S.E.2d 141, 150-51 (1991). Accordingly, we hold the trial court did not err in concluding that neither a court order nor a search warrant was necessary for the police to take hair and saliva samples from defendant in the instant case.

[7] Finally, defendant contests the validity of the search of defendant's residence pursuant to a search warrant. Specifically, defendant argues that the information contained in the application for a search warrant on 17 March 1996 was false or was the product of unconstitutional procedures, in that the application for the warrant contained insufficient evidentiary information to establish probable cause in support of a search warrant. Defendant argues that because the search warrant was invalid, the evidence obtained as a result of the search of defendant's residence should be suppressed. We disagree.

In determining whether there is sufficient probable cause to justify a search warrant, a magistrate must consider the facts under the totality-of-circumstances standard. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 257 (1984). An application for a search warrant is sufficient when the affidavit supporting the application

> supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty. The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. A determination of probable cause is grounded in practical considerations.

Id. at 636, 319 S.E.2d at 256 (citations omitted).

There is a presumption of validity with respect to the affidavit supporting a search warrant. *State v. Fernandez*, 346 N.C. 1, 14, 484 S.E.2d 350, 358 (1997). A defendant nonetheless may challenge the truthfulness of the testimony showing probable cause and thereby

challenge the validity of the warrant. *Id.* at 13-14, 484 S.E.2d at 358. This opportunity is expressly provided by N.C.G.S. § 15A-978(a), which defines truthful testimony as "testimony which reports in good faith the circumstances relied on to establish probable cause." N.C.G.S. § 15A-978(a) (1999). The mere presence of incorrect facts in the affidavit, however, does not necessarily mean the affiant is not being truthful. *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358. The long-standing rule in North Carolina is that in order for a claim for relief based on falsity in the affidavit to succeed, " 'the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.' " *Id.* at 14, 484 S.E.2d at 358 (quoting *State v. Winfrey*, 40 N.C. App. 266, 269, 252 S.E.2d 248, 249, *disc. rev. denied*, 297 N.C. 304, 254 S.E.2d 922 (1979)).

The trial court in the case *sub judice* ultimately concluded that the officers acted in good faith in supplying information to the magistrate for the search warrant. However, defendant makes several arguments as to why the trial court erred in reaching this conclusion. Upon review, we find these arguments unpersuasive. First, defendant contends that when the investigators applied for the search warrant, they relied heavily on the fact that the victim's bloody body was discovered on 29 February 1996, the same day defendant was arrested on a different charge and was observed with blood on his clothing. Defendant asserts that the investigators intentionally did not disclose to the magistrate that the victim had been dead for three days when the victim's body was found, in order to create an incriminating coincidence linking defendant with the murder. However, our review of the record reveals that Officer William E. Ward testified during the suppression hearing that the medical examiner could not pinpoint a specific time when the beating of the victim occurred. Officer Ward testified that he was aware that the victim's injuries could have occurred on the 29th, or prior to the 29th, and that he told the magistrate that the homicide occurred on or before, or on or about, February 29th. Officer Ward's testimony is sufficient evidence for the trial court to conclude that Officer Ward acted in good faith in informing the magistrate of the approximate date of the murder.

Second, defendant asserts that the search warrant also relied upon the finding of glass particles on defendant's clothing. Defendant argues that only one glass particle was found, and a test showed that it had come from a source other than from the victim's door. Defendant also asserts that the test revealing the source of the glass was completed three days prior to the application for the search war-

rant. Therefore, defendant contends that the officers should have had the completed test results when they applied for the search warrant. Defendant argues that the failure to learn the source of the glass prior to their application for the search warrant shows that the officers had a "reckless disregard" for the accuracy of the search warrant application. However, the trial court found that the magistrate knew that the results of the glass test were still pending when the magistrate issued the search warrant. Additionally, the trace evidence analyst with the Charlotte-Mecklenburg Police Department, Linus Whitlock, testified at the suppression hearing that he completed the tests on 14 March 1996. Whitlock further testified that he did not inform anyone of the test's results, except for his supervisor, until 18 March 1996, the day following application for the search warrant. Because the evidence indicates that the officers were not aware that the tests were even completed, we cannot conclude that the officers' failure to obtain the test results prior to applying for the search warrant amounted to an act of bad faith.

Third, defendant argues that the search warrant application is inconsistent with one of the trial court's findings of fact. Defendant asserts that the application refers to defendant's sale of the television to Charlie Davis, but the trial court found that defendant made no "incriminating statements." When Officers Ward and McMillian questioned defendant on 16 March 1996, defendant offered several exculpatory statements. Defendant stated, *inter alia*, that Charlie Davis would be able to provide an alibi for him. Later, when defendant was confronted with the fact that the police had recovered the television from Davis, who said defendant sold the television to him, defendant claimed that he had found the television on the side of the road. Defendant stated that he took the abandoned television to Davis' house and sold it to him for twenty or thirty dollars. The evidence thus supports that defendant told the officers that he sold the television to Davis. We have thoroughly reviewed the trial court's order denying defendant's motion to suppress, and we conclude that the trial court's finding that defendant did not make an incriminating statement after he waived his *Miranda* rights was simply a comment that defendant never confessed to committing the murder. In these catchall assertions, defendant lists several other complaints of a similar nature which we find to be totally without merit. Defendant has failed to show any material inconsistency in the trial court's pertinent findings of fact. We therefore conclude that the trial court's findings support its conclusion that the officers applying for the search warrant acted in good faith. We also conclude that the trial court cor-

rectly determined that there was a sufficient showing of probable cause to justify the search warrant.

This assignment of error is overruled.

[8] In his next assignment of error, defendant asserts that he is entitled to a new trial because the trial court erred in various rulings prior to and during jury selection. Defendant first argues that during the State's initial questioning of prospective jurors, the trial court erroneously permitted the prosecutor to inform jurors that the death penalty was required to be imposed if the State proved an aggravating circumstance beyond a reasonable doubt. Defendant tenders the following quote as an example of what the prosecutor told several prospective jurors:

> Do you all further understand that it is not every first-degree murder case in which the State can even ask for the death penalty? For example, in order for the State to be able to ask for the death penalty in a particular first-degree murder case, the State must be able to prove to you beyond a reasonable doubt the existence of an aggravating circumstance.

Defendant contends that this statement, and others substantially similar to it, was improper because the prosecutor gave only a "scant mention" of mitigating circumstances. Additionally, defendant argues that the prosecutor failed to mention mitigating circumstances when he questioned individual prospective jurors. The prosecutor stated the following to the first prospective juror:

> [I]f and when we get to that portion of this trial, which would be described as the punishment phase, or a phase two of the trial, the judge at that point will instruct you if you are a juror and all the other jurors as to the procedure to go through in terms of evaluating any aggravating circumstance and any mitigating circumstance that the defense may prove in this case.

Defendant notes that the above-quoted statement was the first mention of mitigating circumstances to any of the prospective jurors. The colloquy between the prosecutor and the first prospective juror then continued as follows:

> [PROSECUTOR]: And do you understand that as the final part of that procedure the State has the burden of proving to you beyond a reasonable doubt that the aggravating circumstance is suffi-

ciently substantial to call for the death of the defendant? Do you understand that, sir?

A. I do.

[PROSECUTOR]: Do you further understand that if the State carries that burden, that is, proves to you beyond a reasonable doubt that the aggravating circumstance is sufficiently substantial to call for the death of this defendant, do you understand that under the law of North Carolina it would then be your duty under the law to vote for the death of the defendant?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

THE COURT: Do you understand that sir?

A. Yes, I understand.

[PROSECUTOR]: That at that point in the procedure if the State had proven to you beyond a reasonable doubt that the aggravating circumstance was sufficiently substantial to call for the death of the defendant, that it would then be your duty to vote for his death?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: Do you understand, sir?

A. Yes.

[PROSECUTOR]: Would you be able to do that?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Yes, I would.

Defendant asserts that in the preceding colloquy the prosecutor improperly characterized a juror's duty by explaining that if the State proved a sufficiently substantial aggravating circumstance, then North Carolina law required a juror to vote for the death penalty; that the trial court improperly allowed the prosecutor to repeat such erroneous statements in substantially the same form not less than forty-four times during jury selection; and that these improper questions

and comments adversely affected the composition of the jury and prejudiced defendant because they enabled the State to exclude jurors who were not prepared to vote for a death sentence without considering mitigating circumstances. We disagree.

This Court has stated:

> Both the State and the defendant have the right to question prospective jurors about their views on the death penalty. *State v. Green*, 336 N.C. 142, 159, 443 S.E.2d 14, 24, *cert. denied*, [513] U.S. [1046], 130 L. Ed. 2d 547 (1994). The manner and extent of such an inquiry lie within the trial court's discretion. *Id.* "The trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings in that regard will not be reversed absent a showing of an abuse of its discretion." *State v. Conaway*, 339 N.C. 487, 508, 453 S.E.2d 824, 837-38, [*cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153] (1995).

State v. Buckner, 342 N.C. 198, 213, 464 S.E.2d 414, 422 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996). Furthermore, " '[i]n reviewing any *voir dire* questions, this Court examines the entire record of the *voir dire*, rather than isolated questions.' " *Cheek*, 351 N.C. at 66, 520 S.E.2d at 556 (quoting *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997)).

In *Buckner*, this Court examined an issue similar to defendant's argument in the case *sub judice*. The defendant in *Buckner* contended that the trial court abused its discretion in allowing the prosecutor to ask the following question of each prospective juror:

> If you found that an aggravating circumstance existed and you found that the aggravating factors outweigh the mitigating factors and you found that the aggravating factors were substantially—were sufficiently substantial to call for the imposition of the death penalty; could you return a sentence of death?

Buckner, 342 N.C. at 213, 464 S.E.2d at 422. The defendant in *Buckner* argued that the question was improper because it enabled "the prosecutor [to] repeatedly suggest[] to the jurors that they could decide this final issue without reference to mitigating circumstances." *Id.* This Court concluded that the trial court did not abuse its discretion in allowing the prosecutor to ask that question because "[t]he purpose of the question was merely to screen potential jurors' views on capital punishment." *Id.* at 213-14, 464 S.E.2d at 422. Such inquiry is permissible. *Id.* at 214, 464 S.E.2d at 422. Finally, this Court deter-

mined that even assuming *arguendo* that the question was not proper, the trial court's instructions to the jury, which were in accordance with the North Carolina pattern jury instructions, cured any error. *Id.* at 214, 464 S.E.2d at 423.

We have reviewed the complete *voir dire* transcript contained in the record for the case *sub judice*, and we conclude that the trial court did not abuse its discretion in allowing the prosecutor's questions in this regard. The record, in its entirety, reflects that the purpose of the prosecutor's questions during this aspect of the *voir dire* was to determine whether a prospective juror had the ability to vote for the death penalty if that juror found that the aggravating circumstance outweighed any mitigating circumstances. This Court has repeatedly held that counsel may "ask the jurors if they can follow the long-settled law." *State v. Fletcher*, 348 N.C. 292, 310, 500 S.E.2d 668, 678 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). Even if the prosecutor's questions tended to minimize the proper role or significance of mitigating circumstances, defendant had full opportunity during *voir dire* to explain to prospective jurors the significance of mitigating circumstances in determining the appropriate penalty, and defendant did so with a full explanation. Finally, as this Court held proper in *Buckner*, the trial court in the instant case cured any adverse effect the prosecutor's questions may have had on the jurors when the trial court instructed the jurors at the conclusion of the penalty phase. The trial court explained the procedure for determining punishment in accordance with North Carolina's pattern jury instructions, and this Court presumes that jurors follow the trial court's instructions. *State v. Daniels*, 337 N.C. 243, 275, 446 S.E.2d 298, 318 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Accordingly, we conclude that the trial court did not abuse its discretion in overruling defendant's objections to these questions.

[9] By this same assignment of error, defendant argues that the trial court erred in denying defendant's written request that the trial court give prospective jurors instructions explaining the capital sentencing process. Defendant filed a pretrial motion requesting that the trial court inform jurors of the process of finding, evaluating and weighing evidence of aggravating and mitigating circumstances. The trial court refused defendant's request and instead read an instruction which was essentially in accordance with North Carolina's pattern jury instructions.

"In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the

court abused its discretion and that he was prejudiced thereby." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), *quoted in Fletcher*, 348 N.C. at 308, 500 S.E.2d at 677. In rejecting a similar claim, this Court reasoned:

> We find no abuse of discretion by the trial court in refusing to give the defendant's requested preliminary instruction. By utilizing the pattern instruction, a trial court accurately and sufficiently explains the bifurcated nature of a capital trial, avoids potential prejudice to the defendant, and helps to insure the uniformity of jury instructions for all trials.

State v. Jones, 339 N.C. 114, 143, 451 S.E.2d 826, 841 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Defendant argues that the case *sub judice* is distinguishable from prior holdings on this issue because the trial court erroneously allowed the prosecutor to give improper or incomplete statements of the law. However, as noted above, we have rejected this contention. The trial court properly explained the punishment process, and we conclude that it did not abuse its discretion in refusing defendant's proffered instructions.

[10] Defendant also contends under this assignment of error that the trial court abused its discretion in refusing to allow individual *voir dire* and juror sequestration. This Court has consistently denied relief on this basis. *State v. Gregory*, 348 N.C. 203, 208, 499 S.E.2d 753, 757, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998); *State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 284 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). Defendant does not assert or show how the instant case differs from our prior holdings on this issue, and defendant does not show prejudice. The trial court did not abuse its discretion in denying these requests.

[11] Additionally, defendant argues that the trial court erred in denying defendant's motion seeking permission to rehabilitate each juror challenged for cause. Defendant filed a motion prior to jury selection requesting that the trial court allow rehabilitation of every prospective juror the State challenged for cause. The trial court responded as follows:

> Well, that motion is denied. I will on a juror by juror basis give you the right to potentially ask questions if there's some equivocation in their responses which there's a predication for their being challenged for cause. Other than that, I think the court

has within its discretion to preclude those jurors if they clearly and unequivocally state positions that are contrary to their being able to serve.

This Court has held that "[a] defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause." *State v. Warren*, 347 N.C. 309, 326, 492 S.E.2d 609, 618 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). The defendant in *Warren*, like defendant in the case *sub judice*, sought permission to rehabilitate every juror challenged for cause. *Id.* at 326, 492 S.E.2d at 619. On appeal, this Court found no error in the trial court's denial of defendant's request to rehabilitate each challenged juror and approved the trial court's decision to "exercise its discretion upon each *individual* request for rehabilitation." *Id.* Defendant, in the case *sub judice*, has not shown that the trial court abused its discretion in denying defendant's motion to rehabilitate each juror challenged for cause. The trial court in this instance has properly proceeded pursuant to our holding in *Warren*, and there was no error in this regard.

Finally, defendant contends that the ultimate composition of the jury was flawed because the trial court improperly excused prospective jurors who could not agree to recommend the death penalty without consideration of mitigating circumstances. Specifically, defendant argues that the trial court did not properly determine whether the challenged jurors' views regarding capital punishment would impair each juror's ability to follow the law, because the trial court allowed the prosecutor to misinform the jurors as to what their duties were. Defendant's arguments presuppose that the prosecutor's comments and questions during *voir dire* were improper. However, because we have concluded that there was no impropriety in the prosecutor's conduct during *voir dire*, we conclude that defendant's arguments are without merit. This assignment of error is overruled.

[12] In his next assignment of error, defendant argues that the trial court erred in failing to sufficiently inquire into an alleged improper contact between a juror and a third party. The record reflects that near the end of jury selection, defense counsel told the trial court that an intern with the public defender's office used the same hairdresser as juror number eight, Ms. Sherry Rogers, and that the hairdresser informed the intern that Ms. Rogers had discussed the case with her. The trial court had previously instructed the jury not to discuss the case with anyone. In this regard, the record reflects the following colloquy:

THE COURT: All right. Let the record reflect the jury's out of the courtroom. What is it, Mr. Williams?

[DEFENSE COUNSEL]: I'm trying to find out. We've just been given a note, Your Honor, about a juror that's already selected. I'm trying to find out what it involves so I can intelligently inform the court if this is a potential juror problem. I don't know whether it is or not; if you'd give me just a moment.

. . . .

[DEFENSE COUNSEL]: —we have just received some information about juror number eight, Ms. Sherry Rogers. The information was given to us by an intern with the Public Defender's Office who has been working with us in the case. And I'll be glad to put her on the stand and question her about it,—

. . . .

THE COURT: What is it?

[DEFENSE COUNSEL]: Well, the issue's been raised that this juror apparently has made some comments to her hairdresser about being on this jury, and apparently it's the same hairdresser that this person has been to. And there was some indication that she had talked about it being circumstantial evidence and some other things; there were some comments about it, and it concerns us.

We're just bringing it to the attention of the court. I'll be glad to put this young lady on the stand, ask her about it under oath. I'll be happy to have the prosecutors ask her about it, the court ask her about it. I don't know; I'm just bringing this to the attention of the court. Whether she just happened to be there and be at the same hairdresser, whether she's an intern with the public defender or not doesn't make any difference.

THE COURT: Well, that information doesn't whet my appetite too much. You got any information this juror is apt to be prejudiced or unfair?

[DEFENSE COUNSEL]: I think if we had to request that you allow us to put this young lady on the witness stand and ask her some questions.

THE COURT: Did she have any communications with the juror?

. . . .

[DEFENSE COUNSEL]: No, she did not have any communications—

THE COURT: Well, what benefit is that to anybody?

. . . .

[DEFENSE COUNSEL]: Well, if she's formed some opinion based upon the statements to a hairdresser about this case with regard to circumstantial evidence and how she views it, I think that would have some effect on her partiality.

THE COURT: I suspect you better get the hairdresser in here. What you've got here is the one who had her hair dressed. She's not much benefit. She wasn't privy to the conversation. She's too far down the line. Now, if you want to do that, I'll hear from you.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: I'll leave it in your court. All right, let's bring the jury back in, please.

On the next day, this colloquy continued:

THE COURT: All right. Before continuing with jury selection, I'm going to ask the defense about what you intend to do about this business that you brought up about this so-called conversation that Ms. Rogers had with the beautician.

[DEFENSE COUNSEL]: We're not sure what to do about it at this point, Your Honor.

THE COURT: What do you mean you're not sure?

. . . .

You've had a day since that time. I need to know, otherwise I'm going to pick two alternates. I'm not going to be buying a pig in a poke here for you to be fishing over what you're going to do about it. Are you going to put on evidence about it? Have you contacted the beautician? Have you done anything about it?

[DEFENSE COUNSEL]: We've advised the court of it, Your Honor, which I and we as officers of this court understand is our duty to do so. Simply bringing the matter to the court, we—

THE COURT: You brought a hearsay matter to the attention of the court—

. . . .

[DEFENSE COUNSEL]: Well, because I think, Your Honor, we are officers of this court and as we're required under the code of ethics and officers of this court, at anytime that there's a question raised about a juror talking about the case in direct violation of the court's instruction, then I think it's incumbent upon us to bring it to the attention of the court. We did that. But we're afraid to do anything else, quite frankly. That's an honest answer.

THE COURT: Well, I'll cure your fear. If you're going to do anything about it, you need to do it. Otherwise, I'm going to start picking two more alternates.

Now, what's your intention? To do nothing or do something?

. . . .

[DEFENSE COUNSEL]: My response to the court's inquiry is that we do not intend to do anything further with regard to investigating this juror or contacting the hairdresser in question. We would request of the court, therefore, that you—that the court has indicated to select two additional alternates, and that you instruct the jurors again, and I made a very specific note, that they not discuss this case with anyone, and emphasize that instruction to them, which would mean they just can't talk about it, period. And maybe that would help alleviate any potential misunderstanding that these jurors may have throughout the trial.

Defendant now argues that the trial court improperly placed the burden on defense counsel to investigate this potential juror misconduct. Defendant contends that it was the trial court's duty, and not that of the defense, to determine whether any misconduct occurred. However, this Court has ruled that "the existence of [juror] misconduct and the effect of [juror] misconduct are determinations within the trial court's discretion." *State v. Murillo*, 349 N.C. 573, 600, 509 S.E.2d 752, 767-68 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 87 (1999).

We conclude that defendant has failed to preserve this issue for appellate review. There is no indication in the record that defendant objected to the trial court's response or requested that the trial court further inquire into the matter. Rather, as the above-quoted dialogue

shows, defense counsel's ultimate request to the trial court was for the court to select two more alternate jurors and to specifically instruct all of the jurors not to discuss the case with anyone. Where, as in the case *sub judice*, a defendant has failed to properly object to the trial court's decision, this Court will conclude that defendant has waived this purported error. N.C. R. App. P. 10(b)(1); *State v. Jaynes*, 342 N.C. 249, 262-63, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *Jaynes*, 342 N.C. at 263, 464 S.E.2d at 457.

We note that at the conclusion of this assignment of error in his brief to this Court, defendant wrote, "[i]n the event this Court finds that this error was not properly preserved for appellate review, defendant specifically asserts plain error." However, for the reasons discussed herein, we will not review this assignment of error under the plain error rule.

[13] This Court adopted the plain error rule in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), and defined the rule as follows:

> [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."

Id. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnotes omitted). In defining the plain error rule, this Court emphasized that "the term 'plain error' does not simply mean obvious or apparent error, but rather has the meaning given it by the court in *McCaskill*." *Id.*

Initially, this Court applied the plain error rule only to assignments of error relating to Rule 10(b)(2) of the North Carolina Rules

of Appellate Procedure. That rule addresses the preservation of issues relating to jury instructions for appellate review. This Court reasoned:

> The adoption of the "plain error" rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the "plain error" rule. *See United States v. Ostendorff*, 371 F.2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982, 18 L. Ed. 2d 229 (1967). The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial.

Odom, 307 N.C. at 660, 300 S.E.2d at 378. However, this Court later expanded the application of the plain error rule to include also issues regarding the admission of evidence:

> Because of the similarity of the requirements limiting the scope of review in Rules 10(b)(1) and 10(b)(2) and the likeness of the rationale for the adoption of the two rules we conclude, and so hold, that the "plain error" rule as applied in *Odom* to Rule 10(b)(2) applies with equal force to Rule 10(b)(1).

State v. Black, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983). Even though Rule 10(b)(1) is a general rule pertaining to the preservation of questions for appellate review, this Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now. For the aforementioned reasons, this assignment of error has been waived, and it is dismissed.

[14] In his next assignment of error, defendant contends that he is entitled to a new sentencing proceeding because the trial court failed to instruct the jury on the (f)(7) statutory mitigating circumstance, defendant's age at the time of the offense. N.C.G.S. § 15A-2000(f)(7) (1999). Our review of the transcript reveals that defendant did not request the trial court to submit this mitigating circumstance to the jury, and there was no discussion during the charge conference regarding the submission of the (f)(7) circumstance. Defendant thus asserts in this issue that, notwithstanding his failure to request submission of the mitigating circumstance, it was the trial court's duty to submit the (f)(7) mitigating circumstance.

In *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995), as in the case *sub judice*, the defendant did not request the age mitigating circumstance at trial but on appeal contended that the trial court should have submitted that mitigating circumstance. *Id.* at 660, 452 S.E.2d at 305. The evidence in *Spruill* revealed that even though defendant was thirty-one years old, he was "an immature and dependent person who had borderline intelligence." *Id.* Additionally, this Court noted that the defendant in *Spruill* "had worked as an automobile mechanic and in a shipyard, moved on to a better position, attended church, and functioned quite well in the community." *Id.* In determining that the trial court did not err in failing to submit the (f)(7) mitigating circumstance, this Court in *Spruill* reasoned as follows:

> In *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), the Court reiterated that the statutory mitigating circumstance of age is based on a "flexible and relative concept of age." *Id.* at 393, 346 S.E.2d at 624. Nevertheless, evidence showing emotional immaturity is not viewed in isolation, particularly where other evidence shows "more mature qualities and characteristics." *Id.* Where evidence of emotional immaturity is counterbalanced by a chronological age of twenty-three years, apparently normal physical and intellectual development, and experience, the trial court is not required to submit the mitigating circumstance of age.

Spruill, 338 N.C. at 660, 452 S.E.2d at 305. Accordingly, this Court will not conclude that the trial court erred in failing to submit the age mitigator where evidence of defendant's emotional immaturity is counterbalanced by other factors such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience. *Id.*

In the case *sub judice*, defendant was twenty-six at the time of the crime, and all of the expert witnesses at trial agreed that when defendant was twenty-one, he suffered a head injury which caused organic brain damage and resulted in a personality change. There is also evidence showing that defendant's injury caused him to suffer borderline mental retardation with an IQ in the seventy to seventy-nine range, that defendant's performance IQ component was in the lowest percentile, and that defendant's memory was impaired. Tests indicated that defendant had a memory quotient of sixty-three, which falls below the lowest percentile.

However, the record reflects evidence which counterbalances the evidence of defendant's mental condition. Defendant was twenty-six when the murder was committed. Defendant was also competent to manage simple financial transactions and had a "fair" ability to understand, retain and follow instructions. After defendant was released from prison, he resided with his mother. The evidence reflects that defendant understood that he had to follow his mother's rules, that defendant agreed to do so, and also that he agreed to help his mother financially. Defendant also always apologized to his mother after losing his temper with her. Additionally, the testimony of defendant's employer/supervisor at the Myers Park Country Club, regarding defendant's performance as an employee, included observations that defendant was oriented well to his job on the 153-acre golf course; that he quickly picked up on his duties; that he was good in following orders; that he did not demonstrate any memory problems; that he had good common sense; that he was always polite; and that, except for slow speech, he appeared to be a mentally alert person.

Furthermore, the State presented substantial evidence that defendant had the mental capacity to premeditate and plan his crime. The evidence showed defendant had staked out the victim's house. At trial Katherine Stanford, a crime-scene search technician with the Charlotte-Mecklenburg Police Department, testified that on 17 March 1996, she searched defendant's residence pursuant to a search warrant and found a map of the City of Charlotte among defendant's possessions. Two areas of this map had been labeled with hand-drawn circles. One of the circled areas was the Southpark area, and it had a hand-written label with the words "very rich." The other circled area was the Myers Park neighborhood, which was where the victim resided. This area had a hand-written description of "old rich."

Thus, in light of the foregoing evidence of premeditation and evidence that defendant was twenty-six at the time of the murder, that he was gainfully employed and able to perform his job duties proficiently and that he functioned adequately in society, we conclude that the trial court did not err in failing to submit this circumstance. This assignment of error is overruled.

[15] In his next assignment of error, defendant contends that the trial court erred in denying his request for a peremptory instruction on two statutory mitigating circumstances. This Court has repeatedly held that a " 'trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly

credible evidence.' " *State v. Richmond*, 347 N.C. 412, 440, 495 S.E.2d 677, 692 (quoting *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996)), *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998).

Defendant argues that the trial court should have given a peremptory instruction on the (f)(2) statutory mitigating circumstance, that defendant was under the influence of a mental or emotional disturbance at the time of the murder. N.C.G.S. § 15A-2000(f)(2). Defendant also argues that the trial court should have peremptorily instructed the jury on the (f)(6) circumstance, that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6). In support of these two circumstances, defendant offered evidence from his expert witness, Dr. John F. Warren, a clinical psychologist specializing in medical psychology and forensic psychology. Defense counsel questioned Dr. Warren as follows:

> Q. How has the loss of intellectual ability and the loss of this special physical skills that he possessed affected him?
>
> A. Well, he described himself as recognizing that he wasn't doing as well as before. He described being frustrated with that, he described continuing to ask for help from doctors and other professionals with regard to his thinking and emotional and physical problems, so he has been experiencing a lot of frustration due to his brain injury.
>
> His brain injury was very, very significant and life threatening, and the dealing with that in the last year since that time has been an extremely frustrating [sic] for him.
>
> Q. Does he have a normal capacity to deal with frustration, or was that affected also?
>
> A. He does not. He has a quite abnormal frustration tolerance as well-documented in the medical records, and in my own personal experience with him when Mr. Steen experiences challenges either verbal challenges or frustrations that exceed his ability to cope, he very quickly exceeds his frustration tolerance.
>
> His ability to stay cool and calm and collected, and he very quickly goes into what has been described in the medical records as rage, or explosiveness, or irrational anger including not only verbal expressions of that but physical expressions of that.

Another expert witness, Dr. Jeffery J. Fahs, a neuropsychiatrist, testified that his diagnosis of defendant was "personality change due to brain injury combined type aggressive and disinhibited." Defendant also presented evidence tending to show that he was borderline retarded, had memory deficits, had a personality disorder and did not have the normal capacity to deal with frustration.

We conclude that the trial court was not required to give a peremptory instruction on the (f)(2) mitigating circumstance in this case because defendant's evidence was not uncontroverted. For example, Dr. Fahs, a defense witness, testified that there was nothing about defendant's condition that would have forced him to beat an elderly lady to death. Additionally, Dr. Wanda Karriker, an expert in psychological evaluations, conducted a disability evaluation of defendant in 1991. At trial, Dr. Karriker testified that she tested defendant and reported the following observations to the Disability Determination Services:

> Attitude toward testing was positive. There was no evidence of gross motor impairment. No involuntary movements were observed. Ability to concentrate and focus attention on the task at hand was poor. [Defendant] appeared to make sincere effort to cooperate with the examiner. Visual motor speed was slow.

Dr. Karriker also testified that defendant's "[a]bility to understand, retain, and follow instructions was fair," and that defendant "is considered competent to manage simple financial transactions." Finally, as noted in the previous assignment of error, defendant's supervisor at the Myers Park Country Club testified that defendant did his job correctly, exhibited no memory problems, came to work on time, picked up his paycheck on time, demonstrated good common sense, caused no trouble and did not appear to be mentally deficient. All of this evidence contradicts defendant's evidence supporting the (f)(2) mitigating circumstance, that defendant was under the influence of a mental or emotional disturbance at the time of the murder. Accordingly, the trial court did not err in failing to give a peremptory instruction for the (f)(2) circumstance.

Evidence in the record also contradicts defendant's evidence supporting the (f)(6) mitigator, that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. In addition to the evidence set forth above, Lonnie Henderson, one of defendant's fellow inmates at Central Prison, testified on direct examination as follows:

Q. During the time that you were in Central Prison with the defendant Patrick Steen, did you and he have occasion to spend some time together, playing chess?

A. A game called chess, yes, and we played spades and stuff. He taught me how to play chess. I had never played it; I had never been to prison before.

. . . .

Q. During the time that you spent with the defendant, Mr. Steen, in Central Prison, did there come a time when he talked with you about his murder case?

A. It was some discussion about it, yes, sir.

. . . .

Q. What, if anything, did he tell you about the victim of his crime?

A. He said—some of the stuff I can't recall. It's been a bunch of stuff happened in the past, since then, that's been on my mind.

Some of the stuff that was discussed, it was 80—around an 80 year old lady that was murdered. He had been watching her house. Also, he said that her daughter came back and forth over there to the residence. And he was watching the residence. And when she left and he was on some type of drugs; he was on drugs, narcotics.

. . . .

Q. What did the defendant say to you, about what he did to the 80 year old lady?

A. He said, when he was watching the house over there, when he knew there wasn't nobody there, that's when he had broke in the residence and went in there. And he didn't say exactly how he killed her. He said that he had murdered her, and he had took something; a television, and money, and stuff; pawned it for drugs.

This testimony tends to show that defendant committed a calculated and planned crime, and thus defendant was able to understand and appreciate the criminality of his conduct and was able to conform his conduct to the requirements of the law. Because the evidence of

impaired capacity was not uncontroverted, we conclude that the trial court was not required to give a peremptory instruction on the (f)(6) mitigating circumstance.

Additionally, defendant draws this Court's attention to the fact that the trial court granted defendant's request for peremptory instructions as to several related nonstatutory mitigating circumstances. As to the twelfth nonstatutory mitigating circumstance, the trial court instructed the jury as follows:

> 12, after his brain damage, the defendant, Jody Steen's ability to function on a daily basis was significantly imparied [sic], and his personality changed substantially.
>
> All the evidence tends to show that after his brain damage, the defendant, Jody Steen's ability to function on the daily basis was significantly impaired, and his personality change[d] substantially. Accordingly, as to this mitigating circumstance, I charge that if one or more of you find the facts to be as all the evidence tends to show, you'll answer that issue number 12 yes, that mitigating circumstance number 12 yes, on the Issues and Recommendation Form. If one or more of you also deem that circumstance to have mitigating value.

Defendant argues that because the trial court correctly recognized that the evidence supporting this nonstatutory circumstance was manifestly credible and uncontroverted, the trial court erred in failing to recognize the same for the two related statutory mitigating circumstances. We disagree. The focus of the nonstatutory circumstance was that after defendant's brain injury, his ability to function on a daily basis was impaired and his personality changed significantly. In contrast, the (f)(2) and (f)(6) circumstances focus on whether the defendant's brain damage caused a mental or emotional disorder which influenced defendant's behavior at the time of the crime, or whether defendant's injury otherwise impaired defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time defendant committed the murder. We cannot conclude that because the trial court determined there was sufficient evidence to warrant a peremptory instruction that defendant's brain injury affected his ability to function on a daily basis and also substantially affected his personality, the trial court necessarily had to find that there was uncontroverted and manifestly credible evidence supporting the circumstances that defendant's brain damage amounted to a mental or emotional dis-

turbance or that defendant was unable to conform his conduct to the requirements of the law at the time of the murder.

Therefore, because there is contradictory evidence refuting the (f)(2) and (f)(6) mitigators in this case, we cannot conclude that defendant's evidence was "uncontroverted and manifestly credible" so as to warrant a peremptory instruction on these statutory mitigators. Accordingly, the trial court did not err in refusing defendant's request, and this assignment of error is overruled.

[16] In his next assignment of error, defendant asserts that he is entitled to a new sentencing proceeding because the trial court erred in refusing to give peremptory instructions on seven nonstatutory mitigating circumstances. Those seven nonstatutory circumstances are listed on the "Issues and Recommendation as to Punishment" form as follows:

> (4) Whether the murder was committed while the defendant, Jody Steen, was under the influence of a mental or emotional disturbance that is caused by a medical condition?
>
> (8) Whether in February of 1991, the defendant, Jody Steen, was involved in a motorcycle accident which resulted in severe brain damage?
>
> (9) Whether after emerging from the coma, the defendant, Jody Steen, was unable to speak or walk, requiring extensive rehabilitation and determination on his part?
>
> (11) Whether the defendant, Jody Steen's brain damage was so severe that when he was assessed for social security in June of 1991, he was classified as mentally retarded?
>
> (13) Whether after his brain damage, the defendant, Jody Steen, sought out help for his emotional and mental problems he was experiencing as a result of his brain damage, but he did not receive effective help?
>
> (17) Whether since his brain damage, the defendant, Jody Steen, has been prescribed a number of psychiatric medications, but they were inappropriate medications?
>
> (18) Whether sometimes when he is unable to control his behavior, the defendant, Jody Steen, does not recall the events that occur, and he has been diagnosed with deficits in memory and attention?

We note that the jury found circumstances (4), (8), (11), (13) and (17) to exist and to have mitigating value.

As previously stated, a trial court should grant defendant's request for a peremptory instruction for any mitigating circumstance if that circumstance is supported by "uncontroverted and manifestly credible evidence." *State v. Richmond*, 347 N.C. at 440, 495 S.E.2d at 692. However, defendant does not specifically assess the evidence as to each of these seven asserted circumstances or point out which evidence he believes is "uncontroverted and manifestly credible" and thus supports each of these circumstances. Rather, defendant merely invites this Court to refer to the statement of facts contained in his brief. Because defendant makes no such assessment or argument with cited authorities and does not present this assignment of error in a way for this Court to give it meaningful review, we conclude defendant has abandoned this assignment of error. N.C. R. App. P. 28(a); *State v. Cheek*, 351 N.C. at 71, 520 S.E.2d at 558.

[17] In his next assignment of error, defendant contends that the trial court erred in failing to explain to the jury the difference between statutory and nonstatutory mitigating circumstances. Defendant argues that instead of instructing the jury that statutory mitigating circumstances, if found to exist, have mitigating value as a matter of law, the trial court merely described mitigating circumstances generally and instructed the jury to consider all the mitigating circumstances, both statutory and nonstatutory, in the same manner.

The trial court initially instructed the jury as to mitigating circumstances as follows:

> A mitigating circumstance is a fact or a group of facts which don't, do not constitute a justification for a killing, or an excuse for a killing, or reduce it to any 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 the killing less deserving of extreme punishment than other first degree murders.
>
> Our law identifies possible mitigating circumstances. However, in determining the Issue number 2, it'd be your duty to consider as a mitigating circumstance any aspect of the defendant's character, and or record, and any of the circumstances of this murder that the defendant contends is the basis for sentence

less than death, and any other circumstances arising from the evidence which you deem to have mitigating value.

. . . .

If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the Issues and Recommendation Form. A juror may find any—any or a juror may find that any mitigating circumstance exists by a preponderance of the evidence, whether or not that circumstance was found to exist by any or the rest of the jurors.

In any event, you would move on to consider the other mitigating circumstances, and continue in a like manner until you have considered all of them, all the mitigating circumstances listed on the form, and any others that you deem to have mitigating value. Now, it will be your duty to consider three statutory mitigating circumstances, and they'll be the first three, and any others that you find from the evidence.

The trial court then proceeded to instruct the jury as to each of the three statutory mitigating circumstances submitted to the jury. After each explanation or statement of a statutory mitigating circumstance, the trial court gave the following instruction or a substantially similar instruction:

If one or more of you find, by the preponderance of the evidence, that this circumstance exists, then 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 find this circumstance to exist, you would so indicate by having your foreperson write no in that same space.

The trial court thus completed its instructions regarding statutory mitigating circumstances and then proceeded to nonstatutory circumstances. The trial court stated:

Then members of the jury, you go to what's to the remainder of these or non-statutory mitigating factors, and they start with number four and you should, you should consider those circumstances starting with number four and following from it that arise from the evidence, which you find to have mitigating value. And if any one or more of you find—if any one of or more of you find,

> by a preponderance of the evidence, that any of these following or additional mitigating circumstances exist, and also are deemed to have, or deemed by you to have mitigating value, then you would so indicate by having your foreperson write yes in the space provided after each of the circumstance as it applies.

These instructions are consistent with the pattern jury instructions for capital sentencing proceedings. *See* N.C.P.I.—Crim. 150.10 (1998).

In *State v. Hedgepeth*, 350 N.C. 776, 517 S.E.2d 605 (1999), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 68 U.S.L.W. 3565 (2000), this Court recently reaffirmed that a jury is properly instructed as to the difference between statutory and nonstatutory mitigating circumstances when the trial court follows the pattern jury instructions. *Id.* at 790, 517 S.E.2d at 613-14. The trial court in *Hedgepeth*, just like the trial court in the case *sub judice*, instructed the jury from the appropriate pattern jury instruction, N.C.P.I.—Crim. 150.10, and thus the instructions in *Hedgepeth* are substantially similar in both form and content to the instructions at issue here. *Hedgepeth*, 350 N.C. at 790, 517 S.E.2d at 613-14. Therefore, we conclude that here, as in *Hedgepeth*,

> "the trial court properly informed the jurors that in order to find a statutory mitigating circumstance to exist, all [the jury] 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 790, 517 S.E.2d at 614 (quoting *State v. Davis*, 349 N.C. 1, 56, 506 S.E.2d 455, 485 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)).

However, even though the jury instructions in the case *sub judice* are substantially similar to those this Court has previously upheld, defendant argues that the trial court committed error because the instructions, considered in their entirety, informed the jurors, in effect, that they could elect to give no weight to a statutory mitigating circumstance that they found to exist. Defendant asserts that

because there were twenty nonstatutory mitigating circumstances submitted (including the catchall), the trial court repeated the instruction that a juror must find both that the mitigating circumstance existed *and* that it had mitigating value at least nineteen times. Defendant argues that because that particular instruction was repeated so many times, a reasonable juror would conclude that he or she must apply that instruction to all mitigating circumstances, statutory and nonstatutory alike. Further, defendant asserts that this error is compounded by the fact that the trial court commingled statutory and nonstatutory circumstances in its preliminary general instructions. We disagree.

The number of times a jury is instructed as to nonstatutory mitigating circumstances necessarily parallels the number of nonstatutory mitigating circumstances that defendant requests and the trial court submits to the jury. When the trial court instructed the jury as to the nonstatutory mitigating circumstances, the trial court in the normal course and context of its charge had already properly instructed the jury with regard to the statutory mitigating circumstances. As previously noted, the instructions in this case were given in accordance with the law. This Court presumes that the jury understood and followed the trial court's instructions. *State v. Daniels*, 337 N.C. at 275, 446 S.E.2d at 318. This assignment of error is overruled.

[18] In his next assignment of error, defendant argues that he is entitled to a new sentencing proceeding because the trial court's instructions regarding defendant's statutory and nonstatutory mitigating circumstances were confusing and incorrect. Defendant requested that the trial court submit the statutory and nonstatutory mitigating circumstances to the jury in the form of a declarative contention or statement of fact, to which the jurors could indicate their agreement or disagreement with a "yes" or "no" answer. However, in giving its instructions, the trial court changed each of these declarative statements to a neutral, conditional phrase beginning with "whether." In contrast, defendant points out the trial court submitted the aggravating circumstances to the jury as unambiguous or less neutral questions beginning with "was." Defendant argues that the submission of the mitigating circumstances as neutral, conditional phrases beginning with "whether" failed to place defendant's contentions squarely before the jury. This contention is without merit.

Defendant presents no authority in support of his argument that a question beginning with the word "whether" does not call for a

"yes" or "no" answer. North Carolina's pattern jury instructions provide for the use of the word "whether" in setting out mitigating circumstances. N.C.P.I.—Crim. 150.10. The record reflects that the trial court instructed the jury in accordance with the pattern jury instructions. Our review of the record shows that the jury well understood that the questions on the Issues and Recommendation as to Punishment form called for either a "yes" or "no" answer and that the jury answered the questions accordingly. Thus, we conclude that the trial court did not err in following the pattern jury instructions.

[19] Under the same assignment of error, defendant contends that the trial court improperly phrased the instruction for number sixteen of defendant's nonstatutory mitigating circumstances. The trial court gave the following instruction:

> Number 16, whether the defendant, Jody Steen, received effective treatment for his brain disorder. If any one or more of you find this mitigating circumstance to exist by a preponderance of the evidence, and any one or more of you deem it to have mitigating value, then you would answer number 16 yes. If none of you deem it to have that, that circumstance to—strike that. If none of you find it to exist, and or if none of you deem it to have mitigating value, then you would answer 16 no.

Defendant argues that the trial court's phrasing of this instruction, as well as the phrasing of this circumstance on the Issues and Recommendation as to Punishment form, conveyed the opposite of defendant's contention that he did not receive effective treatment for his brain disorder. Defendant contends that this instruction, as phrased by the trial court, was confusing to the jury and therefore constituted prejudicial error. We disagree.

There is no indication in the record that defendant objected to the trial court's instructions or to the Issues and Recommendation as to Punishment form on the ground he now asserts. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure addresses the preservation of 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 any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2). Because defendant failed to object to the jury instructions on the grounds stated in this assignment of error, defendant has failed to properly preserve this argument for appellate review. Defendant is therefore entitled to review pursuant only to the plain error rule. N.C. R. App. P. 10(c)(4); *State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 522 (1998). "In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that 'absent the error, the jury probably would have reached a different result.' " *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994) (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

The jurors' responses on the Issues and Recommendation as to Punishment form indicate that at least one juror found nonstatutory mitigating circumstance number sixteen to exist and deemed it to have mitigating value. Nonstatutory mitigating circumstance number sixteen was thus found and answered in defendant's favor on the form. Therefore, defendant has failed to show prejudice. Even assuming *arguendo* that the instruction confused the jurors, we cannot conclude that it rises to the level of plain error. Because at least one juror found circumstance number sixteen to exist and to have mitigating value, defendant cannot show that "absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. This assignment of error is overruled.

[20] By his next assignment of error, defendant contends that he is entitled to a new sentencing proceeding because the trial court incorrectly instructed the jury that "your answers [on the Issues and Recommendation as to Punishment form] to Issues 1, 2, 3, and 4, either yes or no must be unanimous." The United States Supreme Court has held that it is a violation of the Eighth Amendment of the federal Constitution to require a capital sentencing jury to be unanimous in finding the existence of mitigating circumstances. *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Because Issue Two on the Issues and Recommendation as to Punishment form deals with whether the jury determines that the mitigating circumstances exist, defendant argues that his constitutional rights were violated. We disagree.

The record reflects that the trial court essentially followed the pattern jury instructions throughout its penalty phase charge.

However, the transcript reveals one sentence where the trial court erroneously deviated from the approved instructions. During its preliminary charge to the jury, the trial court stated:

> When you retire to deliberate your recommendation as to punishment, you'll take with you a form entitled Issues and Recommendation as to Punishment. That form includes a written list of four issues relating to aggravating and mitigating circumstances, and I'm going to take these four issues up with you in greater detail and one by one.
>
> Now, to enable you to follow me more easily, the Bailiff is going to give you a copy of—give each of you a copy of that form that is entitled Issues and Recommendation as to Punishment, which you'll take with you when you retire to deliberate.
>
> Now, don't read ahead on the form, but refer to it as I instruct you on the law as we go through it.
>
> Again, your answers to Issues 1, 2, 3, and 4, either yes or no must be unanimous.

This last sentence reflects the trial court's single error.

We cannot discern from the record whether that one sentence in the trial court's preliminary instruction merely contained a *lapsus linguae* by including Issue Two in that portion of the challenged instruction, or whether there was a mistake in the transcription of the instruction. *State v. Sanderson*, 346 N.C. 669, 684-85, 488 S.E.2d 133, 141 (1997). However, prior to determining whether this error misled the jury, we note that defendant failed to object to the trial court's instruction at issue. Accordingly, this Court's review of this assignment of error is limited to one for plain error. N.C. R. App. P. 10(c)(4); *State v. Call*, 349 N.C. at 424, 508 S.E.2d at 522. Looking at the trial court's instructions in its entirety, we conclude that the error was harmless.

Following its preliminary instruction, the trial court specifically instructed the jury as to each of the four issues on the Issues and Recommendation as to Punishment form. Following its specific instructions as to Issue One, the trial court instructed the jury as to Issue Two relating to the mitigating circumstances as follows:

> If the evidence satisfies *any of you* that a mitigating circumstance exists, you would indicate that finding on the Issues and Recommendation Form. *A juror may find any—any or a juror*

> *may find* that any mitigating circumstance exists by a preponderance of the evidence, *whether or not that circumstance was found to exist by any or the rest of the jurors.*

(Emphasis added.) Here, the trial court clearly explained that only one or more jurors needed to find that a mitigating circumstance existed.

The trial court then stated that there were three statutory mitigating circumstances submitted for the jury's consideration, and the trial court proceeded to describe each circumstance in detail. After its description of the first statutory circumstance, and before moving to the second circumstance, the trial court gave the following instruction:

> If *one of or more of you find*, by the preponderance of the evidence, that this circumstance exists, then 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 find that circumstance to exist, you would so indicate by having your foreperson write no in that same space.

(Emphasis added.) The trial court then repeated this instruction, or gave one substantially similar to it, following its description of the second and third statutory mitigating circumstances.

In addition, prior to giving the jury detailed instructions as to each nonstatutory mitigating circumstance, the trial court stated, as part of its instruction hereinabove set out, as follows:

> *And if any one or more of you find—if any one of or more of you find*, by a preponderance of the evidence, that any of these following or additional mitigating circumstances exist . . . .
>
> If none of you find the circumstance to exist or if none of you deem it to have mitigating value . . . .

(Emphasis added.)

Finally, when the trial court proceeded to instruct the jury as to Issue Three, the trial court stated:

> Members of the jury, if you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstance or circumstances against the mitigating circum-

> stance or circumstances, and when deciding this issue, *each juror may consider any mitigating circumstance or circumstances that the juror determined* to exist by a preponderance of the evidence in issue number 2.

(Emphasis added.)

After reviewing the trial court's specific instructions regarding Issue Two, it is clear that the trial court understood that the law did not require the jurors to unanimously find a mitigating circumstance. We therefore conclude that the portion of the preliminary charge stating that the jury's "answers to Issues 1, 2, 3, and 4 . . . must be unanimous" was merely a *lapsus linguae* by the trial court. We also conclude that the trial court's instructions overall "make it clear that each juror could find any submitted mitigating circumstance to exist . . . [and that the instructions] plainly state that unanimity is not required for a finding of any mitigating circumstance." *State v. Sanderson*, 346 N.C. at 683, 488 S.E.2d at 141. Furthermore, it is significant that the Issues and Recommendation as to Punishment form contains the following instruction:

> Before you answer Issue Two, consider each of the following mitigating circumstances. In the space after each mitigating circumstance, write "yes," *if one or more of you finds that circumstance* by a preponderance of the evidence. Write, "no," if none of you finds that mitigating circumstance.

(Emphasis added.)

Notwithstanding the trial court's *lapsus linguae* in its preliminary instruction, the record shows the trial court clearly and unambiguously instructed that for each of the mitigating circumstances submitted in Issue Two, only one or more of the jurors was required to find that a mitigating circumstance existed. It is also clear from the trial court's instruction regarding Issue Three that no juror was precluded from considering any mitigating circumstance or evidence that he or she found in Issue Two. The instructions contained in the Issues and Recommendation as to Punishment form further clarify that the jury need not be unanimous in finding a mitigating circumstance. Accordingly, we conclude that the trial court's error was harmless beyond a reasonable doubt. This assignment of error is overruled.

In his next assignment of error, defendant argues that he is entitled to a new sentencing proceeding because the trial court's rulings

during jury *voir dire*, jury instructions, and closing arguments deprived the jury of a correct instruction on the sentence of "life without parole."

[21] First, defendant contends that the trial court erred in denying defendant's general request to question prospective jurors regarding their understanding of parole eligibility in capital cases. This Court has considered this issue and decided it against defendant's position. *State v. Skipper*, 337 N.C. at 24, 446 S.E.2d at 264. However, defendant argues that N.C.G.S. § 15A-2002 imposes a duty upon trial courts to instruct juries that life imprisonment means life without parole. That statute provides, in pertinent part:

> The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole.

N.C.G.S. § 15A-2002 (1999). Defendant's argument is misplaced. This statute requires the trial court to give the jury an instruction on the meaning of life imprisonment during the sentencing proceeding following trial. *Skipper*, 337 N.C. at 43, 446 S.E.2d at 275. N.C.G.S. § 15A-2002 does not apply to the jury selection process. Defendant's argument is meritless.

[22] Defendant also assigns error to the trial court's refusal to instruct the jury as to the changes in the laws regarding parole. The trial court refused defendant's request to give the following jury instruction:

> You have received evidence that indicates that at some time in the past, the defendant was paroled from prison without serving the sentence he received in its entirety.
>
> I instruct you that the law of North Carolina has changed from that applied in those earlier and different cases in that parole no longer [exists] for offenses committed after October 1, 1994.
>
> I instruct you that as applied to the sentence you are considering today, the applicable law provides for only two results death by execution, or life imprisonment without parole.

Defendant failed to cite any authority in support of his contention that the trial court was required to specifically explain to the jury how the parole laws have changed since "earlier and different cases." Furthermore, defendant failed to show how the fact that he was

paroled after his breaking and entering convictions would have confused the jury about the possibility of parole for a first-degree murder conviction.

Based upon our review of the record in its entirety, we conclude that the jury was informed that defendant in the instant case would be sentenced to either death or life imprisonment without parole. For example, after closing arguments were completed, the trial court charged the jury as follows:

> Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the court whether the defendant should be sentenced to death or to *life imprisonment without parole.* Your recommendation, whichever it would be, would be binding upon the court. If you unanimously recommend that the defendant be sentenced to death, the court will impose a sentence of death.
>
> If you unanimously recommend a sentence of life without parole, the court will impose a sentence of *life imprisonment without parole.*

(Emphasis added.) Additionally, as the trial court instructed the jury regarding the Issues and Recommendation as to Punishment form, the trial court explained as to Issues Three and Four:

> If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances found are insufficient to outweigh the aggravating circumstance or circumstances found, you would answer Issue number 3 yes.
>
> If you unanimously fail to so find, you would answer Issue number 3 no. If you answer Issue number 3 no, it would be your duty to recommend that the defendant be sentenced to life imprisonment without parole.
>
> . . . .
>
> If you answer Issue number 4 no, then you must recommend that the defendant be sentenced to life imprisonment without parole.

In addition to this instruction, the Issues and Recommendation as to Punishment form stated that the jury had a choice between "life imprisonment without parole" or "death." Accordingly, as the record reflects that the jury was repeatedly and clearly instructed that

defendant would either receive a sentence of death or life imprisonment without parole, we conclude that the trial court did not err in refusing defendant's requested instruction as to changes in the parole laws.

[23] By this same assignment of error, defendant contends that the trial court failed to correctly instruct the jury that a life sentence means life without parole pursuant to N.C.G.S. § 15A-2002. Again, we disagree. The trial court's instructions followed the pattern jury instructions almost verbatim. *See* N.C.P.I.—Crim. 150.10. In addressing the jury, the trial court stated, "If you unanimously recommend a sentence of life without parole, the court will impose a sentence of life imprisonment without parole." This Court recently addressed this identical argument and concluded that even though the better practice would be to charge the jury by using the precise language contained in N.C.G.S. § 15A-2002, the trial court did not err by reading from the pattern jury instructions. *State v. Smith*, 351 N.C. 251, 270-71, 524 S.E.2d 28, 42 (2000).

[24] Defendant also argues under this assignment of error that the trial court erred in preventing defense counsel from arguing to the jury the changes in the parole laws. Additionally, defendant contends that the trial court erroneously refused to allow defendant to argue before the jury that there would be no parole in this case. Defendant's arguments are without merit.

The following colloquy occurred during a motions proceeding:

> [DEFENSE COUNSEL]: [W]e request . . . [t]hat you instruct the jury, again, that life sentence means life without parole pursuant to statute, and we intend to argue, unless the court instructs us otherwise, that there is no parole. Life without parole means without.
>
> THE COURT: No, you're not going to get into that. You just stated what it is. You're not going to get into whether or not there's any parole board or anything of that. That's not evidence before this jury at all. No evidence for that before the jury.
>
> [DEFENSE COUNSEL]: Can we not argue that the law changed in October?
>
> THE COURT: No, sir. No, sir.

A decision regarding the substance of counsel's arguments is a matter within the trial court's discretion. *State v. Bowman*, 349 N.C.

459, 473, 509 S.E.2d 428, 437 (1998), *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 802 (1999). The record reflects that the trial court did permit defendant to argue that defendant should be sentenced to life imprisonment without parole, and thus defendant's argument to the contrary is without merit. During closing arguments, defense counsel asserted that life imprisonment did mean precisely life imprisonment without parole. Defense counsel argued:

> And you don't have to kill him, you're not required to. You don't have to, because when you get to that point in your soul, in your heart, you can say I've got another way to solve this problem, and it's to send him to prison for the rest of his natural life.
>
> . . . .
>
> You can bring closure to everybody in this case, and protect society if you decide that Patrick should spend the rest of his life in prison without parole.

Furthermore, as we have previously stated in this assignment of error, the jury was clearly made aware that life imprisonment meant life imprisonment without parole. Defendant has failed to show that the trial court abused its discretion by prohibiting defendant from making arguments concerning the abolition of the parole board or changes in the parole laws. This assignment of error is overruled.

[25] Defendant's next assignment of error addresses the trial court's failure to prevent the prosecutor from arguing defendant's future dangerousness during the penalty phase closing arguments. During this proceeding, defendant objected at two points to portions of the prosecutor's argument. In addition to those two portions of argument where defendant did object, defendant now also challenges the following underlined portions of the prosecutor's argument:

> He is a cold-blooded person. He is a heartless person. He is vicious. He has no sense of pity. He values money more than human life. He has no compassion. He is very dangerous. He has absolutely no conscience. He is savage. He has absolutely no sense of mercy. He is selective about who he assaults, and he is calculating clever, and cunning. He is a career criminal.
>
> . . . .
>
> Now, I want you to keep in mind that there are doctors, there are nurses, there are administrators, there are secretaries, there

are innocent people, innocent people just like Virginia Frost. Maybe not quite as old, but innocent nevertheless who work inside prisons every day, and the defendant there will have access to those people—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. Go ahead.

[PROSECUTOR]: And I ask you to keep in mind that there is no prison in North Carolina that is escape proof.

[DEFENSE COUNSEL]: Objection.

THE COURT: Objection is sustained. Members of the jury, don't consider that argument from the district attorney.

[PROSECUTOR]: I ask you ladies and gentlemen to recognize that the only way to protect his next victim from him is to find that the death penalty is the appropriate penalty.

At the conclusion of the State's argument, defendant's counsel addressed the trial court:

Very briefly, Your Honor. The defense would move for a mistrial with regard to the State's improper argument.

We have previously moved in limine to prevent the State to introduce evidence or offer or argue with regard to future dangerousness issues. It's not part of the aggravating circumstances statute, and the State has chosen to disregard that, and argue it anyway.

They argued it, we objected. Your Honor did sustain the objection, and direct the jury not to consider it. We move for a mistrial.

THE COURT: Motion denied.

Defendant concedes that this Court has held that the prosecutor may urge the jury to recommend death as a specific deterrent to a defendant committing another murder. *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). However, defendant argues that the case *sub judice* is distinguishable from this Court's previous holdings because those cases were decided prior to the elimination of parole in capital cases. Defendant also argues that the prosecutor improperly argued more

than ordinary future dangerousness by arguing that defendant could potentially harm prison personnel. We conclude these contentions are without merit.

In addressing the propriety of arguments in capital cases regarding issues of future dangerousness, this Court has analyzed the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994). *State v. Richmond*, 347 N.C. at 444-46, 495 S.E.2d at 695. This Court recognized that the Supreme Court in *Simmons* ruled:

> "The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole."

Id. at 445, 495 S.E.2d at 695 (quoting *Simmons*, 512 U.S. at 171, 129 L. Ed. 2d at 147). This Court also noted that the United States Supreme Court limited its analysis in *Simmons* to arguments concerning future dangerousness to the public at large. In this regard, this Court has stated:

> "Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff."

Id. (quoting *Simmons*, 512 U.S. at 165 n.5, 129 L. Ed. 2d at 143 n.5). Accordingly, this Court concluded:

> The Court [in *Simmons*] thus sought to protect against prosecutorial arguments that [misled] jurors into believing that if they do not sentence a defendant to death, he will eventually be released from prison and once again be a threat to society. If a defendant would be imprisoned for life in the absence of a death sentence, then when the State makes such an argument, *Simmons* requires that the defendant be allowed to inform the jury of the nature of his life-without-parole sentence. If, on the other hand, the State refers to future dangerousness only in terms of dangerousness while incarcerated, the concerns of the Court in *Simmons* are not implicated.

Id. at 445, 495 S.E.2d at 695-96. This Court has therefore recognized that it is proper for the State to argue future dangerousness even though a defendant will never receive parole. *Id.*

More recently, the United States Supreme Court and this Court have held that it is permissible to argue the possibility of future dangerousness to prison staff and inmates. In *State v. Williams*, 350 N.C. 1, 510 S.E.2d 626, *cert. denied*, —— U.S.——, 145 L. Ed. 2d 162 (1999), a capital case where defendant would receive either a sentence of death or life imprisonment without parole, the prosecutor's sentencing argument referred to evidence concerning defendant's behavior while in jail. In upholding the State's argument this Court stated:

> When read in context, this 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.

Id. at 28, 510 S.E.2d at 644. Based on the United States Supreme Court's decision in *Simmons*, as well as our decisions in *Richmond* and *Williams*, we conclude that the prosecutor's argument relating to defendant's potential for future dangerousness was proper.

[26] Under this same assignment of error, defendant argues that the trial court's brief curative instruction to disregard the State's improper argument that defendant may escape from prison was insufficient to ensure that the jury did not consider that argument in its deliberations. Defendant therefore contends that the trial court erred in refusing to declare a mistrial.

This Court has held that the decision " 'to grant a motion for mistrial is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion.' " *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998) (quoting *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996)). A trial court should declare a mistrial only " 'when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.' " *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996) (quoting *State*

v. Calloway, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982)), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

Our review of the transcript reveals that the trial court sustained defendant's objection and then issued a curative instruction. "This Court presumes that jurors follow the trial court's instructions." *Norwood*, 344 N.C. at 537, 476 S.E.2d at 361. In the case *sub judice*, defendant has failed to show that the trial court's curative instruction was insufficient to erase any potential prejudice resulting from the comment, and thus the trial court did not abuse its discretion by denying defendant's motion for a mistrial. Furthermore, to the extent that defendant's motion for a mistrial also relates to the prosecutor's comments, to which defendant failed to object during the State's penalty phase argument, we note that we have already determined that the challenged comments relating to future dangerousness were proper. Accordingly, we conclude that the trial court did not abuse its discretion, and we overrule this assignment of error.

[27] In his final assignment of error, defendant contends that the trial court erred by allowing the prosecutor to argue the significance of the grand jury indictment during the guilt/innocence phase closing argument. Additionally, defendant argues that the trial court erred by refusing to give defendant's requested jury instruction, which would have cured this error. Defendant challenges the following portion of the State's closing argument:

> Ladies and gentlemen, what you need to know is, that any date, on any indictment or any charge, is on or about. Meaning that, this crime occurred on or about this date. Even if there's one day placed down there, it's on or about that day. Meaning that an indictment says that it happened on or about that time; doesn't pin down an exact time. And if during the course of an investigation develop more information, you can go back to the grand jury and change the alleged date of offense.
>
> But the police didn't just white out the original date, and pencil in a new date, neither did the district attorney's office. It took a grand jury, of eighteen citizens from the community, to listen to that evidence, and to agree. Yes, we're going to hand down a superseding indictment.
>
> Yes, the evidence is there that this, on or about date, needs to be changed. And we, the grand jury, the people of this commu-

nity, say, yes, it needs to be changed. And the same thing for the other charge, that came out earlier this year.

The police just didn't dream up this charge. They didn't just write it and hand it to the defendant, nor did the district attorney's office. A grand jury was convened. They heard evidence, they decided; eighteen people just like yourselves. Yes, there's evidence to hand down an indictment on this charge. And they did so; they did so.

This isn't just the police just randomly charging. This is people from the community, listening to evidence, and deciding, yes, this charge is warranted. This isn't a haphazard investigation; it's a very careful investigation.

Defendant did not object at the time this argument was made. At the conclusion of the State's argument, the trial court advised the jury that the court would give its instructions to the jury the following morning. The next morning, defendant's counsel presented the following additional request for jury instructions:

[DEFENSE COUNSEL]: A grand jury indictment is no evidence of guilt. The defendant has no opportunity to confront or cross-examine the witnesses who appear before the grand jury. The grand jury only determining [sic] if there is probable cause to believe the crime has been committed, and if the defendant should be charged.

The standard of proof, to convince a grand jury to issue indictment, is not that required for conviction. The fact, that the defendant has been charged by a grand jury, is no evidence of, guilt whatsoever, and you may not consider that in your deliberations.

The following colloquy then ensued:

THE COURT: What gives rise to that issue?

[DEFENSE COUNSEL]: Your Honor, what gives rise is the argument of [the prosecutor], that a jury—

THE COURT: You folks brought up the business of the indictment in your arguments.

[DEFENSE COUNSEL]: Right. But he said that a jury has already heard this case, and made a decision to charge and—

THE COURT: Well, I'll tell them the fact he's charged with anything is no evidence of guilt, that—including all that. That's blanket instruction.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: The objection, and the request of the defense is noted, but denied. You can put it in the record.

Defendant did not bring his objection to the trial court's attention until the day after closing arguments concluded. Because defendant failed to object at the time the argument was made, this Court's review is limited to determining "whether the argument was so improper as to require the trial court's intervention *ex mero motu*." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). A trial court is required to intervene *ex mero motu* only when "the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *Id.* We cannot conclude that the prosecutor's argument was improper because it was made in response to defendant's closing argument. Defendant's counsel stated during the guilt/innocence phase argument:

> The significant thing about Ruth Steen's [defendant's mother] testimony, and you can use whatever tests you want to use in judging her credibility, is that at the time she was being questioned, that's the time that the police took the warrant out on Patrick. And the warrant's in evidence, and you can look at it. But the warrant alleges that Patrick committed this crime on Thursday the 29th of February, 1996.
>
> The police were questioning her about her son's conduct on Thursday the 29th. And do you know what she told the police she remembered? She said, I can't tell you where he was Wednesday and Thursday after he left. There was some indication he'd been home the lights were out. But I can't tell you; I don't know.
>
> Now if she's the kind of person who's trying to save her son or would lie for her son, then she would have been giving him an alibi to the police, on tape, for the 29th of February; and she didn't. She gave him up, if that was the date of the crime.
>
> She told them the bad and the good. But as the investigation developed, the police learned about the crashing noise, they learned about the time of Mrs. Frost's death, and by March 12th,

when they got there on the 25th, when they got the indictments, they'd moved the date from Thursday to Tuesday. Make the facts fit so that we can deal with Mr. Steen. They'd already arrested him, they'd already charged him. Make the facts fit. We got one fiber in a TV, that's good enough. It's a red TV, that's good enough. That's not careful enough, it's not thoughtful enough, and it's wrong.

And then in January of 1998 they change it again to fit, make it fit, make Patrick Steen show where he was every single minute of every single day during that four day period.

Charge him with doing it sometime between the 26th and the 29th. And he can't do it; you couldn't do it.

. . . .

. . . You have to see whether or not all this physical evidence that the State talks about, all this fancy physical evidence, circumstantial evidence, is consistent with the crime being committed when it happened; that's the problem.

So what'd they do? They started with the 29th of February. They changed it to the 27th, then they changed it again between the 26th and the 29th, you know. All right.

The focus of the State's response to this argument was that neither the police nor the district attorney determined what date should appear on the original indictments or on the superceding indictments. Rather, the State explained that the grand jury handed down the indictments based on the evidence presented to it. We conclude that defendant's guilt/innocence phase closing argument regarding the dates on the various indictments opened the door to the State's closing argument regarding the grand jury's role in determining the alleged date of the offenses. *See State v. Gladden*, 315 N.C. 398, 423, 340 S.E.2d 673, 689, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Accordingly, we hold the prosecutor's comments were proper to refute defendant's attack on the procedure used in charging defendant, and the trial court was not required to intervene *ex mero motu*.

As to defendant's argument that the trial court erred in refusing to give defendant's requested jury instruction, we note that the trial court did instruct the jury that "[t]he fact that he's been charged or indicted is no evidence of guilt, whatsoever." This instruction, given

in the context of these closing arguments, was sufficient to eliminate any confusion or false impression the jury may have had in this regard. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises eight additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the statutory short-form indictment insufficiently charged the elements of first-degree murder and failed to specify the aggravating circumstances upon which the State would rely;[1] (2) the trial court erred in its instruction that "the jurors had a duty to impose a death sentence upon answering Issues One, Two and Three in the affirmative"; (3) the trial court erred in submitting to the jury the (f)(1) statutory mitigating circumstance, no significant history of prior criminal activity, over defendant's objection; (4) the trial court erred in denying defendant's motion to prohibit the death penalty for failure of the State to initiate a Rule 24 hearing in a timely manner; (5) the trial court erred in denying defendant's motion to bar the death penalty on the grounds that prosecutorial discretion is arbitrary and capricious; (6) the trial court erred in denying defendant's motion to prohibit death-qualification of the jury; (7) the trial court erred in submitting to the jury the pecuniary gain aggravating circumstance, N.C.G.S. § 15A-2000(e)(6); and (8) the trial court erred in submitting to the jury the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9).

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

[28] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now review the record and determine: (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

1. In *State v. Braxton*, 352 N.C. 158, —, — S.E.2d —, — (2000), this Court reaffirmed its prior decisions that indictments for first-degree murder based on the short-form indictment statute, N.C.G.S. § 15-144, are in compliance with both the North Carolina and United States Constitutions.

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 sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

[29] In the present case, defendant was found guilty of first-degree murder under the theories of premeditation and deliberation and felony murder. He was also convicted of felonious breaking and entering and common law robbery. Following a capital sentencing proceeding, the jury found the two submitted aggravating circumstances: (i) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (ii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted four statutory mitigating circumstances to the jury, including the "catchall" statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). However, the jury found only one statutory mitigating circumstance, that the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). Of the nineteen nonstatutory mitigating circumstances submitted, the jury found seven to exist and to have mitigating value.

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. at 294, 439 S.E.2d at 573. Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In 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, 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). Also, the murder in this case was committed in the victim's home. A murder occurring inside the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), *quoted in State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). 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. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170.

Neither *Stokes* nor *Bondurant* is similar to this case. As we have noted, defendant here was convicted of murder on the basis of premeditation and deliberation as well as under the felony murder rule. The defendant in *Stokes*, however, was convicted solely on the basis of the felony murder rule. 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 in the case *sub judice* "did not exhibit the kind of conduct we recognized as ameliorating in *Bondurant*." *State v. Flippen*, 349 N.C. 264, 278, 506 S.E.2d 702, 711 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *State v. McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although 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. at 287, 446 S.E.2d at 325. 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. at 198, 443 S.E.2d at 47.

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ROGER McKINLEY BLAKENEY

No. 203A98

(Filed 13 July 2000)

1. Jury— selection—capital trial—representation of African-American citizens

The trial court did not err in a capital first-degree murder prosecution by denying defendant's written and oral motions to dismiss the jury venire based on an alleged underrepresentation of African-American citizens where defendant's contention was that affirmative efforts should have been made to ensure that the jury venire was racially proportionate rather than that the selection process involved systematic exclusion, with the argument based upon the venire that actually reported for service rather than the venire summoned. Defendant's showing of a 7.85 percent difference between African-Americans in the county's population and the venire that actually reported does not render the venire

constitutionally infirm; moreover, defendant does not argue, and there is no evidence, that the statutory scheme in N.C.G.S. § 9-2 was not followed or that the selection process otherwise failed to be racially neutral.

2. Jury— selection—capital trial—questionnaire—contact with other races

The defendant in a first-degree murder prosecution did not show that the trial court abused its discretion or that he was otherwise prejudiced by a ruling deleting from a jury questionnaire a question concerning prospective jurors' contacts with people of other races. Defendant did not demonstrate that the ruling was arbitrary or that he was prohibited from asking prospective jurors the question.

3. Jury— selection—capital trial—death penalty views

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by excusing two jurors based on their opposition to the death penalty where their responses to questions revealed that their views of the death penalty would prevent or substantially impair the performance of their duties at trial and that they could not temporarily set aside their own beliefs and agree to follow the law or the court's instructions.

4. Jury— selection—capital trial—rehabilitation

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by refusing to allow defense counsel to rehabilitate jurors where defendant failed to show that any questioning on his part would have produced different answers.

5. Jury— selection—capital trial—newspaper articles—motion for continuance

A first-degree murder defendant's right to an impartial jury was not violated by the trial court's denial of his pretrial motion for a continuance where defendant contended that the jury pool was tainted by two newspaper articles which incorrectly identified him as a convicted felon on parole at the time of the crime. The only juror who admitted reading an article at issue served as an alternate and did not participate in jury deliberations. No juror who participated was exposed to the challenged article and all three jurors who admitted reading newspaper articles about the case indicated that they could set aside what they had read.

6. Constitutional Law— presence at capital trial—post-trial evidentiary findings

A first-degree murder defendant's right to be present at his trial was not violated where the transcript did not indicate whether defendant was present at a post-trial proceeding at which the trial court made findings of fact and conclusions of law supporting oral evidentiary rulings made during trial. Assuming that defendant was not present, there was no prejudicial error because any objections to the findings and conclusions will be considered on appeal as fully as if defendant had specifically objected at the time they were entered; the judge's findings appear to be his own considered determinations based upon evidence presented during the suppression hearing at trial, although he confirmed his findings with the prosecutor and an SBI agent; and the findings are supported by competent evidence.

7. Constitutional Law— presence at capital trial—bench conferences

A first-degree murder defendant's right to be present at his capital trial was not violated by bench conferences where defendant was represented by counsel at each conference, defendant was present in the courtroom, and defendant failed to demonstrate that the challenged bench conferences implicated defendant's confrontation rights or that his presence would have had a reasonably substantial relation to his opportunity to defend.

8. Criminal Law— recordation—bench conferences

The right of a first-degree murder defendant to recordation under N.C.G.S. § 15A-1241 was not violated by unrecorded bench conferences where defendant never requested that the subject matter of a bench conference be reconstructed for the record. Appellate review is facilitated by the trial court's rulings, not the arguments of counsel during a bench conference, and the substance of the challenged rulings in this case is apparent based on the resulting admission of evidence.

9. Criminal Law— recordation—dismissal of juror—appellate review

The lack of recordation of a bench conference preceding dismissal of a prospective juror during jury selection for a first-degree murder prosecution did not inhibit defendant's ability to argue or the Supreme Court's ability to review whether the trial

counsel's failure to make a Batson objection constituted ineffective assistance of counsel. The transcript of proceedings contained sufficient information to determine whether a *Batson* challenge should have been made and defendant did not demonstrate (nor does the record reveal) that a prima facie case of racial discrimination in jury selection could be made in this case.

10. Evidence— photographs—videotape—crime scene

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting photographs and a videotape of the victim and the crime scene where the challenged photographs and videotape were not used excessively and solely to inflame the passions of the jury; the photographs and the portions of the videotape which the court found to be repetitive and nonprobative were excluded; each photograph illustrated a unique aspect of the manner in which the victim was killed; the videotape uniquely depicted the condition and location of the victim's body in the context of the crime scene; and the photographs and videotape illustrated the testimony of the SBI agent who conducted the crime scene search and the testimony of the pathologist who performed the autopsy.

11. Witnesses— expert—SBI agent—burning of home

The trial court did not err in a first-degree murder prosecution by admitting the testimony of an SBI arson investigator that the burning of the victim's home was of incendiary origin. The agent had sufficient knowledge to form an opinion, his testimony concerned matters which are not within the knowledge of the average person, and his testimony was helpful to the jury.

12. Homicide— first-degree murder—district attorney's discretion to prosecute—lack of discretion to try capitally—no constitutional conflict

There is no constitutional conflict between a district attorneys's discretion to try a homicide defendant for first-degree murder, second-degree murder, or manslaughter, and the lack of discretion to try a first-degree murder defendant capitally or noncapitally. N.C.G.S. § 15A-2000.

13. Homicide— choice of first-degree murder or lesser crime—district attorney's discretion

A district attorney's discretion to determine whether to try a homicide defendant for first-degree murder or for a lesser crime

does not render N.C.G.S. § 15A-2000 unconstitutional. There is no evidence that the district attorney's decision to prosecute defendant for first-degree murder was based on any improper factor such as race, religion, or other arbitrary classification.

14. Homicide— first-degree murder—instructions—circumstantial evidence

There was no plain error in a first-degree murder prosecution where the court instructed the jury that it could rely on circumstances surrounding the murder to infer premeditation and deliberation. The instruction given was based upon the pattern jury instruction and prior cases have found no error in nearly identical instructions.

15. Evidence— flight—evidence sufficient

There was sufficient evidence in a first-degree murder prosecution to warrant an instruction on flight where defendant telephoned his wife from his mother's residence before the victim arrived and told her he would be home in a few minutes; defendant instead left the area in his vehicle; a longstanding friend waved at him, but he did not respond; he drove to a "shack in the country" to trade the victim's gun for cocaine and cash; he continued to drive through the country, trading more stolen items for drugs; and he went to another friend's house, where he was apprehended.

16. Sentencing— capital—evidence—scene of prior crime

The trial court did not abuse its discretion in a first-degree murder sentencing proceeding by admitting testimony from the victim of a prior armed robbery and photographs of the crime scene showing blood. The Rules of Evidence do not apply in capital sentencing proceedings; moreover, the probative value of the evidence was not outweighed by the prejudice because the photographs illustrated the testimony and both the testimony and the photographs were relevant to an aggravating circumstance.

17. Sentencing— capital—nonstatutory mitigating circumstance—not submitted

There was no prejudicial error in a capital sentencing proceeding where the court erroneously refused to submit a proposed nonstatutory mitigating circumstance that was supported by defendant's statements to authorities and which a reasonable juror could find to have mitigating value, but defendant's state-

ment was read to the jury, the evidence underlying the circumstance was fully argued to the jury by defense counsel, the catchall mitigating circumstance was argued to the jury, and the error did not preclude any juror from considering and giving weight to any evidence underlying the proposed circumstance.

18. Sentencing— capital—mitigating circumstances—no significant history of criminal activity

The trial court did not err in a capital sentencing proceeding by submitting the statutory mitigating circumstance that defendant had no significant history of criminal activity, N.C.G.S. § 15A-2000(f)(1), where defendant had a conviction for robbery with a dangerous weapon and a history of drug abuse.

19. Sentencing— capital—mitigating and aggravating circumstances—no significant history of criminal activity—prior conviction involving violence—both submitted

The trial court did not err during a capital sentencing proceeding by submitting the no significant history of criminal activity mitigating circumstance, N.C.G.S. § 15A-2000(f)(1), after having submitted the aggravating circumstance that defendant had a prior felony conviction involving violence, N.C.G.S. § 15A-2000(e)(3).

20. Sentencing— capital—instructions—result of unanimous recommendation

The trial court did not err in a capital sentencing proceeding by granting the State's motion to prohibit defendant from arguing to the jury that the failure to agree on punishment would result in life imprisonment and then instructing the jury that the defendant would be sentenced to death if they unanimously recommended death and sentenced to life if they unanimously recommended life. The instruction was in accord with N.C.G.S. § 15A-2002 and it has been held that it is improper for a trial court to inform the jury of the effect of its failure to reach a unanimous verdict.

21. Criminal Law— prosecutor's argument—not improper

The argument of the prosecutor in a capital sentencing proceeding was not so grossly improper as to require the court to intervene ex mero motu where defendant contended that the prosecutor made false and improper statements regarding a clinical psychologist who testified for defendant, but the prosecutor did not travel outside the record.

22. Criminal Law— prosecutor's argument—preparation of defense psychologist's report

There was no error so grossly improper that the court was required to intervene ex mero motu in the prosecutor's argument in a capital sentencing proceeding where the prosecutor argued that a psychiatrist's report was prepared at the last moment to surprise the prosecution, that defense counsel had prepared the report, and that the diagnosis was taken from a manual. The argument concerning the psychiatrist's motive was a permissible inference from the evidence, there was testimony that the psychiatrist had dictated tapes and sent them to defense counsel to be typed, and the psychiatrist testified that he relied in part on the DSM.

23. Sentencing— capital—death penalty not disproportionate

A sentence of death for a first-degree murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the record supports the aggravating circumstances found by the jury; and the sentence was not disproportionate. Defendant was convicted based upon premeditation and deliberation and the jury found the prior violent felony aggravating circumstance, this case is more similar to those where the death penalty was found proportionate than to those where it was found disproportionate, and, based upon the characteristics of the defendant and the crime, the Supreme Court was convinced that the sentence was not disproportionate.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms (William H.), J., on 10 September 1997 in Superior Court, Union County, upon a jury verdict finding defendant guilty of first-degree murder. The Supreme Court, on 26 May 1998, allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 13 October 1998.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, for the state.

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

MARTIN, Justice.

On 13 May 1996 defendant Roger McKinley Blakeney (defendant) was indicted for the first-degree murder of Callie Washington Huntley (the victim). Defendant was also indicted for arson, common law robbery, felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. Defendant was tried capitally at the 25 August 1997 Criminal Session of Superior Court, Union County. At the close of the evidence, the state voluntarily dismissed the larceny charge. In addition, the charge of felonious possession of stolen goods was not submitted to the jury. The jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. The jury also found defendant guilty of first-degree arson, common law robbery, and felonious breaking and entering. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. The trial court also entered judgments sentencing defendant to consecutive terms of imprisonment for the remaining convictions.

The state presented evidence at trial which is summarized as follows: On 15 April 1996, between the hours of 10:00 a.m. and 12:00 noon, defendant, age thirty-three, opened and crawled through a back window in his mother's home for the purpose of stealing something of value that he could sell. Defendant stole three of his mother's rings, a brown leather pouch, approximately $4.00 in change, a small herringbone chain, and his mother's savings account deposit book. Defendant then telephoned his wife and told her he would be home in a few minutes.

After defendant finished speaking with his wife, the victim, age seventy-six, drove behind the house. The victim had lived with defendant's mother for over twenty years. Defendant hid in a small room behind the refrigerator as the victim entered the residence. According to defendant's confession, which was admitted into evidence at trial, defendant entered the kitchen, and the two began arguing. Defendant told authorities that he turned to leave, but the victim grabbed him. Defendant charged at the victim, grabbed and wrestled a .22-caliber revolver out of the victim's hand, and hit the victim in the back of the head with the butt of the gun. The victim fell facedown on the kitchen floor and started bleeding. According to defendant, after some additional period of physical struggle, a metal can of kerosene was accidentally spilled. Defendant also claimed

that a cigarette he was smoking fell out of his mouth at some time during the struggle. According to defendant, at some point, he pulled the victim off the floor, sat him in a chair, and wrapped an electrical cord around his hands and legs. Defendant then removed $78.00 from the victim's wallet, exited the residence, and departed the area in defendant's vehicle.

Terry Lee Bivens (Bivens), defendant's longstanding friend, worked at a nearby business and observed defendant departing his mother's residence on the day in question. Bivens recognized defendant's vehicle. Seconds later, Bivens noticed smoke coming from the residence. Bivens and several other witnesses looked on as the house began to burn.

Firefighters arrived at the scene and discovered the victim's wire-bound body as they fought the fire. Agent Van Worth Shaw, Jr. (Agent Shaw), an arson investigator for the State Bureau of Investigation (SBI), determined that the fire had two distinct points of origin and was caused by the use of a flammable liquid. In contrast to defendant's statement, all accidental causes were eliminated during the investigation, and Agent Shaw opined that the fire was intentionally set. The investigation revealed traces of kerosene on samples taken from the couch in the den and on the victim's clothing.

Dr. Robert Thompson, a forensic pathologist with the Office of the Chief Medical Examiner, performed an autopsy on the victim's body. The autopsy revealed that seventy-five percent of the victim's skin was charred. Dr. Thompson also observed that the victim had received a wound to the back and a wound to the left temporal area of the head, which resulted in injury to the brain. Dr. Thompson opined that the victim was conscious for approximately three to five minutes after the fire started, that the victim died within approximately ten minutes, and that the cause of death was carbon monoxide poisoning produced by the fire.

On 16 April 1996 law enforcement officers located defendant at a friend's residence, sitting in the passenger seat of his vehicle. Defendant consented to a search of his vehicle, where the officers found his mother's stolen jewelry, leather pouch, and savings deposit book in the glove compartment. The authorities later recovered the .22-caliber revolver that defendant had taken from the victim. Defendant had exchanged the gun for a loan. The investigation also revealed that bloodstains found on defendant's clothing were consistent with the victim's blood.

Defendant did not present evidence during the guilt-innocence phase of trial.

Additional facts will be provided as necessary to discuss specific issues pertaining to defendant's assignments of error.

JURY SELECTION

[1] By assignment of error, defendant contends the trial court erred in denying his written and oral motions to dismiss the jury venire based on an alleged underrepresentation of African-American citizens. Defendant does not argue that the jury selection process in this case involved systematic exclusion of African-Americans from the jury pool. Rather, defendant contends that affirmative efforts should have been made to ensure that the jury venire called for his trial was racially proportionate.

Defendant attached a copy of the 1994 census for Union County in support of his written motion to dismiss the venire. The census revealed that African-Americans comprised 16.15% of the county's population. Defendant does not state, and the record does not otherwise indicate, the percentage of African-Americans that were represented in the venire summoned for jury service. Rather, defendant bases his argument on the venire that actually reported for jury service.

The venire that actually reported for jury service consisted of 8.3% African-Americans. Defendant argues that the difference between the percentage of African-Americans in the general population compared to the venire, without more, violated his constitutional right to have a jury drawn from a venire representative of the community.

A criminal defendant has a constitutional right to be tried by a jury of his or her peers. U.S. Const. amend. VI; N.C. Const. art. I, §§ 24, 26. "This constitutional guarantee assures that members of a defendant's 'own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence.' " *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998) (quoting *State v. McNeill*, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990)), *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 802 (1999). The Sixth Amendment does not, however, "guarantee[] the defendant the right to a jury composed of members of a certain race or gender." *State v. Norwood*, 344 N.C. 511, 527, 476 S.E.2d 349, 355 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

To establish a *prima facie* case of disproportionate representation in a venire, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979); *see Bowman*, 349 N.C. at 467-68, 509 S.E.2d at 434; *State v. McNeill*, 326 N.C. 712, 717, 392 S.E.2d 78, 81 (1990); *State v. McCoy*, 320 N.C. 581, 583, 359 S.E.2d 764, 765 (1987).

The state does not dispute that the first prong of the *Duren* test has been satisfied. Rather, the dispositive issue is whether defendant has established the second and third prongs.

The second prong of the *Duren* test requires us to determine whether the representation of African-Americans in the venire was fair and reasonable. 439 U.S. at 364, 58 L. Ed. 2d at 587. This Court has previously addressed cases in which similar census data was presented as a basis for alleged underrepresentation of African-Americans in the venire. *See Bowman*, 349 N.C. at 468, 509 S.E.2d at 434; *State v. Price*, 301 N.C. 437, 447, 272 S.E.2d 103, 110 (1980). The disputed evidence in *Bowman* revealed that African-Americans made up 23% of the summoned jury pool, while the county's population was 39.17% African-American, a difference of 16.17%. *See Bowman*, 349 N.C. at 467-68, 509 S.E.2d at 433-34. Upon reviewing that data, this Court stated, "[W]e cannot conclude that this figure, standing alone, is unfair or unreasonable." *Id.* at 468, 509 S.E.2d at 434.

Similarly, in *Price*, the evidence showed that African-Americans made up 17.1% of the jury pool, while the county's population was 31.1% African-American, a difference of 14%. *Price*, 301 N.C. at 447, 272 S.E.2d at 110. Based on that data, this Court stated, "[W]e are unable to conclude as a matter of law that the applicable percentages are sufficient to establish that the representation of [African-Americans] is not fair and reasonable in light of their presence in the community." *Id.*

In the instant case, the record discloses that the statistical variation alleged by defendant is comparable to that presented in *Bowman* and *Price*. Therefore, under our precedent, defendant's

showing of a 7.85% difference, standing alone, does not render the jury venire constitutionally infirm.

The third prong of the *Duren* test requires us to determine whether the alleged underrepresentation of African-Americans is because of systematic exclusion in the jury selection process. *See* 439 U.S. at 364, 58 L. Ed. 2d at 587. As noted above, defendant does not argue before this Court that the jury selection process in this case involved the systematic exclusion of African-Americans from the jury pool. Rather, defendant contends that affirmative efforts should have been made to ensure that the jury venire was racially proportionate.

We note that N.C.G.S. § 9-2, which governs the selection of the jury pool, "has been expressly recognized as providing 'a system for objective selection of veniremen.' " *McNeill*, 326 N.C. at 718, 392 S.E.2d at 82 (quoting *State v. Avery*, 299 N.C. 126, 133, 261 S.E.2d 803, 807 (1980)). In this case, there is no evidence, and defendant does not argue, that the statutory scheme set out in N.C.G.S. § 9-2 was not followed or that the selection process otherwise failed to be racially neutral. Moreover, "defendant . . . is not entitled to a jury of any particular composition, nor is there any requirement that the jury actually chosen must mirror the community and reflect various and distinctive population groups." *State v. Avery*, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980). Therefore, this assignment of error is overruled.

[2] In his next assignment of error, defendant contends the trial court erred in deleting a question from the jury questionnaire concerning the prospective jurors' contacts with people of other races.

It is well settled that "[r]egulation of the manner and extent of the inquiry of prospective jurors concerning their fitness rests largely in the discretion of the trial court, and such regulation will not be found to constitute reversible error absent a showing of an abuse of discretion." *State v. Fisher*, 336 N.C. 684, 693-94, 445 S.E.2d 866, 871 (1994), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995); *accord State v. Lyons*, 340 N.C. 646, 667, 459 S.E.2d 770, 782 (1995); *State v. McLamb*, 313 N.C. 572, 575, 330 S.E.2d 476, 478 (1985). The 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. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988).

In the instant case, defendant has not demonstrated that the trial court's ruling was arbitrary. Moreover, defendant has not shown that

he was in any way prohibited from asking prospective jurors the same question that was deleted from the questionnaire. *See Fisher*, 336 N.C. at 694, 445 S.E.2d at 871; *Lyons*, 340 N.C. at 667-68, 459 S.E.2d at 782. Defendant has therefore failed to show that the trial court abused its discretion or that he was otherwise prejudiced by the trial court's ruling. Accordingly, this assignment of error fails.

[3] By defendant's next assignment of error, he contends the trial court erred by excusing two jurors for cause based on their opposition to the death penalty.

The standard for determining whether a prospective juror may be excused for cause because of that juror's 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)). Prospective jurors in a capital case are properly excused if they are unable to " 'state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)).

We have recognized 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." *State v. Morganherring*, 350 N.C. 701, 726, 517 S.E.2d 622, 637 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 322 (2000). The trial court's decision to excuse a juror is discretionary and will not be disturbed absent an abuse of discretion. *See State v. Smith*, 351 N.C. 251, 261, 524 S.E.2d 28, 36 (2000); *Morganherring*, 350 N.C. at 726, 517 S.E.2d at 637; *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

In the case at hand, prospective jurors George Crawford (G. Crawford) and Jane Austin (Austin) both responded affirmatively when the prosecutor asked whether they had any moral, religious, or personal beliefs against the death penalty. G. Crawford told the prosecutor that it was not his responsibility to sentence someone to death and that he did not want to make that decision. He further stated that

he could not decide guilt or innocence. Finally, G. Crawford indicated that he did not want to participate at all in a process that may call for imposition of the death penalty. These responses reveal that G. Crawford's views of the death penalty would prevent or substantially impair the performance of his duties at trial. Further, G. Crawford's responses clearly demonstrated that he could not temporarily set aside his own beliefs about the death penalty and agree to follow the law. Therefore, the trial court did not abuse its discretion by excusing him for cause.

During *voir dire* of Austin, she initially indicated that her views of the death penalty would "probably" prevent her from being able to decide guilt or innocence knowing that it may result in imposition of the death penalty. When asked whether she would be inclined to vote against the death penalty in all cases regardless of the facts and circumstances, Austin responded, "Probably I would have some reservations there. Circumstances involving children or extended torture of a victim before death. In certain circumstances maybe I would vote for the death penalty. Not as a rule all of the way across the board." The prosecutor then asked, "Should the evidence in this case not meet what's in your mind . . . would you be unable to follow the law the Court gives you as to what the appropriate punishment would be?" Austin replied, "Probably." When the prosecutor restated the question and asked once again whether Austin would be unable to follow the law, Austin replied, "I think so." Based on that response, the trial court questioned Austin as follows:

> THE COURT: Are you saying, ma'am, that you're going to substitute your own personal beliefs as to what's appropriate rather than what the law of the state [sic]? Is that correct?
>
> JANE AUSTIN: Well, if I sit here in the jury and if I stay and you told me to do this and that and the other, or I have to vote either or, which you have outlined, I don't think I could vote for. I'd have to vote for the whatever you said, life imprisonment.
>
> THE COURT: So you believe that you're going to follow your own personal convictions?
>
> JANE AUSTIN: Yes, sir. I have to.
>
> THE COURT: Okay. I understand that. It's not a criticism of you, but—
>
> JANE AUSTIN: I know.

THE COURT: The question becomes if it's a choice between following the law as I give it to you and your own personal convictions, you're going to follow your own personal convictions?

JANE AUSTIN: Oh, yes, sir.

Following this exchange, Austin was excused for cause.

Austin's responses reveal that her views of the death penalty would interfere with her ability to decide guilt or innocence in a capital case. Further, Austin was unable to set aside her personal beliefs and follow the trial court's instructions. Indeed, Austin expressly stated that she would follow her own personal beliefs concerning the death penalty rather than the trial court's instructions. Therefore, the trial court did not abuse its discretion in excusing Austin for cause.

[4] Further, we reject defendant's argument that the trial court abused its discretion by refusing to allow defense counsel the opportunity to rehabilitate G. Crawford, Austin, and twelve other unnamed jurors. The trial court does not abuse its discretion by refusing to allow a defendant an attempt to rehabilitate a juror unless the defendant can show that further questions would have produced different answers by the juror. *See State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998); *Brogden*, 334 N.C. at 44, 430 S.E.2d at 908. Both G. Crawford and Austin expressed their inability, based on their views of the death penalty, to properly perform the duties of a juror in a capital case. Moreover, defendant has failed to show that any questioning on his part would have produced different answers from any juror. Accordingly, this assignment of error is rejected.

[5] In his next assignment of error, defendant contends his constitutional right to an impartial jury was violated by the trial court's denial of his pretrial motion for a continuance. Defendant's motion was based upon two newspaper articles published prior to trial, which defendant claims incorrectly identified him as a convicted felon on parole at the time of the murder. Defendant claims that the newspaper articles tainted the jury pool and, therefore, that his constitutional rights were violated by the trial court's denial of the motion.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion. *See State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997); *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341 (1982). When a motion to continue raises a con-

stitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. *See State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982); *see also State v. Jones*, 342 N.C. 523, 530-31, 467 S.E.2d 12, 17 (1996). Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that "the denial was erroneous and also that [defendant] was prejudiced as a result of the error." *Branch*, 306 N.C. at 104, 291 S.E.2d at 656.

In the present case, only three jurors who served on defendant's jury stated that they had read a newspaper article about the case. The record reveals that jurors Vicki Turman and Sammy Bryant had not read either of the articles that were the subject of defendant's motion for a continuance. Juror Julie Brown (Brown) admitted that she had read an article about defendant in the newspaper at issue in this case. The record indicates, however, that Brown served as an alternate juror and did not participate in jury deliberations. Thus, no juror that participated in jury deliberations in this case was exposed to the challenged article. Moreover, all three jurors indicated during *voir dire* that they could set aside what they had read and decide the case based solely on the evidence and law presented at trial. Therefore, defendant has failed to demonstrate that he was prejudiced by the trial court's denial of his motion for a continuance or that the trial court abused its discretion. This assignment of error is without merit.

GUILT-INNOCENCE PHASE

[6] In his next assignment of error, defendant complains of a proceeding in which the trial court made findings of fact and conclusions of law in support of its ruling at trial on several of defendant's pretrial motions to suppress evidence. Defendant alleges that the transcript does not reveal whether he or his counsel were present at this proceeding. Therefore, defendant argues, the proceeding violated his right to presence under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

After an evidentiary hearing during trial, the trial court orally denied defendant's motions to suppress his written confession to the police, his blood sample, and evidence obtained from the search of defendant's automobile. The trial judge indicated he would dictate an order for the record at a later time.

The trial judge began the challenged proceeding by announcing his intention to make findings of fact. He started his findings by explaining that defendant was personally present in open court with his attorneys when an evidentiary hearing was held in the absence of the jury. The trial judge interrupted his findings to state to those present, "y'all follow this as I go along so if there [sic] any corrections or anything, speak up so I can address it as I come to it." The trial court then proceeded to make findings of fact based on the evidence presented at trial.

As the trial court announced findings relevant to the admissibility of defendant's confession, the following exchange occurred:

> THE COURT: . . . That Detective Underwood told [defendant] that he was not under arrest, that he just wanted to talk to him. Is that right now? Detective Underwood told him that?
>
> [PROSECUTOR]: Yes.

At another time, the trial court announced its findings concerning a blood sample taken from defendant, and the following exchange occurred:

> THE COURT: . . . That thereafter a consent form was written for purposes of taking a blood sample from the defendant, and that the defendant signed it.
>
> The next morning he signed it, is that correct?
>
> [AGENT] UNDERWOOD: Yes, sir.

The trial judge then completed his findings and recited his conclusions of law for the record.

In a capital case, the defendant has a nonwaivable right to be present at every stage of the proceeding. *See* N.C. Const. art. I, § 23; *State v. Atkins*, 349 N.C. 62, 101, 505 S.E.2d 97, 121 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). "This constitutional mandate serves to safeguard both defendant's and society's interests in reliability in the imposition of capital punishment." *Id.*; *see State v. Huff*, 325 N.C. 1, 30, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990).

In the instant case, defendant apparently relies on the lack of any indication in the record that he was present to establish that he was in fact absent. This Court has held, however, that " 'whatever incompleteness may exist in the record precludes defendant from showing

that error occurred.' " *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995) (quoting *State v. Adams*, 335 N.C. 401, 410, 439 S.E.2d 760, 764 (1994)), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). As in *Daughtry*, the transcript in this case "does not indicate, and defendant has not shown, that he was absent. We will not assume error 'when none appears on the record.' " *Id.* (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)). Nonetheless, we note that the better practice is for the trial court to expressly indicate on the record whether the parties and their counsel are present during trial proceedings.

Assuming *arguendo* that defendant was not present at the challenged post-trial proceeding, the trial court nonetheless committed no prejudicial error. This Court has held that a trial court does not commit prejudicial error by dictating findings of fact and conclusions of law into the record after entry of judgment and without the presence of a capital defendant or his counsel. *See State v. Richardson*, 295 N.C. 309, 320, 245 S.E.2d 754, 761-62 (1978); *see also State v. Rich*, 346 N.C. 50, 55-56, 484 S.E.2d 394, 398, *cert. denied*, 522 U.S. 1002, 139 L. Ed. 2d 412 (1997); *State v. Horner*, 310 N.C. 274, 278-79, 311 S.E.2d 281, 285 (1984). As we stated in *Richardson*, "[a]ny objections defendant wished to make to the findings of fact and conclusions of law which the trial court belatedly entered . . . will be considered by appellate courts of this State just as fully as if defendant had specifically objected to the findings or conclusions at the time they were entered." 295 N.C. at 320, 245 S.E.2d at 761-62.

We further conclude the trial court did not commit prejudicial error by confirming its findings of fact with the prosecutor and Agent Underwood during the challenged proceeding. Although it is the better practice for the trial court to make its findings of fact independently, the trial court's findings are nonetheless binding on appeal if supported by competent evidence. *See State v. Hipps*, 348 N.C. 377, 395, 501 S.E.2d 625, 636 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

In the present case, the challenged proceeding was conducted *after* the trial court had already conducted an evidentiary hearing outside the presence of the jury and ruled on defendant's suppression motions in open court. Prior to announcing his findings, the trial judge explained that he "had an opportunity to see and observe each witness to determine what weight and credibility to give to each of the witness' [sic] testimony." The trial judge's findings therefore appear to represent his own considered determinations based on evi-

dence presented at the suppression hearing during trial. Moreover, assuming error *arguendo*, our review of the record reveals, and defendant does not argue otherwise, that the trial court's findings of fact are supported by competent evidence. *See Richardson*, 295 N.C. at 320, 245 S.E.2d at 761-62. Therefore, the comments by the prosecutor and Agent Underwood did not prejudice defendant. Accordingly, defendant's argument is without merit.

[7] Defendant next contends that the trial court erred in holding various unrecorded bench conferences during his capital trial at which defendant was not personally present. Although present in the courtroom and represented by counsel at the conferences, defendant nonetheless contends his absence from the bench conferences violated his constitutional right to be present at every stage of the capital proceeding.

Defendant complains of one such unrecorded bench conference in particular. During the *voir dire* of prospective juror Robert Crawford (R. Crawford), the prosecutor began his examination with questions concerning R. Crawford's beliefs on the death penalty, his ability to follow the law, and his personal knowledge about the case and defendant. R. Crawford expressed reservations about his ability to follow the trial court's instructions because of his educational background in criminal justice. As the prosecutor continued to question R. Crawford, the following exchange occurred:

> [PROSECUTOR]: His attorneys are within the court here this afternoon, of course. Do you know either Mr. Bob Huffman personally or—
>
> THE COURT: Approach the bench.
>
> (Conference at the bench.)
>
> [PROSECUTOR]: Your Honor, the State with its thanks would excuse Mr. Crawford.
>
> THE COURT: All right, thank you, sir. You're free to leave.

No objection to R. Crawford's dismissal appears in the record.

This Court has repeatedly held that a defendant's constitutional right "to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties." *State v. Buchanan*, 330 N.C. 202, 223, 410 S.E.2d 832,

845 (1991); *accord State v. White*, 349 N.C. 535, 545, 508 S.E.2d 253, 260 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999); *State v. Speller*, 345 N.C. 600, 605, 481 S.E.2d 284, 286 (1997); *State v. Cummings*, 332 N.C. 487, 496-98, 422 S.E.2d 692, 697-98 (1992). We have stated that "bench conferences typically concern legal matters with which an accused is likely unfamiliar and incapable of rendering meaningful assistance." *Buchanan*, 330 N.C. at 223, 410 S.E.2d at 845. The defendant's presence in the courtroom allows him to "observe the context of each conference," and the presence of counsel at the bench conference provides the defendant with "constructive knowledge of all that transpired." *Id.* at 223, 410 S.E.2d at 844. A defendant's constitutional right of presence is violated, however, if "the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend." *Id.* at 223-24, 410 S.E.2d at 845.

In the instant case, our review of the transcript reveals that defendant was represented by counsel at each of the challenged bench conferences. Defendant was also present in the courtroom during each conference. Moreover, defendant has failed to demonstrate, and the record does not in any way suggest, that the challenged bench conferences implicated defendant's confrontation rights or that his presence would have had a reasonably substantial relation to his opportunity to defend. As in *Speller*, defendant "was in a position to observe the context of the conferences and to inquire of his attorneys as to the nature and substance of each one." 345 N.C. at 605, 481 S.E.2d at 286. Likewise, defendant "had a firsthand source as to what transpired, and defense counsel had the opportunity and obligation to raise for the record any matter to which defendant took exception." *Id.* at 605, 481 S.E.2d at 286-87. Therefore, defendant's state and federal constitutional right to presence was not violated by the challenged bench conferences.

[8] Defendant next argues that the unrecorded bench conferences violated his statutory right to recordation under N.C.G.S. § 15A-1241 and deprived him of his constitutional right to due process by rendering appellate review impossible. Specifically, defendant contends it is impossible for this Court to meaningfully review evidentiary rulings that were addressed in unrecorded bench conferences. Defendant also hypothesizes that the dismissal of prospective juror R. Crawford *may* have been the result of racially discriminatory jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d

69 (1986). Defendant contends, however, that the lack of recordation of the bench conference which preceded that dismissal has deprived him of the ability to demonstrate on appeal that his counsel's failure to make a *Batson* objection constitutes ineffective assistance of counsel.

This Court has repeatedly held that section 15A-1241 does not require recordation of "private bench conferences between trial judges and attorneys." *Cummings*, 332 N.C. at 497, 422 S.E.2d at 697; *accord Speller*, 345 N.C. at 605, 481 S.E.2d at 287. If, however, a party requests that the subject matter of a private bench conference be put on the record for appellate review, section 15A-1241(c) requires the trial judge to reconstruct the matter discussed as accurately as possible. *See Cummings*, 332 N.C. at 498, 422 S.E.2d at 698.

In this case, defendant never requested that the subject matter of a bench conference be reconstructed for the record. Thus, the trial court did not err under section 15A-1241 in failing to record its bench conferences with counsel.

We also reject defendant's argument that the unrecorded bench conferences have rendered appellate review impossible. With regard to evidence admitted at trial, we stress that it is the trial court's evidentiary rulings, and not the arguments of counsel during a bench conference, that facilitate effective appellate review. *Cf. Bizzell v. Bizzell*, 237 N.C. 535, 538, 75 S.E.2d 536, 539 (1953). Further, our review of the record reveals that the challenged evidentiary rulings do not thwart our task because the substance of the trial court's rulings is apparent based on the resulting admission of evidence.

[9] We likewise disagree with defendant's assertion that the lack of recordation of the bench conference preceding dismissal of R. Crawford inhibits defendant's ability to argue, or our ability to review, whether defense counsel's failure to make a *Batson* objection constitutes ineffective assistance of counsel.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). First, he must show that counsel's performance fell below an objective standard of reasonableness. *See 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 dif-

ferent absent the error. *See Strickland*, 466 U.S. at 691-96, 80 L. Ed. 2d at 696-99. Thus, to establish ineffective assistance of trial counsel, defendant must demonstrate that a *Batson* objection was proper and, further, that his counsel's failure to raise a *Batson* objection fell below an objective standard of reasonableness.

In *Batson*, the United States Supreme Court recognized that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the use of peremptory challenges for a racially discriminatory purpose. 476 U.S. at 89, 90 L. Ed. 2d at 82-83; *see White*, 349 N.C. at 547, 508 S.E.2d at 262.

> A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

Cummings, 346 N.C. at 307-08, 488 S.E.2d at 560 (citations omitted). Several factors are relevant to the determination of whether a *prima facie* showing of discrimination has been made.

> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995).

Based on the relevant factors, we note that the transcript of proceedings in the present case contains sufficient information to determine whether a *Batson* objection should have been made and, further, whether defense counsel's failure to raise a *Batson* objection under the circumstances constitutes ineffective assistance of counsel. Therefore, defendant's assertion that appellate review of his ineffective assistance of counsel claim is impossible is without merit.

In short, defendant has not demonstrated that his counsel was ineffective by failing to make a *Batson* objection. Rather, "[d]efendant has shown only that he is black and that the State peremptorily struck one black prospective juror. This is insufficient to establish a *prima facie* case of racial discrimination." *State v. Smith*, 347 N.C. 453, 462, 496 S.E.2d 357, 362, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998); *accord State v. Hoffman*, 348 N.C. 548, 551, 500 S.E.2d 718, 720-21 (1998).

Our own review of the record does not otherwise reveal any discriminatory intent by the state. None of the questions and statements of the prosecutor support an inference of discrimination. We also note that both defendant and the victim in this case were African-Americans, "thus diminishing the likelihood that 'racial issues [were] inextricably bound up with the conduct of the trial' " *State v. Davis*, 325 N.C. 607, 620, 386 S.E.2d 418, 424 (1989) (quoting *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987)) (alteration in original), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Because defendant has not demonstrated, and the record does not otherwise reveal, that a *prima facie* case of racial discrimination in jury selection could have been made in this case, counsel's failure to raise a *Batson* objection does not constitute ineffective assistance of counsel.

[10] In his next assignment of error, defendant contends the trial court erred in admitting photographs and a videotape of the victim and the crime scene. Defendant argues the photographs and videotape were repetitive, inflammatory, and 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. *See* N.C.G.S. § 8C-1, Rule 403 (1999); *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999); *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (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.' " *Goode*, 350 N.C. at 258, 512 S.E.2d at 421 (quoting *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527) (alteration in original).

"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 repe-

titious use is not aimed solely at arousing the passions of the jury." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526; *accord State v. Gregory*, 340 N.C. 365, 387, 459 S.E.2d 638, 650 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Photographs may also be admitted into evidence " 'to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree.' " *State v. Thomas*, 344 N.C. 639, 647, 477 S.E.2d 450, 453-54 (1996) (quoting *State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 528, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994)), *cert. denied*, 522 U.S. 824, 139 L. Ed. 2d 41 (1997). " 'Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found.' " *Gregory*, 340 N.C. at 387, 459 S.E.2d at 650-51 (quoting *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816-17 (1991)). These same basic principles govern the admissibility of videotapes. *See State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970).

In the present case, the record does not demonstrate that the challenged photographs and videotape of the victim were used excessively and solely to inflame the passions and prejudices of the jury. The trial court carefully reviewed the challenged photographs and videotape, attentively considered the objections and arguments of counsel, and excluded photographs and portions of the videotape that it found to be repetitive and nonprobative. Our review of the record reveals that each photograph at issue illustrated, in some unique respect, the manner in which the victim was killed, including depiction of electrical wire used to bind the victim at the wrists, knees, and ankles. Likewise, the videotape uniquely depicted the condition and location of the victim's body in the context of the crime scene. Further, the challenged photographs and videotape illustrated the testimony of SBI Special Agent Bobby Bonds, who conducted the crime scene search. The autopsy photographs at issue similarly illustrated the testimony of Dr. Robert Thompson, the forensic pathologist who performed the autopsy on the victim's body. Therefore, we cannot say that the trial court abused its discretion by admitting the challenged evidence. This assignment of error is without merit.

[11] By his next assignment of error, defendant contends the trial court erred in admitting the testimony of SBI Agent Shaw that the burning of the victim's home was of incendiary origin. Defendant argues that Agent Shaw was not qualified to render an opinion on this subject and that his opinion was not of assistance to the jury.

A witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if his or her specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. *See* N.C.G.S. § 8C-1, Rule 702 (1999). This Court has previously held that a properly qualified arson expert may offer opinion testimony that a fire was set intentionally. *See State v. Hales*, 344 N.C. 419, 424, 474 S.E.2d 328, 331 (1996); *State v. Eason*, 328 N.C. 409, 421-22, 402 S.E.2d 809, 815 (1991). In both *Hales* and *Eason*, we noted that the experts had testified as to the matters upon which their opinions were based. *See Hales*, 344 N.C. at 425, 474 S.E.2d at 331; *Eason*, 328 N.C. at 422, 402 S.E.2d at 815. Moreover, in *Hales* we stated that the expert's testimony regarding the basis for his opinion "was in regard to matters not within the knowledge of the average person, and it was helpful to the jury in reaching a decision." 344 N.C. at 425, 474 S.E.2d at 331.

In the instant case, Agent Shaw testified that he is an arson investigator for the SBI, responsible for the determination of the cause and origin of fires, and that he has held that position for over two years. Agent Shaw has attended over five hundred hours of arson investigation courses and has attended numerous seminars organized by the International Association of Arson Investigators. He has also been certified as a fire investigator by the North Carolina Fire and Rescue Commission, and has taught classes on arson. Agent Shaw also testified that he has participated in approximately 125 to 135 arson investigations. After *voir dire* by defendant, the trial court accepted Agent Shaw as "an expert in the area of the cause or origin determination of fires."

Like the experts in *Hales* and *Eason*, Agent Shaw stated his opinion and testified as to the matters upon which he based his opinion. During direct examination, Agent Shaw testified that his investigation revealed that the fire had two distinct points of origin. Agent Shaw noted evidence of "low burning," including several "ignitable liquid pour patterns" on the floor, which indicated to him that an ignitable liquid had been poured, then set on fire. Agent Shaw also testified that he had eliminated all accidental causes or other natural phenomena such as lightning. Based on these and other observations, Agent Shaw testified that, in his opinion, "the fire that had occurred at this residence was an incendiary or set fire."

After careful review of the record, we conclude the trial court did not err in determining that Agent Shaw had sufficient knowledge to

form an opinion that the fire was intentionally set. We likewise believe that the testimony of Agent Shaw "was in regard to matters not within the knowledge of the average person, and it was helpful to the jury." *Id.* Accordingly, this assignment of error fails.

[12] In his next assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree murder. Specifically, defendant argues that N.C.G.S. § 15A-2000, as interpreted by this Court, conflicts with Article IV, Section 18 of the North Carolina Constitution in that it interferes with the district attorney's constitutional responsibility to prosecute.

Under Article IV, Section 18 of the North Carolina Constitution, "[t]he District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." Although the district attorney has broad discretion in a homicide case to determine whether to try a defendant for first-degree murder, second-degree murder, or manslaughter, see *State v. Wallace*, 345 N.C. 462, 468, 480 S.E.2d 673, 677 (1997), the district attorney does not have the discretion to determine whether to try a defendant capitally or noncapitally for first-degree murder. *See* N.C.G.S. § 15A-2000 (1999); *State v. Rorie*, 348 N.C. 266, 270-71, 500 S.E.2d 77, 80 (1998); *State v. Britt*, 320 N.C. 705, 710, 360 S.E.2d 660, 662 (1987).

Put simply, this statutory limitation on prosecutorial discretion does not impermissibly conflict with the prosecutor's constitutional duty to prosecute criminal actions on behalf of the state. Therefore, defendant's argument fails.

[13] We likewise reject defendant's argument that N.C.G.S. § 15A-2000 is otherwise unconstitutional because the district attorney has the discretion, in a homicide case, to determine whether to try a defendant for first-degree murder or a lesser homicide crime. The exercise of prosecutorial discretion does not invalidate the death penalty. *See McCleskey v. Kemp*, 481 U.S. 279, 307, 313, 95 L. Ed. 2d 262, 288, 292 (1987); *Proffitt v. Florida*, 428 U.S. 242, 254, 49 L. Ed. 2d 913, 924 (1976). " 'This Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion.' " *State v. Lineberger*, 342 N.C. 599, 603, 467 S.E.2d 24, 26 (1996) (quoting *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996)). We have likewise recognized

"that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that selection was deliberately based upon 'an unjustifiable standard such as race, religion or other arbitrary classification.' [*Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962).]"

State v. Lawson, 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984) (quoting *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980)), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

In the present case, there is no evidence, nor has defendant argued, that the district attorney's decision to prosecute defendant for first-degree murder was based on any improper factor such as race, religion, or other arbitrary classification. Accordingly, this assignment of error is rejected.

[14] By his next assignment of error, defendant contends the trial court committed plain error by instructing the jury that it could rely on various circumstances surrounding the murder to infer premeditation and deliberation. Defendant argues that the circumstances described by the trial court were not all supported by the evidence in this case and served only to reemphasize the grotesque effect the fire had upon the victim's body after death.

Defendant did not object to the trial court's instructions at trial. He thus failed to preserve this issue for appellate review. *See* N.C. R. App. P. 10(b)(2). The instructions are therefore only reviewed for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

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

Now, neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the conduct of the defendant before, during and after the killing, the use of grossly excessive force, the infliction of lethal wounds after the

victim is felled, the brutal or vicious circumstances of the killing, and the manner in which or means by which the killing was done.

This instruction is based upon the North Carolina pattern jury instructions. N.C.P.I.—Crim. 206.10 (1998). This Court has previously found no error in jury instructions on premeditation and deliberation that were nearly identical to the instruction given in this case and has rejected very similar arguments. *See, e.g., State v. Crawford*, 344 N.C. 65, 78, 472 S.E.2d 920, 928 (1996); *State v. Leach*, 340 N.C. 236, 241-42, 456 S.E.2d 785, 788-89 (1995); *State v. Weathers*, 339 N.C. 441, 454-55, 451 S.E.2d 266, 273 (1994). We have said that " 'the elements listed [in this pattern jury instruction] are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation.' " *Weathers*, 339 N.C. at 454, 451 S.E.2d at 273 (quoting *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990)). Thus, in *State v. Leach*, we held that "the trial court did not err by giving the instruction at issue here, even in the absence of evidence to support each of the circumstances listed." 340 N.C. at 242, 456 S.E.2d at 789.

Likewise, in the instant case, the trial court did not err by giving the challenged instruction. This assignment of error is rejected.

[15] In his next assignment of error, defendant contends the trial court erred in instructing the jury that it could consider his flight from the scene as evidence of guilt. The trial court gave the pattern jury instruction on flight. N.C.P.I.—Crim. 104.36 (1994). Defendant argues there was insufficient evidence of flight to warrant the trial court's instruction.

This Court has held that an instruction on flight is justified if there is " 'some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.' " *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (quoting *Fisher*, 336 N.C. at 706, 445 S.E.2d at 878); *accord State v. Johnson*, 341 N.C. 104, 113, 459 S.E.2d 246, 251 (1995). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

In the present case, defendant telephoned his wife from his mother's residence, before the victim arrived, and informed her he would be home "in a few minutes." The record reveals, however, that defendant did not return home as planned. Rather, defendant ran from the scene of the crime and departed the area in his vehicle. One of defendant's longstanding friends waved at him, but defendant did not respond. After departing the area, defendant drove to "[Emanuel Blackman's] shack out in the country," where he traded the victim's gun for cocaine and twenty dollars in cash. Defendant then continued to drive through the country, stopping in Pageland, South Carolina, where he traded more stolen items for drugs. Rather than return home, as originally intended, defendant then went to Kenneth Funderburk's house and remained there overnight. Law enforcement officers apprehended defendant at this residence the next afternoon.

The evidence presented in the present case, when considered in the light most favorable to the state, was more than sufficient to warrant the trial court's instruction on flight. This assignment of error is overruled.

CAPITAL SENTENCING

[16] By his next assignment of error, defendant contends the trial court erred in denying his motion to exclude testimonial and photographic evidence concerning his prior conviction for armed robbery. The challenged evidence was proffered by the state to prove the existence of the aggravating circumstance that defendant had previously been convicted of a felony involving violence to another person. *See* N.C.G.S. § 15A-2000(e)(3). The photograph at issue depicted blood in the victim's grocery store, which resulted from a head injury defendant inflicted on the victim when he struck him with a gun during the robbery. Defendant argues that the probative value of the challenged evidence was outweighed by its prejudice to defendant. *See* N.C.G.S. § 8C-1, Rule 403.

At the outset, we note the Rules of Evidence do not apply in capital sentencing proceedings. *See* N.C.G.S. § 8C-1, Rule 1101(b)(3) (1999). The trial court, therefore, has "great discretion to admit any evidence relevant to sentencing." *State v. Thomas*, 350 N.C. 315, 359, 514 S.E.2d 486, 513, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 388 (1999); *accord State v. Warren*, 348 N.C. 80, 123, 499 S.E.2d 431, 455, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998); *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). "The State must be allowed to present any competent evidence in support of the death penalty, including 'evidence of the circumstances surrounding a defendant's prior felony, notwithstanding the defendant's stipulation to the record of conviction, to support the existence of aggravating circumstances.' " *Warren*, 348 N.C. at 123, 499 S.E.2d at 455 (quoting *State v. Warren*, 347 N.C. 309, 316, 492 S.E.2d 609, 612 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998)) (citation omitted). The graphic nature of the evidence does not make it inadmissible. *See State v. Moseley*, 336 N.C. 710, 720, 445 S.E.2d 906, 912 (1994), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995). Moreover, the determination of whether photographic evidence is more probative than prejudicial is within the trial court's discretion. *See Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322.

In this case, the grocery store photograph illustrated the testimony of the victim of defendant's prior violent felony. Both the photograph and the accompanying testimony were relevant to support the existence of the (e)(3) aggravating circumstance, that defendant had been previously convicted of a felony involving the use of violence to the person. *See* N.C.G.S. § 15A-2000(e)(3). In any event, defendant has failed to demonstrate that the trial court abused its discretion by admitting the challenged photograph. Accordingly, this assignment of error fails.

[17] In another assignment of error, defendant contends the trial court erred in denying his request to submit to the jury an instruction on the nonstatutory mitigating circumstance that "the defendant did not set out to kill Callie Huntley."

Defendant initially requested that the trial court submit the following nonstatutory mitigating circumstance: "The circumstances of the case in that the defendant did not set out to kill Callie Huntley and attempted to leave the house several times before the lethal acts occurred." The trial court determined not to submit the first half of defendant's proposed instruction but did allow submission of the nonstatutory mitigating circumstance that "[t]he defendant attempted to leave the house several times before the lethal acts occurred."

To demonstrate that the trial court erred by refusing to submit a requested nonstatutory mitigating circumstance, defendant must establish that "(1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2)

there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury." *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988); *accord State v. Cummings*, 326 N.C. 298, 324, 389 S.E.2d 66, 80 (1990).

In *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994), this Court determined that the trial court erred when it refused to submit as a possible nonstatutory mitigating circumstance that "the defendant did not intend to take the life of Sheila Bland or John Michael Edmondson when he entered Young's Cleaners." *Id.* at 185, 443 S.E.2d at 39. We explained that self-serving portions of the defendant's statement to authorities, although controverted by most of the evidence of record, tended to support the requested circumstance, and that a reasonable juror could find such a circumstance to be mitigating. *Id.* Nonetheless, we determined in *Green* that certain submitted mitigating circumstances as well as the catchall mitigating circumstance provided a vehicle for the jury to consider all the evidence tending to support the nonstatutory mitigating circumstance that was not submitted. *Id.*; *see State v. Bishop*, 343 N.C. 518, 549, 472 S.E.2d 842, 858-59 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997); *State v. Frye*, 341 N.C. 470, 504-05, 461 S.E.2d 664, 682 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). Therefore, we held in *Green* that the trial court's error was harmless beyond a reasonable doubt because it was clear that the jury was not prevented from considering any potential mitigating evidence. 336 N.C. at 185-86, 443 S.E.2d at 39; *accord State v. Hartman*, 344 N.C. 445, 470, 476 S.E.2d 328, 342 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997); *State v. Hill*, 331 N.C. 387, 417, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993).

Likewise, in the present case, self-serving portions of defendant's statement to authorities tended to support his requested mitigating circumstance. Moreover, a reasonable juror could find the proposed circumstance to have mitigating value. Therefore, the trial court erred by refusing to submit the circumstance for the jury's consideration.

As in *Green*, however, the trial court's error in this case did not preclude any juror from considering and giving weight to any mitigating evidence underlying defendant's proposed circumstance. Defendant's complete statement, upon which the proposed circumstance was based, was read to the jury. Furthermore, the record reveals that the evidence underlying the requested circumstance was

fully argued to the jury by defense counsel during closing argument. Finally, the trial court submitted the catchall mitigating circumstance to the jury. *See* N.C.G.S. § 15A-2000(f)(9). Therefore, the trial court's error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1999).

[18] By defendant's next assignment of error, he contends the trial court erred by submitting the (f)(1) statutory mitigating circumstance: "The defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1). Defendant argues the evidence does not support a conclusion that his criminal history was insignificant. He also contends the trial court erred by submitting the (f)(1) mitigating circumstance after having submitted the (e)(3) 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).

The statute governing capital sentencing proceedings requires 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). Construing subsection 15A-2000(b), this Court has stated that the test governing the trial court's 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. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988); *accord State v. White*, 343 N.C. 378, 394-95, 471 S.E.2d 593, 602-03, *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996); *Smith*, 347 N.C. at 469, 496 S.E.2d at 366. If the trial court determines that 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." *State v. Parker*, 350 N.C. 411, 436, 516 S.E.2d 106, 123 (1999), *cert. denied*, — U.S. —, 145 L. Ed. 2d 681 (2000); *accord Smith*, 347 N.C. at 469, 496 S.E.2d at 366; *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).

In determining whether a defendant's history is "significant" under section 15A-2000(f)(1), "the [trial court's] focus should be on whether the criminal activity is such as to influence the jury's sentencing recommendation." *State v. Greene*, 351 N.C. 562, —, 528 S.E.2d 575, 580 (2000); *accord State v. Williams*, 350 N.C. 1, 11, 510 S.E.2d 626, 633, *cert. denied*, — U.S. —, 145 L. Ed. 2d 162 (1999); *Parker*, 350 N.C. at 436, 516 S.E.2d at 123.

During the sentencing proceeding in this case, the state presented evidence of, and defendant stipulated to, one conviction for robbery with a dangerous weapon. The state's evidence tended to show that, in 1989, defendant robbed a grocery store and struck the store owner in the back of the head with a gun. Evidence at trial also indicated that defendant had a history of drug abuse.

Based on this evidence, the trial court properly determined that a rational jury could conclude that defendant had no significant history of criminal activity and, therefore, that defendant's history could influence the jury's sentencing recommendation as a mitigating circumstance. *See Greene*, 351 N.C. at —, 528 S.E.2d at 580-81. Therefore, defendant's argument is without merit.

[19] We likewise reject defendant's argument that the trial court erred by submitting the (f)(1) mitigating circumstance after having submitted the (e)(3) aggravating circumstance. This Court has repeatedly upheld submission of the (f)(1) mitigating circumstance in cases where the (e)(3) aggravating circumstance was submitted to the jury. *See, e.g., State v. Ball*, 344 N.C. 290, 311, 313, 474 S.E.2d 345, 357, 359 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997); *State v. Walker*, 343 N.C. 216, 224-26, 469 S.E.2d 919, 923-24, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996); *State v. Brown*, 315 N.C. 40, 61-63, 337 S.E.2d 808, 824-25 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Therefore, defendant has failed to demonstrate that the trial court erred by submitting the (f)(1) mitigating circumstance to the jury. Accordingly, this assignment of error fails.

[20] In another assignment of error, defendant contends the trial court erred by instructing that the jury must be unanimous in its recommendation of a sentence of life and by prohibiting defendant from informing the jury that a life sentence would be imposed if the jury was not unanimous.

The state filed a pretrial motion asking the trial court to prohibit defendant from arguing to the jury during the penalty phase of trial that the failure of the jury to unanimously agree on punishment would result in life imprisonment. The trial court granted the state's motion. Thereafter, the trial court instructed prospective jurors as follows:

> If the jury unanimously recommends that the defendant be sentenced to death, I will be required by the law of this state to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, I will be required by that same law to impose a punishment of imprisonment in the state's prison for life without parole.

The trial court's statement to prospective jurors is in accord with N.C.G.S. § 15A-2002. *See Smith*, 351 N.C. at 270, 524 S.E.2d at 42. Moreover, this Court has repeatedly held that it is improper for a trial court to inform the jury of the effect of its failure to reach a unanimous verdict. *See State v. Jones*, 339 N.C. 114, 137, 451 S.E.2d 826, 837 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995); *State v. Hutchins*, 303 N.C. 321, 353, 279 S.E.2d 788, 807 (1981); *State v. Johnson*, 298 N.C. 355, 369-70, 259 S.E.2d 752, 761-62 (1979). "Such an instruction is improper because it permits the jury to escape its responsibility to recommend the sentence to be imposed." *Jones*, 339 N.C. at 137, 451 S.E.2d at 837. Accordingly, this assignment of error must fail.

[21] In his next assignment of error, defendant argues the trial court failed to intervene *ex mero motu* to preclude the prosecutor from making false and improper statements to the jury during closing arguments. The statements at issue pertained to Dr. Mark Worthen (Dr. Worthen), a clinical psychologist who testified for defendant during the capital sentencing proceeding.

When, as here, defendant fails to object during closing argument, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *See State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80 (1999). " '[T]he trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' " *State v. McNeil*, 350 N.C. 657, 684, 518 S.E.2d 486, 503 (1999) (quoting *Atkins*, 349 N.C. at 84, 505 S.E.2d at 111), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 321 (2000). " '[O]nly an extreme

impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' " *State v. Fletcher*, 348 N.C. 292, 322, 500 S.E.2d 668, 685 (1998) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999).

In a capital sentencing proceeding, trial counsel are allowed wide latitude in their argument to the jury. *See Smith*, 351 N.C. at 268, 524 S.E.2d at 41; *State v. Robinson*, 346 N.C. 586, 606, 488 S.E.2d 174, 187 (1997). Counsel may argue the facts in evidence as well as all reasonable inferences that may be drawn therefrom. *See State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999); *Warren*, 348 N.C. at 124, 499 S.E.2d at 456. Counsel may not, however, "travel outside the record by interjecting facts of their own knowledge or other facts not included in the evidence." *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Defendant first argues the prosecutor falsely informed the jury that Dr. Worthen brought only the answers to questions that he wanted the jury to hear. The prosecutor stated in pertinent part:

> He didn't bring you this four hundred and eighty some questions that he put to this defendant. He only brought the ones that he chose to bring, so you don't know what those questions were or what the answers were that this defendant gave. He chose to leave those at home.

The record reveals conflicting answers from Dr. Worthen as to whether all of the questions posed to defendant were included in his report. Initially, Dr. Worthen testified that only 85 of 566 questions and answers were in his report. The following exchange occurred:

> [PROSECUTOR]: So you don't have the questions and the specific answers to the other four hundred and eighty questions, do you?
>
> [DR. WORTHEN]: Yes. I apologize, that is correct.
>
> . . . .

> [PROSECUTOR]: So you have no way of being able to tell this jury what this defendant's response was to Question Number 41, "I do not always tell the truth", do you?
>
> [DR. WORTHEN]: Unless it's in here, no.

After further questioning, however, Dr. Worthen remembered that all of the answers to the questions were on the last page of his report. The record reveals that the prosecutor held a copy of the "Diagnostic and Statistical Manual for Mental Disorders and Mental Diseases" (DSM) as he questioned Dr. Worthen. The DSM was the source of Dr. Worthen's questions to defendant. The prosecutor apparently asked questions from his copy of the manual, and Dr. Worthen responded from the answer sheet on the last page of his report. It appears from the record, then, that Dr. Worthen's report contained only eighty-five questions from the DSM, but all of defendant's answers. Therefore, the prosecutor did not travel outside the record. Even if improper, the prosecutor's argument was not so "grossly improper" as to require the trial court to intervene *ex mero motu*. *See State v. Gladden*, 315 N.C. 398, 424, 340 S.E.2d 673, 689 (prosecutor's factual argument, though not supported by the evidence, was not so grossly improper as to warrant *ex mero motu* action by the trial court), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

[22] Defendant next argues the prosecutor improperly argued that Dr. Worthen prepared his report at the last moment solely to surprise the prosecution unfairly. The prosecutor argued as follows:

> He prepares a report only at the very last minute, the night before he testifies. We would argue and contend to you it's so that we wouldn't have an opportunity to be able to fairly question him about it, point out the real motive.

The record reveals that Dr. Worthen testified that his final report was not completed until the previous day. The trial court had previously ordered that the report be turned over to the state by the end of the state's case-in-chief. The report was not turned over, however, until after the conclusion of the guilt-innocence phase of trial. Therefore, the prosecutor's argument concerning Dr. Worthen's motive was a permissible inference based on the evidence and was not grossly improper. Accordingly, the trial court did not err in failing to intervene *ex mero motu*.

Defendant further argues the prosecutor improperly suggested to the jury that defense counsel had prepared Dr. Worthen's report. The prosecutor commented as follows:

> And actually the report was prepared by Mr. Blakeney's lawyers. How fair is that? How fair is that, members of the jury? We ask you to carefully consider what he said.

In response to questions by the prosecutor, Dr. Worthen testified that he dictated the report and sent the dictation tapes to defense counsel for them to type. Based on this testimony, we conclude the prosecutor's argument was grounded upon facts in the record and was not so "grossly improper" as to require action by the trial court *ex mero motu*.

Finally, defendant argues the prosecutor's assertion that Dr. Worthen took his diagnosis out of the DSM was unfair and not based on the testimony. The prosecutor argued in pertinent part as follows:

> He's here to take a diagnosis out of a manual that he agreed with me had a cautionary statement at the beginning that says it shouldn't be used in any context other than treatment setting, use great caution in diagnosing from this manual for a legal setting. He diagnosed from it anyway.

Dr. Worthen testified that he relied, in part, on the DSM to diagnose defendant. He further testified that the DSM is "the main manual that is used to provide official diagnosis." Moreover, Dr. Worthen conceded that the DSM contains the following cautionary statement: "The clinical and the scientific considerations involved in characterizations for these conditions as mental disorders may not be wholly relevant to legal judgments." Thus, the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

PRESERVATION

Defendant raises eight additional issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving these issues for any possible further judicial review: (1) the North Carolina death penalty statute is unconstitutional; (2) the trial court erred by instructing the jury concerning the unanimity requirement in various jury decisions; (3) the trial court

erred by instructing the jury that it had a "duty" to recommend a sentence of death if it determined that the mitigating circumstances found were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty; (4) the trial court erred by denying defendant's motions for a bill of particulars seeking information from the state regarding aggravating and mitigating circumstances; (5) the trial court erred by denying defendant's motions to increase the number of peremptory challenges; (6) the trial court erred by denying defendant's pretrial motion for disclosure of the names of the state's witnesses to whom defendant made statements; (7) the trial court erred by denying defendant's motion for separate juries for the guilt-innocence phase and the capital sentencing proceeding; and (8) the trial court erred by submitting the aggravating circumstance that the crime was especially heinous, atrocious, or cruel.

We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject these assignments of error.

PROPORTIONALITY REVIEW

[23] 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).

In the present case, defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. The jury found four aggravating circumstances: (1) defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed while defendant was engaged in the commission of first-degree arson, N.C.G.S. § 15A-2000(e)(5); (3) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (4) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

Of the eight mitigating circumstances submitted, one or more jurors found the following: (1) defendant grew up in very unfortunate and difficult circumstances in that he grew up in a physical and psychological environment which significantly retarded the proper development of his character and functional abilities; (2) defendant's father was absent from the home since defendant was two or three years old; and (3) defendant's mother was in and out of the home and involved in an alcoholic and verbally and sometimes physically abusive relationship with Mr. Huntley, the victim here, which the defendant witnessed.

After thoroughly examining the record, transcript, 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 now to our final statutory duty of proportionality review.

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. *See State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). One purpose of our proportionality review " 'is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *Atkins*, 349 N.C. at 114, 505 S.E.2d at 129 (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)). We have found the death penalty disproportionate in seven cases. *See 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*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *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. Defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation. This Court has held that "a finding of premeditation and deliberation indicates 'a more calculated

and cold-blooded crime.' " *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994) (quoting *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994)), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995). Moreover, the jury's finding of the (e)(3) aggravating circumstance, prior conviction of a violent felony, is particularly significant because none of the cases in which this Court has held the death sentence to be disproportionate have included this aggravating circumstance. *See State v. Peterson*, 350 N.C. 518, 538, 516 S.E.2d 131, 143-44 (1999), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 1087 (2000); *State v. Murillo*, 349 N.C. 573, 613, 509 S.E.2d 752, 775 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 87 (1999); *Harris*, 338 N.C. at 161, 449 S.E.2d at 387; *State v. Rose*, 335 N.C. 301, 351, 439 S.E.2d 518, 546, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994).

We also compare the present case with cases in which this Court has found the death penalty to be proportionate. *See McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court considers all the cases in the pool of similar cases when engaging in proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out the duty." *Id.*; *accord State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998).

There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain a death sentence. *See Warren*, 347 N.C. at 328, 492 S.E.2d at 619. The (e)(3), (e)(5), and (e)(9) aggravating circumstances, which the jury found here, are among them. *See 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). Thus, we conclude that the present case is more similar to cases in which we have found a sentence of death proportionate than to those in which we have found a sentence of death disproportionate.

Whether a sentence of death is "disproportionate in a particular case 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. Therefore, based upon the characteristics of this defendant and the crime he committed, we are convinced that the sentence of death recommended by the jury and ordered by the trial court in the instant case is not disproportionate.

Based on the foregoing, we hold that defendant received a fair trial, free of prejudicial error. The judgments and sentences entered

by the trial court, including the sentence of death for first-degree murder, must therefore be left undisturbed.

NO ERROR.

IN THE MATTER OF: NANCY E. BRAUN, APPLICANT TO THE NORTH CAROLINA BAR BY COMITY

No. 31A00

(Filed 13 July 2000)

Attorneys— comity applicant—failure to actively and substantially engage in practice of law

The Board of Law Examiners did not err in denying a comity applicant's admission to the Bar based on her failure to actively and substantially engage in the practice of law for at least four out of the last six years immediately preceding the filing of the application, and based on character and general fitness grounds, since petitioner's statements purporting to show a practice of law while owning and operating a restaurant during the five-year period from November 1991 to December 1996 lacked candor, because: (1) misrepresentations and evasive or misleading responses that could obstruct full investigation into moral character are inconsistent with the truthfulness and candor required of a practicing attorney; and (2) the whole record reveals that petitioner did not hold herself out as a practicing attorney from November 1991 to November 1996, did not maintain a separate law office, did not maintain professional malpractice insurance, did not attend formal continuing legal education classes, did not keep contemporaneous time or billing records, did not present affidavits from others for whom she claimed to have performed legal work while opening and operating a new restaurant business, and did not report on her tax returns the fair value of what she received in "barter" for her legal services.

Appeal of right pursuant to section .1405 of the Rules Governing Admission to Practice of Law in the State of North Carolina from an order of Farmer, J., signed 3 September 1999 in Superior Court, Wake County, affirming the 1 December 1997 order of the Board of Law Examiners denying the applicant's application for admission

to the North Carolina Bar by comity. Heard in the Supreme Court 15 May 2000.

Harry H. Harkins, Jr., for petitioner-applicant-appellant.

Michael F. Easley, Attorney General, by Robert O. Crawford, III, Special Deputy Attorney General, for respondent-appellee North Carolina Board of Law Examiners.

FREEMAN, Justice.

Petitioner Nancy E. Braun, a 1988 graduate of the State University of New York at Buffalo School of Law, was admitted to practice in the State of New York (4th Department) in 1989 and in the District of Columbia by reciprocity in 1991. On 5 December 1996, Braun applied for admission to the North Carolina Bar by comity. Braun appeared before a two-member panel of the North Carolina Board of Law Examiners (Board) on 15 July 1997. The panel ordered that her comity application be denied, and, thereafter, Braun requested a *de novo* hearing before the full Board. On 24 October 1997, she appeared before the full Board for the purpose of receiving evidence from which the Board could determine whether Braun had met all the requirements of section .0502 of the Rules Governing Admission to Practice of Law in North Carolina. Following this hearing, the Board, by order of 1 December 1997, denied the comity application concluding that Braun had failed to prove to its satisfaction that she met "all the requirements of section .0502 and especially Rule .0502(3)" (comity applicants must prove they are duly licensed to practice law in another state or territory of the United States and have been for at least four out of the last six years immediately preceding the filing of the application actively and substantially engaged in the practice of law in that jurisdiction). Additionally, the Board denied Braun's application on the grounds of character and general fitness. Braun then appealed the Board's determination to Superior Court, Wake County. On 3 September 1999, the trial court entered an order affirming the decision of the Board. Braun appeals to this Court only the Board's determination that she is unfit to be admitted to the Bar of the State of North Carolina, assigning as error the Board's findings of fact as too vague to permit judicial review and further contending that the trial court's ruling is erroneous as a matter of law.

Among the Board's lengthy findings are the following:

7. From September 1988 to October 1990, the Applicant was an associate attorney in the law firm of Moot & Sprague in Buffalo, New York.

8. From November 1990 to November 1991, the Applicant was an associate attorney in the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber in Buffalo, New York.

9. In November 1991, the Applicant went into business for herself as a co-owner and operator of a restaurant business known as Harvest Moon Cafe & Catering in Buffalo, New York.

10. The Applicant operated Harvest Moon Cafe & Catering as a partnership, sole proprietorship, or corporation from November 1991 until November 1996.

11. In November 1996, the Applicant moved from Buffalo, New York, to Charlotte, North Carolina.

12. Section .0502(3) of the Rules Governing Admission to Practice Law in the State of North Carolina requires comity applicants to prove to the satisfaction of the Board that the applicant is duly licensed to practice law in another state, or territory of the United States, or the District of Columbia having comity with North Carolina, and that while so licensed therein, the applicant has been for at least *four out of the last six years* immediately preceding the filing of his application been [sic] *actively and substantially* engaged in the practice of law in that jurisdiction.

13. The six years immediately preceding the filing of the Applicant's Application were December 5, 1990, to December 5, 1996.

14. In addition to operating the restaurant, from November 1991 to November 1996 the Applicant performed certain law related activities for Harvest Moon Cafe & Catering, such as obtaining a business loan; negotiating a lease and resolving disputes with the landlord; attending an unemployment hearing; negotiating dissolution of the partnership; incorporating the business; obtaining an ABC license; negotiating a settlement with the telephone company; responding to Labor Board audit inquiries; and negotiating contracts.

15. The Applicant was not paid for her law related activities for Harvest Moon Cafe & Catering from November 1991 to November 1996.

16. During the period from November 1991 to November 1996, the Applicant performed miscellaneous legal services for various employees and vendors, such as drafting a consignment form agreement, appearing in traffic court, writing demand letters, and negotiating settlements of disputes.

17. The Applicant was paid "in kind" or did not charge for her various miscellaneous legal services for other persons from November 1991 to November 1996. These "in kind" payments were not reported as income on her federal income tax returns for those years.

18. The Applicant did not maintain a legal office separate and apart from her restaurant business from November 1991 to November 1996.

19. The Applicant did not advertise her legal services in the yellow pages or otherwise hold herself out to the general public as a practicing lawyer from November 1991 to November 1996.

20. The Applicant did not maintain professional malpractice insurance from November 1991 to November 1996.

21. The Applicant did not maintain contemporaneous records of billable hours for her law related activities for Harvest Moon Cafe & Catering or her miscellaneous legal services for other persons from November 1991 to November 1996.

22. The Applicant did not attend formal continuing legal education (CLE) from November 1991 to November 1996.

23. While the Applicant operated Harvest Moon Cafe & Catering between 1991 and November 1996 she was not engaged in the active and substantial practice of law.

. . . .

25. The Applicant's answers to questions attempting to show that her work at Harvest Moon Cafe & Catering was the active and substantial practice of law showed a lack of candor.

26. The Applicant's statements and answers to questions showed a lack of candor; was [sic] misleading to the Board; and have a significant bearing on her character and fitness.

27. The Applicant has failed to satisfy the Board that she possesses the qualifications of character and general fitness required

of an attorney and counselor of law and she is of such good moral character and is entitled to the high regard and confidence of the public.

Braun argues that the above findings of fact, in particular numbers 25 and 26, fail to identify which of her specific statements show a lack of candor or are misleading and that the findings are therefore too vague to permit judicial review. We disagree.

Braun contends that her case is precisely on point with our decision in *In re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981). Among its four findings of fact in that case, the Board stated in finding number three that "[o]n several occasions in [the applicant's] testimony before the Board, the applicant made false statements under oath on matters material to his fitness of character." *Id.* at 638, 272 S.E.2d at 829. This Court held that the finding "fails adequately to resolve this issue and lacks the requisite specificity to permit adequate judicial review of the Board's order." *Id.* at 640, 272 S.E.2d at 830.

Contrary to Braun's assertions, *Moore* can be differentiated from the present case in several ways. First, unlike the present case, the evidence in *Moore* was in conflict, and thus there was a need to resolve crucial facts before any meaningful judicial review could be made. *Id.* at 639-40, 272 S.E.2d at 829-30. In the instant case, Braun was the only witness. There is no conflicting evidence in either the record or the transcript. Second, the Board in *Moore* made only four findings of fact, whereas in the present case, the Board made twenty-seven findings of fact. Unlike the four findings in *Moore*, these twenty-seven findings provide ample information to permit appropriate judicial review. Third, in *Moore*, the Court determined that the applicant had satisfied his burden of making a *prima facie* showing of good moral character and that the Board had failed to rebut that showing. *Id.* at 640, 272 S.E.2d at 830. Here, the Board concluded, and we agree, that Braun failed to satisfy her burden of establishing a *prima facie* showing of good moral character and fitness. Finally, the Board's finding in *Moore* was conclusory, failing to identify which of *Moore*'s "several" statements were false. In contrast, the Board in the present case clearly sets forth in its finding of fact 25 which of Braun's statements were found lacking: "[t]he Applicant's *answers to questions attempting to show that her work at Harvest Moon Cafe & Catering* was the active and substantial practice of law showed a lack of candor." (Emphasis added.) This is a specific factual finding that identifies Braun's statements about her work at Harvest Moon

Cafe as those showing a lack of candor. The finding allows adequate judicial review because the whole evidentiary record, coupled with the fact that the Board observed Braun's demeanor, supports this finding.

> When reviewing decisions of the Board of Law Examiners, this Court employs the whole record test. *In re Legg*, 325 N.C. 658, 669, 386 S.E.2d 174, 180 (1989), *cert. denied*, 496 U.S. 906, 110 L. Ed. 2d 270, (1990). Under this test, there must be substantial evidence supporting the Board's findings of fact and conclusions of law. *Id.* "Substantial evidence" has been defined as relevant evidence which a reasonable mind, not necessarily our own, could accept as adequate to support a conclusion. *In re Moore*, 308 N.C. 771, 779, 303 S.E.2d 810, 815-16 (1983).

In re Golia-Paladin, 344 N.C. 142, 149, 472 S.E.2d 878, 881 (1996), *cert. denied*, 519 U.S. 1117, 136 L. Ed. 2d 847 (1997).

Here, the Board determined that Braun's statements regarding her active and substantial practice of law for four out of the last six years immediately preceding 5 December 1996 were misleading; in particular, those statements purporting to show a practice at the Harvest Moon Cafe during the five-year period from November 1991 to December 1996. Misrepresentations and evasive or misleading responses that could obstruct full investigation into moral character are inconsistent with the truthfulness and candor required of a practicing attorney. *See In re Willis*, 288 N.C. 1, 18, 215 S.E.2d 771, 781, *appeal dismissed*, 423 U.S. 976, 46 L. Ed. 2d 300 (1975). The record in this case is replete with such responses by Braun justifying the Board's determination that she did not *actively and substantially* engage in the practice of law for at least four out of the last six years immediately prior to filing for comity in North Carolina. Further, after examination of the whole record, the evidence in this case also shows that the Board was fully justified in its determination that Braun's statements showed a lack of candor and had a negative bearing on her character.

The Board may accept or reject in whole or in part the testimony of any witness. *See In re Legg*, 337 N.C. 628, 638, 447 S.E.2d 353, 358 (1994). The Board has the opportunity to observe the applicant's demeanor during the hearing and thus is in a better position to determine the weight and sufficiency of the evidence and the credibility of the witness. *See Moore*, 308 N.C. at 780-81, 303 S.E.2d at 816.

Braun claimed that she worked five hundred hours in excess of the hours required for comity admission. She calculated the time she devoted to the legal profession during the five-year period in question in fractions of months. Braun claimed six months of law practice related to starting her restaurant, working "well over 60 hours per week" between November 1991 and April 1992, the same period of time she devoted to opening and operating her restaurant. Among Braun's claims related to her business, quoted verbatim from her memorandum in support of her application, were the following:

A. November 1991-April 1992; Prepared Partnership Agreement; Filed D/B/A; Prepared Business Plan; Negotiated with Commercial Lenders, Negotiated and drafted 2 Commercial Leases; obtained all licenses and permits, Filed with all appropriate labor boards and government agencies, Negotiated equipment and company van leases; Negotiated lines of credit and purchase contracts with suppliers; Drafted catering contracts, Negotiated agreements with advertisers and Drafted employment applications and Company Policy. During this period Applicant worked well over 60 hours per week (6 Months).

B. 1992; On behalf of Harvest Moon Cafe appeared before the Appeal Board of Unemployment Insurance Division of the Labor Board in a matter regarding a former employee's application for unemployment. . . . (.5 month)

C. 1993; On behalf of Harvest Moon Cafe appeared before the Sanitation Hearing Officer regarding an alleged waste disposal violation. . . . (.25 month).

D. January 1991-November 1996; Represented and Assisted in representing Harvest Moon Cafe with on going legal disputes with it's [sic] Landlord, including but not limited to lack of necessary services (water and heat), contractor delays and quality of workmanship, excess utility charges, premises not meeting code, constructive eviction (excessive odors from neighboring beauty salon) and eviction. Applicant devoted at least 2 full months each year to these matters affecting Harvest Moon Cafe (12 months).

E. September 1994-June 1995; Assisted in representing herself in the Partnership Dissolution. (1 Month).

F. January-April 1996; Prepared and filed all necessary Incorporation Documents (including but not limited to S Corp. status, By Laws and Certificate of Assumed Name on behalf of Harvest Moon Cafe. (1 Month).

. . . .

I. June 1995-September 1995; On behalf of Harvest Moon Cafe prepared and successfully applied for Alcoholic Beverage Retail License. (1 Month).

J. 1992; Successfully negotiated on behalf of Harvest Moon Cafe a settlement agreement with telephone directory publishing company. (.25 month).

. . . .

Q. 1991-1996; Reviewed and negotiated all contracts entered into by Harvest Moon Cafe[.] (2 month).

In addition, Braun claimed she represented others such as vendors or her employees. Among those verbatim claims in her memorandum of support to the Board were the following:

G. February-April 1996; Prepared and filed all necessary Incorporation Documents (including but not limited to S Corp. status, By Laws and Certificate of Assumed Name on behalf of client, Data Systems, Inc. (1 Month).

. . . .

K. 1993; Successfully represented client before Amherst Court for Vehicle Traffic violations. (.25 month).

. . . .

R. 1996; On behalf of Client, successfully negotiated settlement with her former Accountant regarding her negligent professional services. (1 month).

S. 1996; Represented corporate client with regards to negligent omission in telephone directory. (.25 month)

T. July 1996-November 1996; Applicant Successfully represented herself in lawsuit against Radio Station for value of a trip she won as a door prize but never received. Applicant appeared in court a number of times and worked over 35 hours a week during this time period[.] (5 months).

Despite these and other numerous claims, Braun had no evidence to support her time estimates. She did not keep and present contemporaneous time or billing records. She did not present affidavits from her restaurant employees or others for whom she claimed to have performed legal work. She did not show on her tax returns any income from law practice. Further, Braun did not hold herself out as a practicing lawyer from November 1991 to November 1996, did not maintain a separate law office, did not maintain professional malpractice insurance, and did not attend formal continuing legal education classes. These facts are inconsistent with one being actively and substantially engaged in the practice of law. Testimony that is contradictory, inconsistent, or inherently incredible is a sufficient basis upon which to deny admission on character grounds. *See In re Elkins*, 308 N.C. 317, 326, 302 S.E.2d 215, 220, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983). When these inconsistencies are coupled with her exaggerated claims for time spent as legal counsel to her business and for representing others while at the same time claiming to be opening and operating a new restaurant business with all that attends that endeavor, Braun's evidence becomes inherently incredible.

Braun further testified that she was not paid for her legal services but instead received an in-kind exchange of trade. However, as the Board found in its finding of fact 17, Braun failed to report on her tax returns the fair value of what she received in "barter" for her legal services, thus compounding her misrepresentations. This cavalier attitude regarding her taxes is a further factual basis for the Board's conclusion that Braun "failed to satisfy her burden of proving to the Board that she possesses the qualifications of character and general fitness requisite for an attorney and counselor of law and that she is of such good moral character as to be entitled to the high regard and confidence of the public."

As long as the Board does not act in an arbitrary, capricious, or erroneous manner, it has, as an instrument of the State, "wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law." *Golia-Paladin*, 344 N.C. at 152, 472 S.E.2d at 883 (quoting *In re Application of Griffiths*, 413 U.S. 717, 725, 37 L. Ed. 2d 910, 917 (1973). Nothing in the record indicates that the Board acted in an arbitrary, capricious, or erroneous manner. Rather, the whole record indicates that the Board did precisely what it is charged by law to do—protect the public of North Carolina from those unfit to practice law.

We conclude that the Petitioner Braun was afforded a careful consideration of her application and that there was substantial evidence to support the Board's findings of fact and conclusions. Accordingly, we affirm the order of the trial court, which affirmed the 1 December 1997 order of the Board of Law Examiners denying Braun's application.

AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL EARL SEXTON

No. 499A91-4

(Filed 13 July 2000)

1. Discovery— capital cases—postconviction motion for appropriate relief—retroactivity of discovery statute

Although defendant filed his motion for postconviction discovery of prosecutorial and law enforcement investigative files pursuant to N.C.G.S. § 15A-1415(f) over three years after his initial filing of a motion for appropriate relief, the trial court did not err in holding that defendant was retroactively entitled to discovery because on 21 June 1996, defendant's motion for appropriate relief, or at least a portion thereof, was pending before the trial court.

2. Discovery— capital cases—discovery of State's files—Attorney General's files not included

Although defendant is entitled to postconviction discovery of prosecutorial and law enforcement investigative files pursuant to N.C.G.S. § 15A-1415(f), the Attorney General's files are excluded from those discoverable files because: (1) N.C.G.S. § 15A-1415(f) limits the files available to defendants in a postconviction discovery phase to those that relate specifically to the investigation of the crimes committed or to the prosecution of defendant; (2) the district attorney is responsible for the prosecution of criminal cases on behalf of the State; (3) the Attorney General is not a "law enforcement" or "prosecutorial" agency, as specified in N.C.G.S. § 15A-1415(f) since its role in criminal cases is limited by law to defending the conviction during the appellate and capital post-

conviction stages of the case; and (4) the only possible exception, which is not present in this case, is when the Special Prosecutions Division of the Attorney General's office did, in fact, prosecute or participate in the actual prosecution, N.C.G.S. § 114-11.6.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 30 August 1999 by Stephens (Donald W.), J., in Superior Court, Wake County, granting defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 13 December 1999.

Michael F. Easley, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State-appellant.

Irving Joyner and Tracy Barley for defendant-appellee.

ORR, Justice.

The facts and procedural history relevant to this action are as follows. Defendant, Michael Earl Sexton, was tried capitally at the 9 September 1991 Criminal Session of Superior Court, Wake County, on charges of first-degree murder, first-degree rape, first-degree sexual offense, first-degree kidnapping, and common law robbery. The jury found defendant guilty of all charges. After a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. The trial court subsequently entered consecutive sentences of life imprisonment for the rape conviction, life imprisonment for the sexual offense conviction, forty years' imprisonment for the kidnapping conviction, and ten years' imprisonment for the robbery conviction. On appeal, this Court found no error, and the United States Supreme Court subsequently denied defendant's petition for writ of certiorari. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994).

In an order filed on 1 April 1996, the trial court stated the procedural history as follows:

> 6. On 15 September 1995, defendant filed a Motion for Appropriate Relief and Evidentiary Hearing, a Motion to Submit Physical Evidence for DNA Testing and a Motion to Appoint Psychological Expert.
>
> . . . .

8. On 2 October 1995, the State filed a Motion to Declare Attorney/Client Privilege Waived and to Provide Access to Defendant's Case Files, and a Motion for Partial Summary Judgment.

9. On 21 December 1995, [the trial court heard] defendant's Motion to Submit Physical Evidence for DNA Testing, and his Motion to Appoint Psychological Expert, and . . . the State's Motion to Declare Attorney/Client Privilege Waived and its Motion for Partial Summary Judgment. That same day in open court, [the trial court] denied defendant's Motions and allowed the State's Motions.

10. On 9 January 1996, defendant filed an Amended Motion for Appropriate Relief and Evidentiary Hearing.

11. On 22 February 1996, [the trial court] entered a written Order denying defendant's Motion to Submit Physical Evidence for DNA Testing and his Motion to Appoint Psychological Expert, and allowed the State's Motion to Declare Attorney/Client Privilege Waived and its Motion for Partial Summary Judgment.

. . . .

13. On 6 March 1996, the State filed its Answer to Defendant's Motion for Appropriate Relief and Evidentiary Hearing.

14. On 11 April 1996, the State filed a Motion for Partial Denial of Defendant's MAR on the Pleadings . . . .

The trial court, after making findings of fact, made the following conclusions of law:

1. Claims IIB, IIC, IIE and V (5) of defendant's Amended Motion for Appropriate Relief and Evidentiary Hearing are DENIED.

2. The State's Motion for Partial Denial of defendant's MAR on the Pleadings is ALLOWED.

3. Claims IIA, IID, IIID and IV (4) only of defendant's Amended Motion for Appropriate Relief and Evidentiary Hearing remain for resolution at an evidentiary hearing.

4. Defendant is barred from raising any issue in any subsequent Motion for Appropriate Relief that he was in a position to raise in the present Amended Motion for Appropriate Relief but failed to do so.

Defendant petitioned this Court for writ of certiorari on 16 May 1996 seeking review of the denied claims. This Court denied that petition on 12 June 1996. On 15 October 1996, the trial court resolved the remaining claims against defendant.

This matter arises out of defendant's motion for postconviction discovery filed in Superior Court, Wake County, on 8 December 1998, seeking prosecutorial and law enforcement investigative files. On 30 August 1999, the trial court entered an order finding, *inter alia*, that on the date of the enactment of N.C.G.S § 15A-1415(f), 21 June 1996, a portion of defendant's motion for appropriate relief was still pending. Thus, the trial court concluded that, in accordance with *State v. Green*, 350 N.C. 400, 514 S.E.2d 724, *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 840 (1999), and *State v. Basden*, 350 N.C. 579, 515 S.E.2d 220 (1999), defendant was entitled to postconviction discovery. On 1 September 1999, the State filed a motion for reconsideration of defendant's entitlement to postconviction discovery in light of *State v. Keel*, 350 N.C. 824, —— S.E.2d —— (1999), to which defendant responded on 10 September 1999. The trial court denied the State's motion on 14 September 1999, concluding that its previous ruling was correct under the mandate of *Green* and *Basden* and that it had "no authority to rule otherwise." Following the entry of the trial court's order allowing discovery, defendant notified the State that he also wanted to review the Attorney General's files. The State then petitioned this Court for writ of certiorari which was allowed on 28 September 1999.

The issue for review is whether the trial court properly granted defendant's motion for postconviction discovery under N.C.G.S. § 15A-1415(f) and, if so, what that postconviction discovery right entails. The State argues that the trial court erred in granting defendant's motion for postconviction discovery in that defendant waited too long to file his motion for appropriate relief and thus waived his right to postconviction discovery, and even if defendant is entitled to discovery, the Attorney General's files are not subject to postconviction discovery.

[1] The State first argues that defendant, by filing his motion for discovery pursuant to N.C.G.S. § 15A-1415(f) over three years after his

initial filing of a motion for appropriate relief, waived his rights to discovery. Based upon our recent decision in *State v. Williams*, 351 N.C. 465, 526 S.E.2d 655 (2000), we disagree.

The legislature adopted N.C.G.S. § 15A-1415(f) effective 21 June 1996. This statute grants broad discovery rights to capital defendants whose cases are in postconviction review. The text of N.C.G.S. § 15A-1415(f) is as follows:

> 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. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

N.C.G.S. § 15A-1415(f) (1999).

In *State v. Williams*, we held that "[b]ecause the purpose of [N.C.G.S. § 15A-1415(f)] is to assist capital defendants in investigating, preparing, or presenting all potential claims in a single [motion for appropriate relief], it logically follows that any requests for postconviction discovery must necessarily be made within the same time period statutorily prescribed for filing the underlying [motion for appropriate relief]." *Williams*, 351 N.C. at 468, 526 S.E.2d at 656. The time frame set forth for the underlying motion for appropriate relief requires that such a motion be filed within 120 days of the triggering occurrence as defined under N.C.G.S. § 15A-1415(a). *Id.*

Williams allows for one exception to this rule, which applies to those defendants who are retroactively entitled to postconviction discovery based on the decision in *Green*. The *Green* decision entitles defendants to postconviction discovery if their motions for appropriate relief had been allowed before or were still pending on 21

June 1996, the date that N.C.G.S. § 15A-1415(f) became effective. "Pending," as defined by our Court in *Green*, "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." *Green*, 350 N.C. at 406, 514 S.E.2d at 728. In *Williams*, we held that the 120-day deadline for filing motions of discovery under N.C.G.S. § 15A-1415(f) would commence 29 June 1999, the day that our *Green* opinion was certified, essentially adding the *Green* decision as a triggering event. *Williams*, 351 N.C. 465, 526 S.E.2d 655.

In the instant case, defendant filed his motion for appropriate relief on 15 September 1995. After the trial court denied portions of that motion for appropriate relief on 21 December 1995, defendant filed an amended motion for appropriate relief. In an order dated 1 April 1996, the trial court denied defendant's motion as to all but four claims, which were formally denied on 15 October 1996. Therefore, on 21 June 1996, the motion for appropriate relief, or at least a portion thereof, was pending before the trial court. Because the motion for appropriate relief was still pending, as pending is defined in the *Green* test, N.C.G.S. § 15A-1415(f) must be applied retroactively in this instance. Therefore, we hold that the trial court correctly ruled that defendant is entitled to postconviction discovery under N.C.G.S. § 15A-1415(f).

[2] The second question that the State argues relates to whether the Attorney General's files fall within the purview of N.C.G.S. § 15A-1415(f). The State contends that the Attorney General is not a "law enforcement" or "prosecutorial" agency, as specified in N.C.G.S. § 15A-1415(f), but rather that its role in criminal cases is limited by law to defending the conviction during the appellate and capital postconviction stages of the case except in limited exceptions that are not present here. We agree.

Our Constitution dictates that the Attorney General's duties are those "prescribed by law." N.C. Const. art. III, § 7(2). In cases such as the case *sub judice*, the Attorney General is subsequently limited by law to defending the conviction during the appellate and, when applicable, the capital postconviction portions of the case. *See* N.C.G.S. § 114-2(1) (1999). N.C.G.S. § 15A-1415(f) limits the files available to defendants in a postconviction discovery phase to those

that relate specifically to the investigation of the crimes committed or to the prosecution of the defendant. N.C.G.S. § 15A-1415(f). It is the district attorney who is "responsible for the prosecution of criminal cases 'on behalf of the State.' " *State v. Bates*, 348 N.C. 29, 38, 497 S.E.2d 276, 281 (1998) (quoting N.C. Const. art. IV, § 18). Accordingly, it is the district attorney who shall "be responsible for the *prosecution* on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe." N.C. Const. art. IV, § 18 (emphasis added).

"The Attorney General has no voice in the preparation of the record on appeal but must take it as he finds it." *State v. Hickman*, 2 N.C. App. 627, 630, 163 S.E.2d 632, 633 (1968). Because the Attorney General does not generally "prosecute" but instead only defends the State's conviction when on appeal, we conclude that the Attorney General's files do not fall within the purview of N.C.G.S. § 15A-1415(f). Therefore, defendant is not generally entitled to access to such files in postconviction discovery by way of N.C.G.S. § 15A-1415(f). The possible exception to this rule would exist when the Special Prosecutions Division of the Attorney General's office did, in fact, prosecute or participate in the actual prosecution. This occurs only when attorneys assigned to that division are "requested to [assist in the prosecution] by a district attorney and the Attorney General approves." N.C.G.S. § 114-11.6 (1999). This, however, is not the circumstance in the present case.

For the reasons stated herein, the order of the superior court to grant defendant postconviction discovery rights under N.C.G.S. § 15A-1415(f) is affirmed, but files belonging to the Attorney General's office are excluded from those discoverable files.

AFFIRMED.

SARAH JOAN WATSON v. BOBBY DIXON AND DUKE UNIVERSITY

No. 103A99

(Filed 13 July 2000)

Damages and Remedies— punitive damages—vicarious liability—ratification—employer liability in excess of employee's

In a case where plaintiff sued a co-employee and their employer for the co-employee's intimidation and harassment of plaintiff in the workplace, the Court of Appeals did not err by concluding that punitive damage liability of an employer under a theory of vicarious liability, such as ratification, can exceed the punitive damage liability of the employee because: (1) unlike compensatory damages, punitive damages are not necessarily intended to restore plaintiff to her original condition or to make plaintiff whole; and (2) limiting an employer's punitive damages to the amount assessed against the employee whose tortious conduct the employer ratified would chill the deterrent and penal effects of punitive damages on the employer.

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. 329, 511 S.E.2d 37 (1999), affirming after rehearing its earlier unanimous opinion, 130 N.C. App. 47, 502 S.E.2d 15 (1998), in which it affirmed in part and reversed and remanded in part an order entered 15 November 1996 by Stanback, J., in Superior Court, Durham County. Heard in the Supreme Court 13 March 2000.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher and William S. Mills, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak and Stewart, P.C., by Guy F. Driver, Jr., and Robert A. Sar, for defendant-appellant Duke University.

FRYE, Chief Justice.

The sole issue in this case is whether the Court of Appeals erred by concluding that the punitive damage liability of an employer under a theory of vicarious liability, such as ratification, can exceed the punitive damage liability of the employee. For the reasons stated

herein, we conclude that the Court of Appeals did not err, and we affirm its decision.[1]

Since the issue in this case is not fact-laden and presents only a question of law, only a brief recitation of the facts is necessary. Sarah Watson (plaintiff) and defendant Bobby Dixon (Dixon) were employed by defendant Duke University (Duke). Plaintiff and Dixon were co-employees in the sterile processing department of the Duke University Medical Center. Shortly after plaintiff began working at Duke in July 1991, Dixon engaged in a seven- to eight-month campaign of intimidation and harassment against plaintiff. Stripped of the graphic details, Dixon's conduct consisted of extremely inappropriate comments to plaintiff and offensive touching of plaintiff in the workplace. On the several occasions when Dixon harassed or intimidated plaintiff, plaintiff reported Dixon's conduct to various Duke officials; however, Duke took no serious action until after March 1992, when management finally transferred plaintiff to another department. As a result of Dixon's conduct, plaintiff suffered a variety of ailments including crying spells, vomiting, headaches, nightmares, and insomnia. Plaintiff was also later diagnosed with depression and post-traumatic stress disorder.

On 22 October 1992, plaintiff initiated the underlying action against defendants. In her complaint, plaintiff asserted claims for intentional infliction of emotional distress; negligent infliction of emotional distress, including claims of Duke's negligent hiring and retention of Dixon; and assault. Defendants answered the complaint, denying all pertinent allegations and asserting various defenses. Defendants subsequently filed motions to dismiss and for summary judgment. On 18 July 1995, the trial court granted Duke's motions to dismiss on plaintiff's claims for assault and negligent hiring and dismissed the negligent infliction of emotional distress claims against both defendants.

The remaining claims of intentional infliction of emotional distress and negligent retention of employee against Duke and the remaining claims of assault and intentional infliction of emotional distress against Dixon were tried before a jury at the 23 September 1996 Civil Session of Superior Court. At the close of the presentation of evidence from both sides, the jury answered the issues submitted by the trial court as follows:

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1. Since chapter 1D of the North Carolina General Statutes, pertaining to punitive damages, was enacted after the lawsuit in this case was initiated, it does not apply.

(1) Did the defendant, Bobby Dixon, assault the plaintiff, Sarah JoAn Watson?

Answer: no

(2) Did the defendant, Bobby Dixon, commit a battery upon the plaintiff, Sarah JoAn Watson?

Answer: yes

. . . .

(3) What amount is the plaintiff, Sarah JoAn Watson, entitled to recover for her personal injury as a result of the assault and/or battery committed by the defendant, Bobby Dixon?

Answer: $100

(4) Did the defendant, Bobby Dixon, intentionally cause severe emotional distress to the plaintiff?

Answer: yes

. . . .

(5) Did the defendant, Duke University, by its actions, ratify the actions of the defendant, Bobby Dixon, that you found intentionally caused severe emotional distress to the plaintiff, Sarah JoAn Watson?

Answer: yes

. . . .

(6) What amount is the plaintiff, Sarah JoAn Watson, entitled to recover for her personal injury as a result of the intentional infliction of emotional distress?

Answer: $100,000

. . . .

(7) What amount of punitive damages, if any, does the jury, in its discretion[,] award to the plaintiff as a result of the intentional infliction of emotional distress from the defendant, Bobby Dixon?

Answer: $5000

. . . .

(8) What amount of punitive damages, if any, does the jury, in its discretion[,] award to the plaintiff as a result of the intentional infliction of emotional distress from the defendant, Duke University?

Answer: $500,000

. . . .

(9) Was the plaintiff injured as a proximate result of the defendant Duke University's negligence in retaining the defendant Bobby Dixon as its employee?

Answer: no

On 21 October 1996, the trial court entered its judgment incorporating the jury's findings; adding interest; and taxing defendants for expert witness fees, deposition expenses, and court costs. On 28 October 1996, defendants filed a motion for judgment notwithstanding the verdict, a new trial, or a remittitur as to damages, which the trial court denied on 15 November 1996. Both defendants appealed the trial court's denial of this motion to the Court of Appeals.

On appeal, the Court of Appeals concluded that "the trial court properly entered judgment on plaintiff's claims against Dixon for intentional infliction of emotional distress and against Duke for ratification." *Watson v. Dixon*, 130 N.C. App. 47, 56, 502 S.E.2d 15, 22 (1998). However, the Court of Appeals reversed the judgment of the trial court as to the punitive damages award and remanded the case for a determination of the punitive damages to be awarded against both defendants. *See id.* All parties petitioned for a rehearing, which the Court of Appeals allowed without additional briefing or arguments.

Upon rehearing, a majority of the Court of Appeals panel affirmed the trial court's judgment awarding punitive damages and stated that it could not "say that as a matter of law the punitive damage awards against Dixon for $5,000 and Duke for $500,000 was [sic] an abuse of discretion." *Watson v. Dixon*, 132 N.C. App. 329, 334, 511 S.E.2d 37, 41 (1999). Judge McGee concurred in part and dissented in part, concluding that "the liability of the employer under a theory of vicarious liability, such as *respondeat superior* or ratification, cannot be in excess of that of the employee." *Id.* at 335, 511 S.E.2d at 41 (McGee, J., dissenting in part).

The propriety and sufficiency of the evidence to support punitive damages is not at issue in this case since all three judges on the Court of Appeals panel agreed that there was direct evidence to support punitive damages against both Dixon and Duke. *Id.* at 334, 511 S.E.2d at 41; *id.* at 335, 511 S.E.2d at 41 (McGee, J., concurring in part). Our review here is limited to the resolution of defendant Duke's contention, based on Judge McGee's dissenting opinion, that the punitive damage liability of an employer under a theory of vicarious liability, such as ratification, cannot exceed the punitive damage liability of the employee. For the reasons below, we disagree with defendant's contention.

This case appears to present an issue of first impression for this Court. In support of its position, defendant relies on *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E.2d 366 (1942), and its progeny. *See also MacFarlane v. N.C. Wildlife Resources Comm'n*, 244 N.C. 385, 93 S.E.2d 557 (1956), *overruled in part on other grounds by Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 192 S.E.2d 273 (1972). These cases addressed compensatory damages and not punitive damages. Compensatory damages serve a purpose different from that of punitive damages. The objective of compensatory damages is to restore the plaintiff to his original condition or to make the plaintiff whole. *See Bowen v. Fidelity Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936) ("[C]ompensatory damages are allowed as indemnity to the person who suffers loss in satisfaction and recompense for the loss sustained. The purpose of the law is to place the party as near as may be in the condition which he would have occupied had he not suffered the injury complained of."). Thus, it is axiomatic that an employer's liability for compensatory damages based on ratification of the employee's tortious conduct may not exceed the employee's liability for that conduct. The plaintiff, who has been injured by the tortious conduct of the employee, is not entitled to additional compensation solely because of the ratification by the employer. Stated differently, the amount of damages required to restore the plaintiff to his original condition or to make the plaintiff whole is the same, notwithstanding ratification by the employer. *See Pinnix*, 221 N.C. at 351, 20 S.E.2d at 369 ("The plaintiff can have but one satisfaction—payment of the damages caused by the wrongful act of [the employee].").

Punitive damages, on the other hand, are not necessarily intended to restore the plaintiff to his original condition or to make the plaintiff whole. In *Oestreicher v. American Nat'l Stores*,

Inc., this Court noted the standard applied to the imposition of punitive damages:

> It is generally held that punitive damages are those damages which are given in addition to compensatory damages because of the "wanton, reckless, malicious, or oppressive character of the acts complained of." 22 Am. Jur. 2d, Damages § 236 (1965). Such damages generally go beyond compensatory damages, and they are usually allowed to punish defendant and deter others. It is generally held that punitive damages are recovered not as a matter of right, but only in the discretion of the jury. As a rule you cannot have a cause of action for punitive damages by itself. If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award.

Oestreicher, 290 N.C. 118, 134, 225 S.E.2d 797, 807-08 (1976) (citations omitted); *see also Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976) (explaining punitive damages); *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 452 S.E.2d 233 (1994) (explaining punitive damages). Since punitive damages and compensatory damages serve different purposes, defendant's reliance on cases dealing with compensatory damages is misplaced.

This Court has also stated that "it is well established that evidence as to the financial worth of a defendant is competent for consideration by the jury when an issue as to punitive damages is warranted and submitted." *Hinson v. Dawson*, 244 N.C. 23, 29, 92 S.E.2d 393, 397 (1956); *see also Harvel's, Inc. v. Eggleston*, 268 N.C. 388, 392, 150 S.E.2d 786, 790 (1966) ("[T]he admission of evidence tending to establish [financial] ability is held to be prejudicial, except in cases warranting an award of punitive damages.").

Limiting an employer's punitive damages to the amount assessed against the employee whose tortious conduct the employer ratified would chill the deterrent and penal effects of punitive damages on the employer. It may take a different amount of money to deter or punish an employer-defendant like Duke than it would to deter or punish an employee-defendant like Dixon. An employer who has ratified an employee's tortious conduct should not be allowed to use its employee's limited financial resources as a shield against additional punitive damages.

We reach our decision here by harmonizing our case law with the policies underlying punitive damages. Further, we note that other courts have reached similar results. *See, e.g., Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1154-55, 74 Cal. Rptr. 2d 510, 526-27 (1998) (" '[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort . . . .' "); *O'Donnell v. K-Mart Corp.*, 100 A.D.2d 488, 490, 474 N.Y.S.2d 344, 346-47 (1984) (allowing an award of punitive damages against a corporate employer to stand in the absence of an award of punitive damages against the employee where the corporate employer ratified the employee's malicious acts and where the court's charge permitted such an award).

We conclude that the liability of an employer for punitive damages based on ratification is not limited to the punitive damage liability of the employee whose conduct the employer ratified. Thus, we affirm the decision of the Court of Appeals.

AFFIRMED.

IN THE MATTER OF: CAROLYN A. GORDON, APPLICANT TO TAKE THE FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

No. 20A00

(Filed 13 July 2000)

1. Attorneys— Bar applicant—findings of Board—substantial evidence

Although the North Carolina Board of Law Examiners' findings that petitioner committed three specific acts of misconduct while licensed in California arguably conflict with her statements at the hearing and with factual findings in the Agreement in Lieu of Discipline (ALD) she entered into pursuant to the California Code, the whole record test reveals the trial court did not err in upholding the Board's decision to deny petitioner's application for admission to the February 1998 North Carolina Bar Exam because: (1) the Board may elect to reject in whole or in part the statements made by any witness at the hearing; (2) the ALD contained petitioner's unequivocal admission that she willfully violated three Rules of Professional Conduct, which standing alone

is sufficient to constitute substantial evidence in support of the Board's findings of fact and conclusions of law; and (3) petitioner's testimony before the Board and the unequivocal ALD admission also constitute substantial evidence that she committed other alleged acts of misconduct.

2. Attorneys— Bar applicant—character—burden of proof on applicant

The North Carolina Board of Law Examiners did not err in concluding that petitioner failed to carry her burden of establishing that she possessed the requisite qualifications of character and general fitness for an attorney and counselor-at-law, based on her prior acts of misconduct while licensed in California, because: (1) petitioner admitted violating three ethical rules when she executed an Agreement in Lieu of Discipline (ALD) in California, and her testimony revealed she was aware that by signing the document she was bound by her admission; (2) when questioned regarding the acts of misconduct, petitioner continued to maintain her innocence notwithstanding her unambiguous admission in the ALD; and (3) there is substantial evidence in the record to support the Board's determination that petitioner committed the three acts of misconduct.

Appeal of right pursuant to section .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina from an order of LaBarre, J., filed 16 December 1999 in Superior Court, Wake County, affirming the 29 October 1998 order of the Board of Law Examiners denying petitioner's application to take the February 1998 North Carolina Bar Examination. Heard in the Supreme Court 15 May 2000.

Harry H. Harkins, Jr., for petitioner-appellant.

Michael F. Easley, Attorney General, by Robert O. Crawford, III, Special Deputy Attorney General, for respondent-appellee North Carolina Board of Law Examiners.

MARTIN, Justice.

Carolyn A. Gordon (petitioner) graduated from Southwestern University School of Law in May 1990 and gained admittance to the California State Bar (California Bar) in June 1991. From June 1994 until April 1997, petitioner worked as in-house general counsel for Alliance Affiliated Companies (Alliance), a group of closely held com-

panies which provided, among other things, estate-planning and insurance services. Through direct mail, referrals, and telemarketing, Alliance offered packages of estate-planning documents to customers for a flat fee. As part of Alliance's marketing approach, a sales representative visited the customer's home to obtain information necessary to execute legal documents.

In 1995 the California Bar received a complaint alleging that petitioner had violated various provisions of the California Business and Professions Code (California Code) and the California Rules of Professional Conduct (California Rules). The California Bar reviewed these allegations and determined that there were insufficient grounds for disciplinary action.

In July 1996 petitioner, along with her employer, Alliance, its principals, and other in-house counsel, was named as a defendant in a civil suit. The plaintiffs were the People of the State of California and the California Bar. The plaintiffs alleged that petitioner and the other defendants had engaged in misleading statements, unfair competition, and the unauthorized practice of law with respect to the marketing and preparation of living trusts. These alleged violations implicated various provisions of the California Rules and the California Code. In April 1997 petitioner entered into a settlement agreement and was dismissed from the lawsuit. The settlement agreement prevented her from suing the plaintiffs and provided that her actions were still subject to review by the California Bar.

On 27 June 1997 petitioner entered into an "Agreement in Lieu of Discipline" (ALD) pursuant to the California Code. Petitioner acknowledged within the ALD that she violated California Rules 1-300(A), 3-110(A), and 3-310. The ALD contained both stipulated facts and an ultimate conclusion of law that petitioner had violated three specific rules of professional conduct. The ALD required petitioner, during a two-year period, to (1) report periodically to the probation unit of the California Bar, (2) complete continuing legal education in legal ethics, (3) complete the State Bar Ethics School, and (4) refrain from specified acts. As required, petitioner reported periodically and attended the ethics school. Furthermore, she resigned from her employment with Alliance.

In August 1997 petitioner moved to North Carolina. On 3 November 1997 she applied to the North Carolina Board of Law Examiners (Board) to take the February 1998 North Carolina bar examination (exam). Petitioner was permitted to take the exam with

the results sealed, pending a determination by the Board as to her character and fitness.

On 14 October 1998 petitioner appeared before the Board to present evidence supporting her qualifications of character and general fitness to practice law in North Carolina. On 29 October 1998 the Board denied her application for admission to the exam. In its order, the Board waived the general waiting period of section .0605 of the Rules Governing Admission to the Practice of Law in the State of North Carolina (Admission Rules) and provided that petitioner would be eligible to take the exam once her two-year probation period in California terminated. Petitioner appealed the Board's decision to the Superior Court, Wake County.

On 16 December 1999 the trial court filed its order affirming the Board's order, concluding that the Board's findings of fact and conclusions of law were supported by competent evidence in the record.

[1] On appeal to this Court, petitioner contends the Board erroneously found that she had committed three acts of misconduct and that the trial court thus erred in affirming the Board's order. Specifically, petitioner argues that the Board's findings are contradicted by the ALD and her testimony before the Board.

This Court employs the whole record test when reviewing decisions of the Board. *See In re Golia-Paladin*, 344 N.C. 142, 149, 472 S.E.2d 878, 881 (1996), *cert. denied*, 519 U.S. 1117, 136 L. Ed. 2d 847 (1997); *In re Legg*, 325 N.C. 658, 669, 386 S.E.2d 174, 180 (1989), *cert. denied*, 496 U.S. 906, 110 L. Ed. 2d 270 (1990); *In re Rogers*, 297 N.C. 48, 64-65, 253 S.E.2d 912, 922 (1979). Under this test there must be "substantial evidence" in support of the Board's findings of fact and conclusions of law. *See Golia-Paladin*, 344 N.C. at 149, 472 S.E.2d at 881; *Legg*, 325 N.C. at 669, 386 S.E.2d at 180; *In re Moore*, 308 N.C. 771, 779, 303 S.E.2d 810, 815-16 (1983). This Court has previously determined that "substantial evidence" is "relevant evidence which a reasonable mind . . . could accept as adequate to support a conclusion." *Golia-Paladin*, 344 N.C. at 149, 472 S.E.2d at 881; *see In re Legg*, 337 N.C. 628, 636, 447 S.E.2d 353, 357 (1994); *Moore*, 308 N.C. at 779, 303 S.E.2d at 815-16. "Under the 'whole record' test we must review all the evidence, that which supports as well as that which detracts from the Board's findings . . . ." *Moore*, 308 N.C. at 779, 303 S.E.2d at 815-16, *quoted in Legg*, 337 N.C. at 636, 447 S.E.2d at 357. " 'It is the function of the Board to resolve factual disputes.' " *Moore*,

308 N.C. at 780, 303 S.E.2d at 816 (quoting *In re Elkins*, 308 N.C. 317, 321, 302 S.E.2d 215, 217, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983)). Furthermore, in hearings before the Board, "[t]he initial burden of showing good character rests with the applicant." *Legg*, 337 N.C. at 636, 447 S.E.2d at 357 (quoting *Legg*, 325 N.C. at 669, 386 S.E.2d at 180); *see Rogers*, 297 N.C. at 57, 253 S.E.2d at 918. Finally, the whole record test was not designed to allow this Court to replace the Board's judgment with its own when there are two reasonably conflicting views of the evidence. *See In re Elkins*, 308 N.C. 317, 321-22, 302 S.E.2d 215, 217-18, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983); *Rogers*, 297 N.C. at 65, 253 S.E.2d at 923.

In the instant case the Board found that petitioner had committed three specific acts of misconduct. Each of the three findings below, as found in the Board's order, correlate to a violation of the California Rules which petitioner admitted in her ALD:

> 20. . . . [petitioner] did willfully aid and abet the unlawful practice of law by delegating to non-lawyer sales representatives the authority to give legal advice and present estate planning information and documents to senior citizens.
>
> . . . .
>
> 22. . . . [petitioner] did willfully fail to competently perform services by not properly supervising subordinate staff personnel or monitoring their activities or properly reviewing their work product, resulting in the preparation of inadequate trust documents.
>
> . . . .
>
> 24. . . . [petitioner] did willfully fail to disclose to clients that a possible conflict of interest may exist with respect to the professional relationship which she had with the annuities underwriters.

In its order, the Board states that it based these findings on the legal conclusion found in the ALD and on petitioner's testimony before the Board. The ALD contained both findings of fact and an ultimate conclusion of law. The ALD included ten specific findings of fact which, by signing the ALD, petitioner acknowledged to be true. Under the conclusion of law, the ALD contained an unequivocal admission that petitioner had violated California Rules 1-300(A), 3-110(A), and 3-310.

Notwithstanding petitioner's execution of the ALD, in which she admitted wrongdoing, petitioner maintains that contradictory evidence before the Board renders its findings of fact erroneous. The Board, in its order, states that petitioner "did willfully fail to disclose to clients that a possible conflict of interest may exist with respect to the professional relationship which she had with the annuities underwriters." Petitioner notes, however, that the ALD provides that her "only client was . . . Alliance." Likewise, in her statements before the Board, petitioner continued to profess that Alliance was her only client.

Our review of the whole record reveals that, in her testimony before the Board, petitioner admitted that her employer, Alliance, was a group of closely held companies which included *both* an insurance company and an estate-planning company. Further, at the hearing, petitioner conceded that she reported directly to the owners of Alliance, who ultimately controlled both the insurance and the estate-planning entities. Likewise, she testified that a form letter in the packet of legal documents sold to consumers of the estate-planning unit had her signature affixed thereon and identified her as an "attorney at law." Finally, the ALD that petitioner signed contained a statement admitting violation of rule 3-310 of the California Rules, which specifically prohibits representation of adverse interests.

Nonetheless, we agree with petitioner that the Board's findings that she committed the specific acts of misconduct at issue arguably conflict with statements made by her at the hearing and with factual findings in the ALD. The Board, however, may elect to reject in whole or in part the statements made by any witness at the hearing. *See Legg*, 337 N.C. at 638, 447 S.E.2d at 358. Moreover, as stated above, the ALD contained the following unequivocal admission:

> The [petitioner] acknowledges that . . . she wilfully violated Rules of Professional Conduct, rule 1-300(A), 3-110(A) and 3-310.

This admission, standing alone, is sufficient to constitute "substantial evidence" in support of the Board's findings of fact and conclusions of law. Therefore, based on the whole record before us, there is "substantial evidence" to support the Board's findings of fact with regard to petitioner's conflict of interest. This same evidence—petitioner's testimony before the Board and the unequivocal ALD admission—also constitutes "substantial evidence" that petitioner committed the other alleged acts of misconduct.

[2] Petitioner next contends the Board erroneously found that she did not possess the requisite qualifications of character and general fitness to practice law in North Carolina. Petitioner argues that, even if this Court were to find that the Board's findings of fact and conclusions of law were supported by substantial evidence, nothing in the record warrants the Board's ultimate conclusion that she was unfit to practice law in North Carolina. Petitioner further argues that the California Bar was the appropriate agency to reprimand her for her alleged acts of misconduct, all of which took place in California. She also notes that she was not prohibited from practicing law in California.

Section .0601 of the Admission Rules in this State requires every applicant to prove that he or she possesses the requisite qualifications of good moral character and general fitness entitling one to the high regard and confidence of the public. The applicant has the burden of demonstrating to the Board that she possesses the requisite character. *See Legg*, 337 N.C. at 636, 447 S.E.2d at 357; *Elkins*, 308 N.C. at 321, 302 S.E.2d at 217. The Board has " 'wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law.' " *Golia-Paladin*, 344 N.C. at 152, 472 S.E.2d at 883 (quoting *In re Griffiths*, 413 U.S. 717, 725, 37 L. Ed. 2d 910, 917 (1973)).

When petitioner executed the ALD, she admitted violating three ethical rules. Furthermore, her testimony showed that she was aware that, by signing the document, she was bound by her admission. When questioned regarding the acts of misconduct, petitioner continued to maintain her innocence notwithstanding her unambiguous admission in the ALD. In any event, there is "substantial evidence" in the record to support the Board's determination that petitioner committed the three acts of misconduct. Therefore, the Board committed no error in its conclusion that petitioner failed to carry her burden of establishing that she possessed the requisite qualifications of character and general fitness for an attorney and counselor-at-law.

Accordingly, we affirm the order of the trial court.

AFFIRMED.

ADERHOLT v. A. M. CASTLE CO.

No. 277P00

Case below: 137 N.C.App. 718

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000.

ANDERSON v. DEMOLITION DYNAMICS, INC.

No. 126P00

Case below: 136 N.C.App. 603

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

CATERSON v. BRETAN

No. 255P00

Case below: 137 N.C.App. 772

Motion by plaintiff to withdraw petition for discretionary review allowed 21 June 2000.

GREENE v. FIRST BANK

No. 134P00

Case below: 136 N.C.App. 670

Motion by appellee to dismiss the appeal for lack of substantial constitutional question allowed 26 June 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 June 2000.

HIXSON v. KREBS

No. 46P00

Case below: 136 N.C.App. 183

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 June 2000.

KNIGHT PUBL'G CO. v. CHASE MANHATTAN BANK

No. 523A98-2

Case below: 137 N.C.App. 27

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 12 July 2000.

LEONHARDT v. CAROLINA FREIGHT CARRIERS CORP.

No. 201P00

Case below: 137 N.C.App. 384

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

McLAIN v. TACO BELL CORP.

No. 210P00

Case below: 137 N.C.App. 179

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 July 2000. Conditional petition by defendant (Taylor Foods, Inc.) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 13 July 2000.

ROYALS v. PIEDMONT ELECTRIC REPAIR CO.

No. 243P00

Case below: 137 N.C.App. 700

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. BASDEN

No. 159A93-4

Case below: 352 N.C. 150

Petition by defendant to rehear the decision of this Court denying his petition for a writ of certiorari pursuant to Rule 31 dismissed 12 July 2000.

STATE v. BLUE

No. 292P00

Case below: 138 N.C.App. 404

Motion by Attorney General for temporary stay allowed 10 July 2000 pending determination of the Attorney General's petition of discretionary review.

STATE v. CONNER

No. 219A91-3

Case below: Gates County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Gates County, denied 12 July 2000.

STATE v. COOPER

No. 289A00

Case below: 138 N.C.App. 495

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 6 July 2000.

STATE v. FARMER

No. 242P00

Case below: 138 N.C.App. 127

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. FIEDLER

No. 284P00

Case below: 138 N.C.App. 328

Motion by defendant for temporary stay allowed 27 June 2000.

STATE v. HOLDER

No. 238P00

Case below: 138 N.C.App. 89

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 July 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. HUSKEY

No. 220P00

Case below: 116 N.C.App. 736

Motion by defendant pro se for a writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000.

STATE v. INGRAM

No. 229P00

Case below: 137 N.C.App. 588

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. LOCKLEAR

No. 291P00

Case below: 138 N.C.App. 549

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000. Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 12 July 2000.

STATE v. LUCAS

No. 278P00

Case below: 138 N.C.App. 226

Motion by Attorney General for temporary stay allowed 26 June 2000 pending determination of the State's petition for discretionary review. Motion by defendant to expedite determination of the State's petitions for discretionary review and writ of supersedeas allowed 12 July 2000. Petition by Attorney General for writ of supersedeas allowed 12 July 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 12 July 2000. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 12 July 2000.

STATE v. MATTHEWS

No. 149P00

Case below: 136 N.C.App. 849

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 July 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. McGRAW

No. 251P00

Case below: 137 N.C.App. 726

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. McSWAIN

No. 225P00

Case below: 137 N.C.App. 588

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000.

STATE v. MELVIN

No. 148P00

Case below: 136 N.C.App. 849

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. PINKLETON

No. 260P00

Case below: 138 N.C.App. 168

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 12 July 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. SALTERS

No. 233P00

Case below: 137 N.C.App. 553

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000. Second petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000.

STATE v. SHIPP

No. 154P00

Case below: 136 N.C.App. 233

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000.

STATE v. SOUTHERN

No. 232P00

Case below: 137 N.C.App. 773

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 July 2000.

STATE v. TEW

No. 87PA00

Case below: 136 N.C.App. 669

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 12 July 2000 for the limited purpose of entering the following order: The conviction and judgment of the Superior Court, Alamance County, in case Number 98CRS4002, wherein defendant was convicted of attempted second degree murder, are vacated pursuant to this Court's 7 April 2000 decision in *State v. Coble*, 351 N.C. 448, 527 S.E.2d. 45 (2000).

STATE v. THOMAS

No. 91A95-4

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County, denied 12 July 2000.

STATE v. WASHINGTON

No. 507P98-2

Case below: 135 N.C.App. 386

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of appeals denied 12 July 2000.

TRACEY v. ESTATE OF TRACEY

No. 275P00

Case below: 138 N.C.App. 168

Motion by defendant for temporary stay denied 27 June 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2000.

VAN EVERY v. REID

No. 224PA00

Case below: 137 N.C.App. 589

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 12 July 2000 only as to issue number three which states: Whether the trial court erred in failing to include the financial contributions of J. Timothy Reid to the household expenses of Defendant-Appellee in its child support computations.

WATSON v. SMOKER

No. 241P00

Case below: 138 N.C.App. 158

Petition by plaintiff (Watson) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 July 2000.

WINTERS v. WINTERS

No. 228A00

Case below: 137 N.C.App. 589

Notice of appeal by plaintiff pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 12 July 2000. Motion by defendant (St.Augustine's) to dismiss appeal based on constitutional question dismissed as moot 12 July 2000. Motion by defendant (St.Augustine's) for sanctions denied 12 July 2000.

STATE v. GOLPHIN

[352 N.C. 364 (2000)]

STATE OF NORTH CAROLINA v. KEVIN SALVADOR GOLPHIN

STATE OF NORTH CAROLINA v. TILMON CHARLES GOLPHIN, JR.

No. 441A98

(Filed 25 August 2000)

1. Constitutional Law— right to be present at all stages—out-of-court discussions—special venire

The trial court did not violate defendants' right to be present at all stages of their capital trial when it ruled the jury would be drawn from a special venire from another county, even though defendants were not present during out-of-court meetings relating to change of venue or a special venire, because: (1) the meetings took place prior to commencement of defendants' trial; (2) defendants were present at the hearing on change of venue at which defendants stipulated to a special venire; and (3) both defendants agreed through counsel to the special venire.

2. Jury— special venire—another county

Although one defendant argues there was no filed court order changing venue for purposes of jury selection, the trial court did not abuse its discretion in a capital trial by ordering a special venire from another county for the limited purpose of jury selection because: (1) both defendants agreed through their counsel to the proposed change; (2) N.C.G.S. § 15A-957 does not apply since defendants never moved for a change of venue; and (3) N.C.G.S. § 15A-133 was not violated since the trial court had the inherent authority to order the change based on the nature and circumstances of the alleged crimes against two law enforcement officers, and defendants' acquiescence to the stipulation and proposal at the hearing.

3. Constitutional Law— right to fair cross-section—jury venire

The trial court did not violate defendants' right to have a jury selected from a representative cross-section of the community in which the crimes occurred, based on defendants' failure to establish a prima facie case of disproportionate representation, because: (1) defendants are not entitled to a special venire from the population of a county which exactly mirrors the population of the county in which the crimes were committed as long as the

venire was selected in a manner in which various interests were represented; (2) there is only a 14.3% absolute disparity in the representation of African-Americans between the county of the crimes and the special venire county, and this percentage standing alone is not unfair and unreasonable; and (3) the fact that the racial composition of the county of the crimes differs from that of the special venire county is not sufficient to show "systematic exclusion."

4. Homicide— first-degree murder—short-form indictment—sufficiency

The trial court did not err by denying one defendant's motion to dismiss the murder indictments and by holding the short-form indictments were sufficient to charge both defendants with first-degree murder.

5. Homicide— first-degree murder—indictment—aggravating circumstances

The trial court did not err in a capital trial by failing to require the State to disclose in its indictment the aggravating circumstances it intended to rely upon at sentencing, and by denying defendants' pretrial motions for disclosure of aggravating and mitigating circumstances, because: (1) an indictment does not need to set forth facts relevant only to the sentencing of an offender found guilty of the charged crime, since it is not an element of the offense; and (2) a trial court may not require the State to disclose which aggravating circumstances it intends to rely upon at the sentencing phase since N.C.G.S. § 15A-2000(e) provides sufficient notice of the aggravating circumstances.

6. Criminal Law— joinder—common scheme—same transaction

The trial court did not abuse its discretion in a capital trial by denying one defendant's pretrial motion to sever the cases and by overruling his objections to improper joinder, because: (1) the presence of antagonistic defenses standing alone does not warrant severance; (2) there was overwhelming evidence from several eyewitnesses concerning defendant's involvement in the crimes; (3) defendant signed a waiver regarding any objections to the redaction and/or admission of the statement of his non-testifying co-defendant, and defendant's attorney stated in open court that there was no objection to the introduction of the codefendant's statement as it relates to defendant; (4) defendant was not precluded from offering exculpatory evidence since he could

have subpoenaed witnesses to testify for him; and (5) the evidence supports consolidation of defendants' trials since the offenses arose out of a common scheme and were part of the same transaction. N.C.G.S. §§ 15A-926(b) and 15A-927(c).

7. Discovery— victims' personnel files—not discoverable

The trial court did not err in a capital trial by denying one defendant's pretrial motion for discovery of the two law enforcement victims' personnel files because: (1) defendant did not preserve his constitutional issue since it was not raised and determined by the trial court, N.C. R. App. P. 10(b)(1); and (2) the list of discoverable items in N.C.G.S. § 15A-903(d) does not include victims' personnel files, and the personnel files were not in the possession, custody, or control of the prosecutor in this case.

8. Constitutional Law— right to counsel—incriminating statements—booking exception

The trial court did not violate one defendant's rights in a capital trial by denying his pretrial motion to suppress the incriminating statements he made to law enforcement officers after his arrest, based on the police continuing the custodial interrogation of defendant after he invoked his right to counsel, because: (1) a motion in limine was not sufficient to preserve this issue since defendant did not object when it was offered at trial; (2) defendant did not argue plain error in his brief, N.C. R. App. P. 10(c)(4); (3) the questions asked by the police were included in the booking exception for eliciting biographical information; (4) it is unreasonable to conclude the S.B.I. agent should have known his questions concerning biographical information were reasonably likely to elicit an incriminating response; and (5) defendant initiated the further discussion when he asked the agent and detective why they wanted to talk about the incident when it had been videotaped.

9. Constitutional Law— right to counsel—incriminating statements—no standing

The trial court did not violate defendant's rights in a capital trial by denying his codefendant's pretrial motion to suppress the incriminating statements the codefendant made to law enforcement officers after his arrest because: (1) defendant has no standing to assert his codefendant's constitutional right to counsel; (2) defendant did not make a motion in limine to suppress his co-

defendant's statement, nor did he object at the time the statement was offered into evidence at trial, N.C. R. App. P. 10(b)(1); and (3) defendant did not argue plain error, N.C. R. App. P. 10(c)(4).

10. Jury— capital trial—selection—use of panels

The trial court did not violate its duty to ensure jury selection was conducted in a random manner when it used panels because: (1) defendants failed to object on constitutional grounds, thus waiving review of any constitutional issues; (2) defendants failed to comply with N.C.G.S. § 15A-1211(c) to challenge the panels; (3) even if the trial court violated N.C.G.S. § 15A-1214(a), defendants cannot show prejudicial error in light of the fact that neither defendant objected when the trial court informed both defendants of how the prospective jurors were to be placed into panels; and (4) neither defendants nor the State exhausted their peremptory challenges, evidencing satisfaction with the jury which was empaneled.

11. Constitutional Law— right to be present at every stage—administrative matters

The trial court did not violate defendants' right to be present at every stage of their capital trial by directing the clerk of court to meet privately with jurors about transportation and logistical matters because: (1) the right to be present is not violated when a clerk communicates with a jury about administrative matters, and defendants failed to show their presence would have had a reasonably substantial relation to their opportunity to defend; (2) the trial court's failure to give an additional instruction shows there was no concern that the jurors were asking the clerk inappropriate questions; (3) nothing in the record suggests that anything other than logistics were discussed; and (4) the fact that defendants failed to object allows the assumption that the clerk engaged only in the administrative duties assigned.

12. Jury— challenge for cause—unable to render fair and impartial verdict

The trial court did not abuse its discretion in a capital trial by excusing for cause a prospective juror based on the theory that she was unable to render a fair and impartial verdict as required by N.C.G.S. § 15A-1212(9) because: (1) the prospective juror became emotional and stated she had substantial doubt about her impartiality after being questioned by one defendant's counsel; (2) one defendant did not request an opportunity to ask addi-

tional questions of the prospective juror as required by N.C. R. App. P. 10(b)(1) in order to preserve this question for appeal; and (3) there was no showing that further questioning by the codefendant's counsel would have produced different answers.

13. Jury— excusal—service on federal jury within two years

The trial court did not violate one defendant's rights by excusing a prospective juror under N.C.G.S. § 9-3 on the basis that she had previously served on a federal jury within two years and was not immediately qualified to serve in the instant case, because: (1) defendant suggested that the trial court excuse her from service and cannot now complain that his constitutional rights have been violated; (2) defendant did not raise any constitutional issue below, and therefore, has failed to preserve this question for appellate review; and (3) the trial court could not have moved the prospective juror to a later panel and then have her sworn in at the time she was called, which would have been two years after her prior jury service, since N.C.G.S. § 9-14 mandates that prospective jurors be sworn in at the beginning of court.

14. Jury— peremptory challenges—not racially discriminatory manner

The trial court did not err in a capital trial by allowing the State to exercise peremptory challenges for two African-American prospective jurors because: (1) the articulated reasons that one juror was relatively young and close to the age range of the defendants, and that she had a sibling approximately the age range of defendants, constitutes an articulable race neutral reason; (2) the articulated reasons that the other juror had a criminal record specifically involving an interaction with an officer and the potential empathy that might be engendered, and the fact that the juror's father was incarcerated for six years, are race neutral reasons; (3) the State did accept an African-American juror; and (4) the State made no comments which would support an inference of discrimination.

15. Evidence— demonstration—pepper spray

The trial court did not unfairly prejudice one defendant's defense in a capital trial by allowing the State during its presentation of rebuttal evidence to demonstrate the effects of pepper spray because: (1) the demonstration was relevant under N.C.G.S. § 8C-1, Rule 401 since defendant made the effects of

pepper spray an issue in the case, and the probative value was not substantially outweighed by the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403; (2) the use of law enforcement officers during the presentation did not prejudice defendant since he was also given an opportunity to present witnesses to be sprayed and then to testify, but decided not to do so; and (3) the trial court allowed both sides to cross-examine each person as to their potential bias.

16. Appeal and Error— preservation of issues—constitutional issue—failure to raise in a motion or in trial court

The trial court did not violate one defendant's Confrontation Clause rights in a capital trial by admitting evidence of a police report regarding seizure of that defendant's luggage by the police a week prior to the murders because: (1) defendant did not raise any constitutional issue in his motion in limine requesting a hearing on the admissibility of evidence; and (2) defendant did not preserve his argument since he did not raise this constitutional issue at the trial court.

17. Evidence— hearsay—police report—not truth of matter asserted—subsequent actions

The trial court did not err in a capital trial by admitting evidence of a police robbery report regarding seizure of one defendant's luggage by the police a week prior to the murders because: (1) the report was relevant since the statements made to the officer were vital to the identification of defendants as the suspects in the armed robbery; (2) the report does not indicate the Fayetteville police actually discovered drugs in the luggage; and (3) the report was admissible for nonhearsay purposes to help explain the subsequent actions taken by the officer in traveling to the home of defendants' grandparents, which in turn furthered the investigation of the case.

18. Evidence— prior crimes or acts—motive

The trial court did not violate one defendant's rights by admitting his grandfather's testimony, offered by his codefendant, concerning the seizure of defendant's luggage by the police at a bus station a week prior to the murders because: (1) defendant did not preserve any constitutional argument since he did not raise it at the trial court; (2) the testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) to prove defendant's motive for not wanting to return by bus, and for his future actions; and (3) the

jury could infer that defendant did not wish to take the bus because it would stop in the city where his luggage had been seized by police.

19. Confessions and Incriminating Statements— redacted statement of codefendant

The trial court did not violate one defendant's constitutional rights by admitting his nontestifying codefendant's redacted statement that there was a plan to rob a Food Lion and that the codefendant shot the two officers when he saw them attempting to spray defendant with mace, because: (1) the codefendant's statement to another inmate was not "powerfully incriminating" toward defendant; (2) the trial court repeatedly cautioned the jury to consider the evidence against each defendant separately; and (3) the codefendant's statement to another inmate did not clearly make reference to defendant in relation to the plan, nor did it create a substantial risk that the jury would ignore the trial court's instructions in its determination of defendant's guilt.

20. Confessions and Incriminating Statements— right to silence—equivocal

The trial court did not commit plain error in a capital trial by admitting into evidence a portion of one defendant's statement to police after defendant's alleged invocation of his right to silence because defendant's statement, that he did not want to say anything about the jeep and that he did not know who it was or he would have told the officers, did not constitute an unequivocal request to remain silent.

21. Criminal Law— prosecutor's argument—displaying rifle in direction of juror

The trial court did not err in a capital trial by failing to intervene ex mero motu during the State's closing argument when the prosecutor displayed a rifle in the direction of a juror because: (1) the prosecutor did not use the rifle to attempt to draw inferences from the weapon which were not supported by the evidence; (2) the juror was not frightened or intimidated by the prosecutor's actions; (3) the prosecutor was merely explaining one defendant's actions according to what witnesses observed; and (4) defendants were not prejudiced and were not prevented from receiving a fair trial in light of the overwhelming evidence.

22. Criminal Law— prosecutor's argument—defendant's statements as lies

The trial court did not err in a capital trial by overruling one defendant's objection to the portion of the State's closing argument where the prosecutor referred to parts of the nontestifying defendant's statement as lies because: (1) the prosecutor was showing the jury instances where defendant had not been truthful while giving his statement to law enforcement officers; and (2) the prosecutor was pointing out exculpatory statements or omissions to show how the facts differed from defendant's statement.

23. Criminal Law— acting in concert—propriety of instruction

The trial court did not err in a capital trial by giving acting in concert instructions based on the possession of a stolen vehicle for the first-degree murder and robbery with a dangerous weapon charges because the trial court's instructions were given consistent with the pattern jury instructions and comported in all respects with previous case law.

24. Homicide; Robbery— first-degree murder—armed robbery—sufficiency of evidence

The trial court did not err in a capital case by denying one defendant's motion to dismiss charges of first-degree murder and robbery with a dangerous weapon of a deputy sheriff because: (1) defendants acted with a common purpose in possessing a stolen vehicle and removing the license plate from the stolen vehicle to avoid detection; (2) sufficient evidence revealed that defendant committed first-degree murder based on his admission that he took a State trooper's gun and was the only one to shoot it, a gunshot residue test revealed defendant had shot a weapon recently, and a bullet from the trooper's gun was recovered from the deputy's body; and (3) sufficient evidence revealed that defendants committed robbery with a dangerous weapon based on the facts that the codefendant shot the deputy with an assault rifle and thereafter took the deputy's weapon, defendant inflicted a fatal wound to the deputy, and both defendants fled the scene with the deputy's weapon.

25. Sentencing— capital—joinder

The trial court did not abuse its discretion in a capital sentencing proceeding by joining defendants' cases for sentencing and by denying a motion to sever because: (1) one defendant did

not preserve this issue since he did not object to joinder for sentencing or renew a previous motion to sever, and plain error review does not apply; (2) the codefendant made an unsubstantiated assumption without an offer of proof that his mother would have testified favorably on his behalf if the trials were severed, and the significance of the testimony is not apparent from the record; (3) the codefendant could have subpoenaed his mother to testify; and (4) the codefendant cannot show he was denied individualized consideration.

26. Appeal and Error— preservation of issues—failure to object

Although one defendant contends the trial court erred in a capital sentencing proceeding by denying his motion to suppress two letters seized by prison officials, defendant did not preserve this issue for appeal since he did not object when the letters were introduced, and he cannot rely on his pretrial motion to suppress.

27. Sentencing— capital—note confiscated from courtroom—racial motivation—aggravating circumstances—especially heinous, atrocious, or cruel

The trial court did not err during a capital sentencing proceeding by admitting evidence of a note that one defendant drafted while sitting in the courtroom during the jury selection phase of the trial, which was confiscated by an officer when defendant was leaving the courtroom, because: (1) defendant did not preserve any constitutional argument since he did not raise it at the trial court; (2) the trial court is not required to perform the N.C.G.S. § 8C-1, Rule 403 balancing test during a sentencing proceeding; and (3) the references in defendant's note are evidence that the murders were racially motivated, and therefore, could be considered by the jury when determining if the murder was especially heinous, atrocious, or cruel under N.C.G.S. § 15A-2000(e)(9).

28. Appeal and Error— preservation of issues—failure to object—failure to argue plain error

Although one defendant claims the trial court erred during a capital sentencing proceeding by allowing the State to cross-examine an expert regarding his potential bias, defendant did not preserve this issue because: (1) he failed to object or to raise any constitutional argument at the trial court; and (2) defendant did not "specifically and distinctly" argue plain error as required by N.C. R. App. P. 10(c)(4).

29. Sentencing— capital—hearsay—Rules of Evidence inapplicable

The trial court did not violate one defendant's rights during a capital sentencing proceeding by allowing one expert's report into evidence for purposes of cross-examining another expert because: (1) even if the report itself was hearsay, the Rules of Evidence do not apply in sentencing hearings; and (2) the trial court can admit any evidence it deems relevant to sentence.

30. Constitutional Law— right of confrontation—expert report—basis of opinion

The trial court did not violate one defendant's right of confrontation during a capital sentencing proceeding based on the theory that defendant was not given an opportunity to cross-examine an expert regarding the substance of the expert's report because: (1) defendant was aware of the report's existence prior to the conclusion of the expert's testimony; (2) the trial court gave defendant a second opportunity to question the expert after the State revealed the report's existence, and defendant stated he had no questions for the expert; (3) defendant could have requested a continuance if he felt he had a lack of time for adequate preparation; and (4) the report did not contain inadmissible hearsay since the comments in the report were introduced to help show the basis of the expert's opinion, and not for the truth of the matter asserted. N.C.G.S. § 8C-1, Rule 703.

31. Evidence— expert witnesses—cross-examination—another expert's report

The trial court did not violate one defendant's rights during a capital sentencing proceeding by allowing the State to cross-examine his codefendant's expert witness with a report prepared by another expert witness because: (1) N.C.G.S. § 8C-1, Rule 705 provides that an expert witness may be cross-examined with regard to the underlying facts and data used by the expert in reaching his expert opinion, including other experts' reports; and (2) any error that may have resulted was harmless beyond a reasonable doubt in light of the overwhelming evidence of his guilt.

32. Sentencing— capital—aggravating and mitigating circumstances—requested instruction

The trial court did not err during a capital sentencing proceeding by failing to instruct the jury that a life sentence should be imposed unless the aggravating circumstances outweighed the

mitigating circumstances, because: (1) the trial court's instruction was consistent with N.C.G.S. § 15A-2000(c)(3); and (2) the Supreme Court has previously denied this same argument.

33. Criminal Law— prosecutor's argument—capital sentencing—general deterrent effect of death penalty

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's arguments that these two defendants deserve the death penalty for what they did, that someone has got to tell people like these two defendants that we absolutely will not tolerate this any longer, and that we cannot rely on the next jury to send that message, because: (1) the State's argument viewed in context did not constitute a general deterrence argument; and (2) even if the State's arguments were improper, they were not so grossly improper as to warrant intervention by the trial court.

34. Criminal Law— prosecutor's argument—capital sentencing—community sentiment

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's arguments, that someone has got to stand up and tell defendants like this that we are not going to tolerate this conduct and that asked what type of message a life sentence for these two defendants would send to the citizens of this state, because a review of the prosecutor's statements reveals that the prosecutor never told the jury what was expected of them by the community, but instead reiterated what the jury's message should be to the community.

35. Criminal Law— prosecutor's argument—capital sentencing—hatred based on Rastafarian beliefs

The trial court did not violate one defendant's rights in a capital sentencing proceeding by failing to intervene ex mero motu during the State's argument stating that both defendants had hatred based on Rastafarian beliefs because there was evidence that defendant was involved with Rastafarianism, including a note and the testimony of defendant's own expert witness.

36. Sentencing— capital—*Enmund/Tison* instruction inapplicable

The trial court did not commit plain error during a capital sentencing proceeding by failing to instruct the jury according to

the *Enmund/Tison* instruction that there was evidence one defendant did not participate in the murder of the deputy, because this instruction does not apply to a defendant who has been found guilty of first-degree murder based on premeditation and deliberation.

37. Sentencing— capital—peremptory instructions—statutory mitigating circumstances—age—controverted evidence

The trial court did not violate one defendant's rights during a capital sentencing proceeding by failing to give a peremptory instruction for the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance concerning the age of defendant at the time of the crime, because: (1) the trial court gave a partial peremptory instruction that all the evidence showed defendant was seventeen years old at the time of the crimes; (2) defendant waived review of the trial court's instruction since he failed to object, N.C. R. App. P. 10(b)(2); (3) defendant cannot show prejudice because one or more jurors found the (f)(7) circumstance to exist; and (4) defendant did not specifically and distinctly argue plain error, N.C. R. App. 10(c)(4).

38. Appeal and Error— preservation of issues—failure to object

The trial court did not violate one defendant's rights during a capital sentencing proceeding by refusing to give a peremptory instruction for the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance concerning the age of defendant at the time of the crime, because defendant failed to preserve this issue since he did not request this peremptory instruction, nor did he object to the trial court's failure to give this instruction. N.C. R. App. P. 10(b)(2).

39. Sentencing— capital—peremptory instructions—statutory mitigating circumstances—ability to appreciate criminality—controverted evidence

The trial court did not violate one defendant's rights during a capital sentencing proceeding by refusing to give a peremptory instruction for the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance concerning his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, because: (1) defendant attempted to eliminate a witness, and he initially denied shooting either victim; and (2) defendant's family members stated that defendant cared for his grandmother, and evidence by friends and family that a defendant volunteered to

help and take care of others conflicts with evidence that a defendant's capacity to appreciate the criminality of his conduct was impaired.

40. Sentencing— capital—peremptory instructions—nonstatutory mitigating circumstances—controverted evidence

The trial court did not violate one defendant's rights during a capital sentencing proceeding by refusing to give peremptory instructions for the nonstatutory mitigating circumstances that he was subjected to parental neglect, his mother forced him to lie about being abused, he did not receive appropriate counseling, and he was abandoned by his father, because: (1) the jury was given a peremptory instruction on the mitigating circumstance that defendant was abandoned by his father; (2) the State presented contradictory evidence from defendants' neighbors that they never witnessed neglect by defendants' parents; (3) the evidence is unclear as to whether defendant was forced to lie about his abuse; and (4) an expert's testimony that there was nothing in the record that says defendant got any counseling is not definitive evidence that he did not have any counseling.

41. Sentencing— capital—aggravating circumstances—murder during course of felony—disjunctive instructions

The trial court did not err during a capital sentencing proceeding by giving disjunctive instructions on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed in the course of a felony based on either an armed robbery in which a car was taken or a robbery in which a trooper's weapon was taken, because: (1) there was evidence to support both theories of the (e)(5) circumstance and both theories involved felonies, showing that it is immaterial which crime the jurors use to support the circumstance; and (2) unanimity is required for elements of an offense, rather than for aggravating circumstances.

42. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel

The trial court did not err during a capital sentencing proceeding by submitting as to one defendant the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder of a State trooper was especially heinous, atrocious, or cruel, because: (1) although defendant now contends the (e)(9) circumstance is unconstitutionally vague, no constitutional claims were

made at trial, defendant never objected, and this argument has previously been rejected; (2) the trooper-victim was aware of his fate and unable to prevent impending death; and (3) the State met its burden to show that one defendant's part in the crime was unnecessarily torturous to the victim.

43. Sentencing— capital—aggravating circumstances—avoiding lawful arrest—committed against law enforcement officer

The trial court did not err during a capital sentencing proceeding by submitting both the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, and the N.C.G.S. § 15A-2000(e)(8) circumstance that the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties, because even though the same underlying sequence of events was the subject of both circumstances, the (e)(8) circumstance looks to the underlying factual basis of defendant's crime whereas the (e)(4) circumstance looks to defendant's subjective motivation for his act.

44. Sentencing— capital—aggravating circumstances—flight—course of conduct—no plain error

The trial court did not commit plain error during a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the capital felony was committed while defendant was engaged in or in flight after committing a robbery, and the N.C.G.S. § 15A-2000 (e)(11) circumstance that the murder was committed as part of a course of conduct involving other violent crimes, because: (1) neither defendant objected to submission of these two circumstances on the basis that there was a likelihood the jury might have utilized the same evidence, nor did they request a limiting instruction to that effect; (2) there is sufficient evidence to provide independent bases for the two aggravating circumstances; and (3) defendants cannot show that a different result was probable had a limiting instruction been given.

45. Sentencing— capital—mitigating circumstances

The trial court did not err during a capital sentencing proceeding by its instruction that allows the jury to reject a nonstatutory mitigating circumstance if it finds the circumstance to

be without mitigating value because although one defendant attempts to frame this argument anew by stating that his nonstatutory mitigating circumstances contain "inherent mitigating content" requiring the jury to give them mitigating value, the Supreme Court has previously rejected this claim and finds no reason to revisit their prior decisions.

46. Sentencing— capital—mitigating circumstances—peremptory instruction—jury free to reject

The sentences of death were not imposed in an arbitrary and capricious manner based on the jury's rejection of the N.C.G.S. § 15A-2000 (f)(2) mental or emotional disturbance mitigating circumstance, even though a peremptory instruction was given, because: (1) a jury remains free to reject the circumstance; (2) the evidence presented by one defendant's mental health expert was not so manifestly credible to require the jury to find it convincing; and (3) a juror's acceptance of an expert's testimony that defendant lacked parental involvement or support in treatment for psychological problems is not determinative of the sufficiency of the evidence in support of the (f)(2) circumstance since the nonstatutory mitigating circumstance relates to parental support whereas the statutory circumstance involves defendant's mental or emotional state at the time of the crimes.

47. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing two sentences of death for each defendant because: (1) defendants murdered two law enforcement officers for the purpose of evading lawful arrest; (2) defendants were each convicted of two counts of first-degree murder; (3) defendants' convictions for the murders were based on the theory of premeditation and deliberation; and (4) as to each murder conviction, the jury found the two aggravating circumstances of N.C.G.S. § 15A-2000(e)(5) and N.C.G.S. § 15A-2000(e)(11), either of which standing alone has been held sufficient to support a death sentence.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death for each defendant entered by Brewer, J., on 13 May 1998 in Superior Court, Cumberland County, upon jury verdicts finding each defendant guilty of two counts of first-degree murder. The Supreme Court allowed defendants' motions to bypass the Court of Appeals as to their appeal of

additional judgments on 19 July 1999. Heard in the Supreme Court 14 February 2000.

Michael F. Easley, Attorney General, by William B. Crumpler and Robert C. Montgomery, Assistant Attorneys General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine C. Fodor and Anne M. Gomez, Assistant Appellate Defenders, for defendant-appellant Kevin Golphin.

M. Gordon Widenhouse, Jr., for defendant-appellant Tilmon Golphin.

WAINWRIGHT, Justice.

On 1 December 1997, indictments were handed down charging defendants Kevin Salvador Golphin (Kevin) and Tilmon Charles Golphin, Jr. (Tilmon), each with two counts of first-degree murder, two counts of robbery with a dangerous weapon, one count of assault with a deadly weapon with intent to kill, one count of discharging a firearm into occupied property, and one count of possession of a stolen vehicle. Defendants, who are brothers, were tried jointly in a capital proceeding at the 23 February 1998 Criminal Session of Superior Court, Cumberland County. Defendants were tried before a jury drawn from a special venire selected in Johnston County. The jury found defendants guilty on all charges. After a capital sentencing proceeding, the jury recommended a sentence of death in each murder for both defendants. On 13 May 1998, the trial court entered judgments against defendants in accordance with the jury's recommendations. In addition, the trial court sentenced each defendant to the following consecutive terms of imprisonment: (1) for possession of a stolen vehicle, a minimum of six months and a maximum of eight months; (2) for assault with a deadly weapon with intent to kill, a minimum of thirty-one months and a maximum of forty-seven months; (3) for discharging a firearm into occupied property, a minimum of thirty-one months and a maximum of forty-seven months; and (4) for each count of robbery with a dangerous weapon, a minimum of eighty months and a maximum of one hundred five months. Defendants appeal to this Court as of right from the judgments imposing sentences of death. On 19 July 1999, this Court allowed defendants' motions to bypass the Court of Appeals on the other convictions.

The State presented evidence which tended to show that on 23 September 1997, Kevin, who was seventeen, and Tilmon, who was nineteen, were living with their grandparents in Greeleyville, South Carolina. That morning, defendants' cousin, Demetric Mack, drove them to Kingstree, South Carolina, leaving them in a parking lot in the downtown area. During the ride into town, Mack noticed that Kevin was carrying a rifle that he had covered with a white towel and that Tilmon was carrying a book bag.

At about 10:00 a.m., defendants entered Financial Lenders, a finance company in downtown Kingstree. Two employees, Ava Rogers and Sandra Gaymon, were working that morning, and a customer, Earletha Mouzon, was also in the building. Gaymon and Mouzon were discussing business in a small office near the front of the building and saw defendants enter and walk toward the office where Rogers was working. Mouzon saw that one defendant was carrying a rifle. She immediately left the building and called the police. The taller defendant, later identified as Kevin, pointed the rifle at Rogers and demanded the keys to her car. She gave the keys to him. Defendants then ordered Rogers and Gaymon to go to the back of the building. Defendants then told the two women to go into the bathroom. The taller defendant told the women to stand with their backs toward defendants. While their backs were turned, both women heard clicking sounds made by the rifle. Defendants then left the bathroom, and the two women heard them moving things around and placing objects in front of the door. The women stayed in the bathroom for approximately five minutes. While they were in the bathroom, they heard a vehicle start and leave the parking lot behind the building. The women then left the bathroom and called 911. Rogers found that her purse had been opened and that her wallet had been stolen. She also found that her car, a dark green 1996 Toyota Camry with South Carolina license plate number CEL-269, had been stolen.

Lieutenant Michael Kirby of the Kingstree Police Department investigated the robbery at Financial Lenders. He arrived at the business shortly after the robbery and obtained a description of the suspects and the stolen vehicle. He then issued a "BOLO" advisory ("Be On the Look Out" for certain suspects or vehicles) to all law enforcement agencies in the area which contained the description of the suspects and the stolen vehicle. Lt. Kirby also entered the description of the stolen vehicle into the National Crime Information Center (NCIC) computer network. Later that morning, Lt. Kirby learned that the

suspects were Kevin and Tilmon Golphin. He then went to their grandparents' home but was unable to locate the suspects.

On that same day, Bobby Owens was on duty as a shift supervisor at the State Highway Patrol Communications Center in Elizabethtown, North Carolina. The Elizabethtown center provided communications support to state troopers in a region comprised of Cumberland, Harnett, Robeson, Onslow, Duplin, Pender, New Hanover, Brunswick, Bladen, and Columbus Counties. At approximately 12:25 p.m., Owens was communicating with troopers in Cumberland County. Trooper Lloyd E. Lowry of the North Carolina State Highway Patrol was on duty in Cumberland County. He was patrolling the northbound lanes on Interstate 95 (I-95). At 12:25 p.m., Owens received a radio call from Trooper Lowry asking for a check on South Carolina registration CEL-269. Owens performed the check on the NCIC computer, and the check indicated that the vehicle with that registration had been stolen in South Carolina. At 12:26 p.m., Owens asked Trooper Lowry whether he had the vehicle stopped, and Trooper Lowry responded that he did. Owens then advised Trooper Lowry, using code "signal three," to turn off the speaker inside his vehicle so that anyone in the vehicle could not hear the communications and told Trooper Lowry that the vehicle was stolen. Trooper Lowry asked Owens to send him a backup unit. Owens requested Trooper Lowry's location, and Trooper Lowry answered that he was near the intersection of I-95 and N.C. Highway 24. At 12:27 p.m., Owens informed Trooper Lowry that there were no highway patrol units available to respond and that he would contact the Cumberland County Sheriff's Department to request assistance. Owens called the sheriff's department, and the dispatcher acknowledged the request and told Owens that a car would be dispatched to the scene. At 12:29:12 p.m., Owens called Trooper Lowry and informed him that a sheriff's department unit was en route to assist. Trooper Lowry informed Owens that a subject was in his vehicle and that he was awaiting the backup unit. After this transmission, Owens called the highway patrol office in Fayetteville and informed Sergeant Bill Martin of Trooper Lowry's situation. Sgt. Martin advised Owens that he would be en route to assist Trooper Lowry and asked Owens to attempt to contact Trooper Lowry again. At 12:32 p.m., Owens called Trooper Lowry to inform him that Sgt. Martin was en route to his location and to ask him to verify the description of the vehicle given by the NCIC computer as a dark green Toyota. At 12:32:22 p.m., Trooper Lowry confirmed the description of the vehicle. Owens did not receive any further communication from Trooper Lowry.

On that same day, Susan Gillis was working as a dispatcher with the Cumberland County Sheriff's Department. At 12:28 p.m., she received a telephone call from Owens requesting assistance for Trooper Lowry. Gillis passed the request for assistance to Linda Zema, another dispatcher, who asked for available sheriff's department units in the area of I-95 and N.C. Highway 24. Deputy David Hathcock responded to the call, and the dispatchers determined that he was the closest unit to the area where Trooper Lowry had requested assistance. Deputy Hathcock was sent to the scene at 12:30 p.m. At 12:33 p.m., Deputy Hathcock reported that he would be reaching the scene in approximately one minute. No further transmissions were received from Deputy Hathcock despite repeated attempts by the dispatchers to contact him.

At 12:38 p.m., Deputy Kelly Curtis of the Cumberland County Sheriff's Department advised the dispatchers that he had arrived at the scene. Seconds later, Deputy Curtis informed dispatchers, "Officers down. Officers down." He requested immediate assistance. At 12:39 p.m., Deputy Curtis called and advised the dispatchers that two black male suspects were last seen headed northbound on I-95 driving a dark green Toyota. Shortly thereafter, Deputy Curtis informed the dispatchers that both officers appeared to be dead.

The State presented a number of witnesses who testified regarding the events that occurred along the side of I-95 near its intersection with N.C. Highway 24 at mile marker 52 in Cumberland County. James Patrick Rogers was driving along the exit ramp which led from westbound Highway 24 onto the service road which led to the northbound lanes of I-95. As Rogers came down the ramp, he saw that a highway patrol vehicle and a sheriff's department vehicle were stopped in the grassy area between the service road and the northbound lanes of I-95. The two police vehicles were parked parallel to one another on opposite sides of the grassy area facing northbound. A dark—colored car was pulled over in front of the highway patrol vehicle. Rogers testified that a black male was standing at the rear of the highway patrol vehicle with his hands on the trunk. A state trooper was standing behind him. A second black male was sitting in the front passenger seat of the dark-colored car. A sheriff's deputy was standing near the open door of that vehicle and appeared to be talking to the male seated in the car.

Walter Pearce was traveling on I-95 north and saw the flashing blue lights of the highway patrol vehicle. As he got close to the vehi-

cles, he saw a state trooper and a black male with braided hair scuffling on the ground at the back of the patrol car. Pearce saw a sheriff's deputy standing between the police vehicles and a second black male sitting in the front seat of a Toyota Camry that was pulled over in front of the highway patrol vehicle. Pearce continued northbound, and a few minutes later, he saw the same two black males pass him in the Camry. A highway patrol vehicle passed him shortly afterwards, and Pearce saw both the Camry and the highway patrol vehicle leave I-95 at exit 71.

Marla McDowell was traveling on I-95 north and saw the police vehicles on the side of the road with a Toyota Camry pulled over in front of them. She saw an officer and a black male struggling on the ground behind the highway patrol vehicle, and another officer and a second black male struggling in the area between the police vehicles and the Camry. She also saw the second black male pull away from the officer and run back toward the Camry.

Janice Hocutt and her niece were traveling south on I-95 as they approached the scene where two police vehicles and a bluish-green car were pulled over. Hocutt saw a black male, who was wearing an "orange-brownish" hooded sweatshirt, facing south between the green car and the police vehicles. An officer was standing in front of him facing north. Hocutt saw the black male moving toward the officer, and then she saw something brown being sprayed by the officer. The officer began backing away from the black male and then fell. She then saw the black male kick and punch the officer on the ground. She never saw the officer get up. Hocutt identified Tilmon as the black male she saw kicking and punching the officer on the ground.

Wilbur Brannan was traveling northbound on I-95 and passed the scene. He saw the highway patrol vehicle with its blue lights flashing, and as he passed it, he saw a state trooper lying facedown on the ground near the back of his vehicle. A black male was bending over the trooper. Brannan saw the black male get up and turn around toward a dark green Toyota Camry parked in front of the highway patrol vehicle. Brannan continued driving northbound and saw the same Toyota Camry with two black occupants pass him a few miles further on I-95.

Dana Blecke, a pharmacist and former emergency medical technician, was traveling south on I-95 and saw the blue lights flashing from the highway patrol vehicle. As she passed by, she

saw someone lying in the grass on the side of the road in front of the highway patrol vehicle. She also saw a black person running toward the driver's side of a car that was parked in front of the highway patrol vehicle. Blecke slowed down and turned around through the median of the interstate and drove back toward the police vehicles. The car parked in front of the police vehicles was now gone. She parked her vehicle and went to the police officer lying in the grass. She could feel no pulse or respirations. She then walked to the state trooper who was lying facedown near the back of his vehicle. By this time, another state trooper who had arrived at the scene helped her roll the trooper's body. They found no pulse or other signs of life.

Ronald Waters was driving north on I-95 as he came over a hill and saw the flashing blue lights of the highway patrol vehicle. As he approached the scene, he saw two black males, one taller than the other, moving around in the area between the two police vehicles and the car parked in front of the highway patrol vehicle. He saw an officer wearing a gray shirt and dark pants lying facedown in the grass near the back of the highway patrol vehicle. As he drove almost parallel with the highway patrol vehicle in the right lane of I-95, he saw that one of the black males had what appeared to be an "automatic" handgun in his hand. At that time, Waters, who had slowed down, accelerated quickly past the scene. He pulled off approximately two hundred yards further up the road, got out of his vehicle, and called 911 on his cellular phone. He looked back toward the scene and saw the taller black male shoot one of the officers four or five times. The two black males then got into the Toyota Camry and drove north on I-95. Waters saw that other motorists had stopped, and he decided to follow the Camry. Waters remained on his cellular phone talking to the 911 operator while following the Camry. He followed the Camry until it left I-95 at exit 55, Murphy Road. Waters saw the vehicle turn off onto a dirt road near the exit. Waters stopped his car and watched the subjects. A few minutes later, the subjects got back in the Camry and drove over the bridge to the other side of the interstate. Waters noted that the license plate had been removed from the Camry. Waters waited along the side of the ramp that led back to I-95 north. He soon noticed the Camry come back over the top of the bridge and turn onto the ramp beside him. As the Camry pulled alongside Waters' vehicle, Waters saw the barrel of a rifle being pointed out the window toward him. He leaned over in his seat and accelerated quickly. He heard three shots hit his vehicle, and subsequently, discovered the vehicle was disabled. Waters heard the other vehicle's engine revving

higher and thought it had left, so he raised his head to look out the window. He saw the Camry drawing almost parallel with his window just four to six feet away. Waters testified that the black male holding the rifle smiled at him and then pulled the trigger. The rifle clicked as if it were jammed or out of ammunition. The black male pulled the rifle back into the Camry, which sped north on I-95. Waters identified the individual who pointed the rifle at him as Tilmon, and he identified the rifle pointed at him as the same Russian-made SKS 7.62-millimeter rifle seen by Demetric Mack, defendants' cousin, in his car that morning.

Trooper Kenneth Morgan heard a radio transmission that a trooper was down and proceeded south on I-95 from exit 72 in Harnett County. As he drove south, he obtained a description of the Toyota Camry and its occupants. At exit 65, just inside the Cumberland County line, Trooper Morgan waited on an exit ramp facing south. Just after 12:52 p.m., Trooper Morgan observed a green Toyota Camry driving north on I-95. Trooper Morgan drove down the northbound exit ramp to attempt to overtake the Camry. He noted that there was no license plate on the vehicle and that it swerved quickly from the left lane over to the emergency lane on the far right and began accelerating rapidly. Trooper Morgan pursued the vehicle at speeds up to 120 miles per hour as the Camry veered from lane to lane heading north. At exit 71, the Camry drove up the ramp but failed to make the turn. It rolled at least once down an embankment and came to rest on its wheels. Trooper Morgan saw the two suspects run from the vehicle toward a group of tractor-trailers that were parked near a tire repair shop.

Police officers from the Harnett County Sheriff's Department, the Cumberland County Sheriff's Department, the Dunn Police Department, and the State Highway Patrol searched the area and apprehended Tilmon and Kevin. A Glock 9-millimeter handgun, later identified as Deputy Hathcock's weapon, was found beside Tilmon as he was arrested, and a Beretta .40-caliber handgun, identified as Trooper Lowry's weapon, was found under the steps of a home near where Kevin was captured. Deputy Hathcock's Glock handgun was fully loaded and did not exhibit any signs of being fired. Trooper Lowry's Beretta handgun was found in a cocked position, ready to fire. Only five cartridges remained in the weapon, indicating that if the weapon had been fully loaded when taken, six cartridges were missing. The SKS rifle was recovered from the wrecked Camry. The top cartridge in the magazine had misfed, causing the

rifle to jam. Tilmon and Kevin were transported by the State Highway Patrol to the Cumberland County Sheriff's Department where they were questioned.

At the sheriff's department, Kevin waived his juvenile rights and gave a statement to Special Agent Jay Tilley of the State Bureau of Investigation (SBI). Agent Tilley and Detective Ray Wood of the Cumberland County Sheriff's Department interviewed Kevin. Kevin admitted that he and Tilmon stole the Camry in Kingstree that morning and headed north on I-95, intending to drive to Richmond, Virginia. A state trooper pulled them over in North Carolina. The trooper asked Kevin for his license, and Kevin gave him Tilmon's South Carolina license. The trooper told Kevin he was stopped for not wearing a seat belt and asked him to get out of the Camry and sit in the patrol vehicle. Kevin saw the trooper typing on his computer and talking into his telephone. Kevin heard the trooper ask for another car to come and assist him.

Kevin stated that he saw a different kind of police car drive up beside the trooper's car and that a police officer wearing a different uniform got out and came over to the trooper's car. The trooper got out of the car and told Kevin to "sit tight." The trooper then came around to the passenger side where Kevin was sitting, pulled out his pistol, opened the door, and ordered Kevin out of the car. Kevin said that he got out and put his hands on the hood of the car. The trooper told the other police officer to "get the guy" in the Camry. Kevin asked why he was being arrested and was told to "shut up." The trooper pushed Kevin's head down and put him in an arm lock. Kevin stated that he resisted and tried to get free. The trooper pushed Kevin to the ground. The other officer brought Tilmon back toward the trooper's car. The trooper told the other officer to spray Kevin with pepper spray. The other officer sprayed Kevin, and Kevin began screaming and kicking at the other officer. At that point, Kevin heard gunshots. His eyes began to clear, and he saw the two police officers on the ground. The trooper tried to grab Kevin, but he shook the trooper away. Kevin then took the trooper's pistol.

At first, Kevin did not admit shooting the trooper's pistol and claimed not to have shot any gun that day. After being told that .40-caliber shell casings had been found at the scene and that gunshot residue tests had been performed on his hands, Kevin admitted firing the trooper's handgun. He said he did not know how many times he shot the gun, but it was pointed at the trooper when he did so.

After he fired the gun, Kevin got into the passenger seat of the Camry, and he and Tilmon drove north on I-95. He and Tilmon left the interstate at the next exit and stopped on top of a bridge where they switched places. Kevin continued driving north on I-95, and they were chased by several police cars. Kevin said that he tried to get away, but wrecked the car when he attempted to exit the interstate. He and Tilmon ran from the car, but both were caught.

Later in the interview, Kevin admitted that Tilmon had shot at a Jeep that was following them on I-95 and that had stopped at the same exit where they switched drivers. Kevin said that Tilmon told him he was trying to shoot at the tires of the vehicle. Kevin also admitted that Tilmon never shot the trooper's handgun and that Tilmon never had the trooper's handgun in his possession.

Tilmon was interviewed at the sheriff's department by Special Agent Neil Godfrey of the SBI and Detective Mike Casey of the Cumberland County Sheriff's Department. Agent Godfrey advised Tilmon of his rights, and Tilmon asked to speak with an attorney. Tilmon was informed that investigators could no longer talk with him because he had requested an attorney, but they asked him several biographical questions. After he answered the questions, Tilmon stated he wanted to tell the investigators what had happened.

Tilmon's description of the events was very similar to Kevin's. When the Camry was pulled over by the state trooper, the trooper told them he had pulled them over because Kevin was not wearing his seat belt. Kevin and the trooper went back to the trooper's car while Tilmon waited in the Camry. Eventually, he saw another police car pull up beside them. He saw the other officer get out and walk toward the trooper's car. He then saw Kevin and the trooper at the back of the trooper's vehicle, and Kevin was pushed up against the vehicle. Tilmon got out of the Camry and walked back toward them. The other officer came toward him, pushed him up against the Camry, and patted him down. The officer then walked with him back toward the trooper's car where Kevin and the trooper were on the ground struggling. Tilmon said he heard Kevin say that he could not breathe. The trooper then told the other officer to spray Kevin with pepper spray. The officer sprayed Kevin and then turned to spray Tilmon. Tilmon knocked the canister from the officer's hand and ran back toward the Camry. He got the rifle from the backseat of the car. Tilmon said he pointed the rifle directly at the other officer who was about nine to twelve feet away; looked him right in the eyes; and shot him. Tilmon

said the other officer appeared to be dead. He then walked over to where the trooper was on top of Kevin, aimed at the trooper's side, and shot him. Tilmon said he aimed at the trooper's side because he did not want to kill him. Tilmon then ran over to the other officer, took the handgun from his holster, and went to the driver's side of the Camry. He and Kevin drove north on I-95 for a few miles, then exited and switched places. Tilmon stated he shot at the tires of a vehicle that had been following them. He and Kevin then continued driving north on I-95 and were captured a short while later after they were chased by other police cars.

Tilmon originally stated that he had not fired a gun that day but later admitted that he "probably had" shot a gun but could not remember doing so. Subsequently, Tilmon was able to recount how the rifle "jumped" as he shot the trooper. Tilmon also made no mention of the use of pepper spray by either officer but later remembered that the trooper told the other officer to spray Kevin. Additionally, Tilmon said nothing about his encounter with Waters during the first portion of his interview, but later described shooting at the tires of the Jeep in detail.

Autopsies were performed on the bodies of Trooper Lowry and Deputy Hathcock. Three .40-caliber bullets that were fired from Trooper Lowry's handgun were recovered from his body along with a 7.62-millimeter bullet fired from the SKS rifle. An additional 7.62-millimeter bullet was found inside the body bag used to transport Trooper Lowry's body. Trooper Lowry was shot at least seven and possibly eight times, with several gunshots coming from close range. Trooper Lowry suffered potentially fatal wounds from both weapons. One .40-caliber bullet fired from Trooper Lowry's handgun and two 7.62-millimeter bullets fired from the SKS rifle were recovered from Deputy Hathcock's body. Deputy Hathcock suffered four gunshot wounds to his chest and abdomen and one gunshot wound to his wrist. Any of the four wounds to his chest and abdomen would have been fatal. Those wounds were made by both .40-caliber and 7.62-millimeter bullets.

PRETRIAL ISSUES

[1] By assignments of error, both Kevin and Tilmon argue the trial court violated their federal and state constitutional rights to be present at every stage of their capital trial when it ruled the jury would be drawn from a special venire from Johnston County. Specifically, defendants claim they should have been present during out-of-court

meetings relating to change of venue or a special venire. Defendants argue the right to be present includes the right to be present during the meetings concerning venue because the discussions were substantially related to the fullness of their rights to defend against the charges. *See United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 490 (1985). Defendants further argue that because the meetings involved venue for jury selection and trial, they were particularly critical to defendants, and not merely administrative as in *State v. Chapman*, 342 N.C. 330, 338-39, 464 S.E.2d 661, 665-66 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996). We disagree.

Initially, we note the Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees all defendants the right to be present at every stage of their trial. *See Illinois v. Allen*, 397 U.S. 337, 338, 25 L. Ed. 2d 353, 356 (1970). Through the Due Process Clause of the Fourteenth Amendment, this right also applies to the states. *See Pointer v. Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 926 (1965); *State v. Buchanan*, 330 N.C. 202, 209, 410 S.E.2d 832, 836 (1991).

Similarly, in North Carolina, pursuant to the Confrontation Clause in Article I, Section 23 of the North Carolina Constitution, a defendant has a right to be present at every stage of his trial. *See State v. Call*, 349 N.C. 382, 397, 508 S.E.2d 496, 506 (1998); *Chapman*, 342 N.C. at 337, 464 S.E.2d at 665; *State v. Daniels*, 337 N.C. 243, 256, 446 S.E.2d 298, 307 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995); *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). If the defendant is being tried capitally, this right cannot be waived. *See State v. Buckner*, 342 N.C. 198, 227, 464 S.E.2d 414, 430 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996). Generally, however, "this right does not arise prior to the commencement of trial." *Call*, 349 N.C. at 397, 508 S.E.2d at 506; *see also Chapman*, 342 N.C. at 338, 464 S.E.2d at 665; *State v. Rannels*, 333 N.C. 644, 653, 430 S.E.2d 254, 259 (1993).

In November 1997, defense counsel for both defendants informed the prosecution that they intended to file change of venue motions from Cumberland County. In meetings between the defense attorneys and the prosecutors to discuss change of venue, defendants were not present, and the meetings were not recorded. The prosecutors and defense attorneys then met with the presiding judge to discuss possible change of venue sites or special venire locations; defendants were not present at this meeting, and the meeting was not recorded.

Subsequently, on 5 January 1998, in the presence of Kevin, Tilmon, and their attorneys, the parties stipulated to a change of venue for purposes of jury selection. Thereafter, the trial court stated:

> As to each Defendant, it would be my understanding that each Defendant is agreeing to a special venire for [sic] Johnston County for that Defendant's trial if the cases are joined or if that Defendant is chosen for the first trial, but that neither Defendant is waiving their right to make a Motion for a Change of Venue if there are separate trials and that particular Defendant's trial is not the first trial.

When the trial court asked both defendants if this was correct, they responded, through their attorneys, in the affirmative. Pretrial motions were later heard on 16 and 23 February 1998, and jury selection commenced in Johnston County on 26 February 1998.

The meetings at issue in this case took place prior to commencement of defendants' trial. Moreover, defendants were present at the hearing on change of venue at which defendants stipulated to a special venire from a county other than Cumberland; the trial court proposed a special venire from Johnston County; and both defendants agreed, through counsel, to the special venire from Johnston County. Thus, no error, constitutional or otherwise, was committed. *See Buckner*, 342 N.C. at 228, 464 S.E.2d at 431 (holding there was no constitutional violation because the pretrial conference took place prior to commencement of the defendant's trial); *Rannels*, 333 N.C. at 652, 430 S.E.2d at 258 (holding it was not error to conduct private, unrecorded sidebar conferences with prospective jurors where conferences took place prior to calling the calendar for the session and the administration of the oath to the jurors). These assignments of error are overruled.

[2] In another assignment of error, Kevin argues there was no filed court order changing venue for purposes of jury selection, and this violated his federal and state constitutional rights. However, the question presented in Kevin's brief relating to this assignment of error concerns whether the trial court erred by not following the statutory mandates in ordering the special venire from Johnston County. In his argument, Kevin does not address the trial court's failure to file a court order changing venue for that limited purpose. Rule 28(a) of the North Carolina Rules of Appellate Procedure provides: "Questions raised by assignments of error in appeals from trial tri-

bunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C. R. App. P. 28(a). Thus, Kevin abandoned this assignment of error. Nevertheless, in our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we will address the merits of the question presented in Kevin's brief. *See* N.C. R. App. P. 2.

Kevin argues the trial court did not follow the statutory mandates in ordering the special venire from Johnston County, thereby entitling him to a new trial. Specifically, Kevin argues there are only two statutory mechanisms for changing venue—by order of the court pursuant to N.C.G.S. §§ 15A-957 and -958, or by an agreement of the parties pursuant to N.C.G.S. § 15A-133. The trial court followed neither. We disagree.

Generally, venue for "trial proceedings in cases within the original jurisdiction of the superior court lies in the county where the charged offense occurred." N.C.G.S. § 15A-131(c) (1999). Parties may waive venue or defendants may move for a change of venue pursuant to N.C.G.S. § 15A-957. *See* N.C.G.S. § 15A-133 (1999). A waiver of venue must be in writing, must be signed by both parties, and must specify the stages of the proceedings affected by the waiver. *See id.* A defendant may move for a change of venue if the prejudice is so great that he/she cannot obtain a fair and impartial trial; the trial court can then move the proceeding or order a special venire. *See* N.C.G.S. § 15A-957 (1999). In addition, the trial court may, upon motion by the defendant or the State, or upon its own motion, "issue an order for a special venire of jurors from another county if in its discretion it determines the action to be necessary to insure a fair trial." N.C.G.S. § 15A-958 (1999).

"These statutory limitations on the power of a court to order a change of venue are preempted by the inherent authority of the superior court to order a change of venue in the interest of justice." *State v. Chandler*, 324 N.C. 172, 183, 376 S.E.2d 728, 735 (1989) (holding the trial court did not abuse its discretion in granting the State's motion for change of venue, despite the statute's granting only the defendant a right to move for a change of venue, because the findings supported the trial court's conclusion and resulting order); *see also State v. Barfield*, 298 N.C. 306, 320, 259 S.E.2d 510, 524-25 (1979) (holding the superior court had the inherent power to move the proceedings to a county other than an adjoining county in the judicial district or a county in an adjoining judicial district as provided by the statute),

cert. denied, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). Moreover, the trial court's ruling on a motion to change venue will not be disturbed absent a showing of abuse of discretion. *Chandler*, 324 N.C. at 183, 376 S.E.2d at 735.

In the instant case, on 5 January 1998, there was a hearing at which both defendants, through counsel, stipulated to a transfer of venue to allow jury selection in a county other than Cumberland County with the trial to be held in Cumberland County. The trial court proposed changing venue for the limited purpose of jury selection from a special venire of Johnston County residents. The trial court asked both defendants if they agreed to the proposal, and both defendants, through counsel, answered in the affirmative. Thereafter, on 13 January 1998, the trial court entered an "ORDER FOR SPECIAL VENIRE" which provided that "venue . . . has been ordered changed to Johnston County as of February 26th, 1998 for the selection of a jury." Additionally, the trial court stated "that . . . due to the number of defendant[]s and the fact that the charges involve the first degree murders of two law enforcement officers, the jury selection process in these matters will require that a Special Venire of jurors be summoned."

As Kevin never moved for a change of venue, N.C.G.S. § 15A-957 does not apply in the instant case. In addition, there is no violation of N.C.G.S. § 15A-133 as Kevin argues because there was a ruling by the trial court on the issue of venue for jury selection. Given the nature and circumstances of the alleged crimes against two law enforcement officers and defendants' acquiescence to the stipulation and proposal at the hearing, the trial court had the inherent authority to order the change of venue for the limited purpose of jury selection from a special venire of Johnston County residents. Moreover, Kevin has not shown the trial court abused its discretion in ordering the limited change of venue. Kevin's assignment of error has no merit.

[3] By assignments of error, both defendants argue the trial court violated their federal and state constitutional rights to have a jury selected from a representative cross-section of the community in which the crime occurred. We disagree.

Initially, we address the State's argument that defendants did not preserve this issue for appellate review. Generally, "[t]his 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); *see also* N.C. R. App. P. 10(b)(1). In this case,

there is no indication from the record that defendants objected to the special venire from Johnston County. In fact, defendants, through counsel, agreed with the trial court's proposal of a special venire from Johnston County. Thus, defendants waived appellate review of this assignment of error. Nevertheless, we elect, in our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, to review these assignments of error. *See* N.C. R. App. P. 2.

The state and federal constitutional guarantees of a trial by a jury of the accused's peers "assures that members of a defendant's 'own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence.' " *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998) (quoting *State v. McNeill*, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990)) (alteration in original), *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 802 (1999). In *Duren v. Missouri*, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979), the United States Supreme Court established a three-prong test to determine whether the right to a fair cross-section in the jury venire had been violated. To establish a *prima facie* case of disproportionate representation in the jury venire, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id., *quoted in Bowman*, 349 N.C. at 468, 509 S.E.2d at 434.

In the instant case, defendants claim, according to the 1990 Census data, 60% of the residents of Cumberland County are Caucasian, and 31.8% are African-American; and 80% of the residents of Johnston County are Caucasian, and 17.5% are African-American. Thus, defendants contend, African-Americans were underrepresented in the jury pool by 45%.

There is no question in the instant case that defendants satisfied the first prong of the *Duren* test because African-Americans are unquestionably a "distinct" group for purposes of the *Duren* analysis. *See Peters v. Kiff*, 407 U.S. 493, 498-99, 33 L. Ed. 2d 83, 91 (1972).

In determining whether there is disproportionate representation under the second prong of *Duren*, this Court considers absolute disparity figures on a case-by-case basis. *See State v. Hough*, 299 N.C.

245, 252, 262 S.E.2d 268, 273 (1980). "Absolute disparity" in the instant case is the percentage of African-Americans in Cumberland County minus the percentage of African-Americans in Johnston County. *See id.* at 251, 262 S.E.2d at 272. Defendants, however, calculated the comparative disparity, or the percentage of absolute disparity between the counties divided by the percentage of African-Americans in Cumberland County. *See id.* at 251-52, 262 S.E.2d at 272. To calculate the absolute disparity, we subtract 17.5% (the percentage of African-Americans in Johnston County) from 31.8% (the percentage of African-Americans in Cumberland County); thus, the absolute disparity is 14.3%, much lower than the 45% comparative disparity reported by defendants.

This Court has held various percentages of absolute disparity, standing alone, are not unfair and unreasonable. *See Bowman*, 349 N.C. at 468, 509 S.E.2d at 434 (absolute disparity of 16.17%); *State v. Price*, 301 N.C. 437, 447, 272 S.E.2d 103, 110 (1980) (absolute disparity of 14%). The reasoning is that a defendant is " 'not entitled to a jury of any particular composition, . . . [or to] a jury which mirrors the presence of various and distinctive groups within the community.' " *Bowman*, 349 N.C. at 468, 509 S.E.2d at 434 (quoting *Price*, 301 N.C. at 448, 272 S.E.2d at 110-11); *see also Apodaca v. Oregon*, 406 U.S. 404, 32 L. Ed. 2d 184 (1972). In addition, the trial by jury right " 'carries with it the right to be tried before a body which is selected in such a manner that competing and divergent interests and perspectives in the community are reflected rather than reproduced absolutely.' " *Bowman*, 349 N.C. at 468-69, 509 S.E.2d at 434 (quoting *Price*, 301 N.C. at 448, 272 S.E.2d at 111); *see also Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975).

As we stated in *Bowman* and *Price*, defendants are not entitled to a special venire from the population of a county which exactly mirrors the population of Cumberland County as long as the venire was selected in a manner in which various interests were represented. While the population of Johnston County is not the mirror image of the population of Cumberland County, African-Americans were represented in Johnston County, and there is only a 14.3% absolute disparity. Therefore, we cannot say the absolute disparity between Cumberland County and Johnston County, standing alone, is unfair or unreasonable.

As to the third prong of *Duren*, this Court has held "[t]he fact that a particular jury or series of juries does not statistically reflect the

racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause." *Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607 (1976), *quoted in State v. Avery*, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980); *see also Bowman*, 349 N.C. at 469, 509 S.E.2d at 434-35 (holding the defendant "failed to present any evidence showing that the jury-selection process was tainted by the systematic exclusion of African-Americans from the jury pool"). Moreover, "[s]tatistics concerning one jury pool, standing alone, are insufficient to meet the third prong of *Duren*." *Bowman*, 349 N.C. at 469, 509 S.E.2d at 435.

Likewise, in the instant case, the fact that the racial composition of Johnston County differs from that of Cumberland County is not sufficient to show "systematic exclusion." The statistics concerning this one jury pool cannot satisfy the "systematic exclusion" requirement of the third prong of *Duren*. *See id.* Therefore, defendants have failed to establish a *prima facie* case of disproportionate representation, and these assignments of error are overruled.

[4] By assignments of error, both defendants challenge the sufficiency of the short-form murder indictments. Kevin argues the trial court committed constitutional error by entering judgment on his first-degree murder convictions where the indictments were insufficient to charge this offense. Tilmon argues the trial court erred in denying his motion to dismiss the murder indictments. Both defendants contend the short-form indictments do not allege the specific elements of first-degree murder that defendants acted with premeditation and deliberation in violation of their federal constitutional rights.

We recently addressed this issue in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), and *State v. Braxton*, 352 N.C. 158, —— S.E.2d —— (2000), and we decline to revisit the issue in the instant case. Defendants' arguments that the short-form murder indictments were insufficient are overruled.

[5] By assignments of error, both defendants argue the trial court erred by failing to require the State to disclose the aggravating circumstances on which it intended to rely at sentencing. Defendants contend the indictment should have contained the aggravating circumstances, and the trial court erred in denying their pretrial motions for disclosure of aggravating and mitigating circumstances. Specifically, defendants rely on *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and argue that because aggravating circum-

stances may increase the penalty for first-degree murder from life imprisonment to death, defendants are entitled to pretrial notice, within the indictment or other binding instrument, of the aggravating circumstances the State intends to use at sentencing. We disagree.

The United States Supreme Court has previously held an indictment "need not set forth facts relevant only to the sentencing of an offender found guilty of the charged crime." *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 140 L. Ed. 2d 350, 358 (1998). In *Jones*, the Supreme Court recognized the difference between elements of an offense and sentencing factors when it stated, "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that *elements* must be charged in the indictment." *Jones*, 526 U.S. at 232, 143 L. Ed. 2d at 319 (emphasis added).

On the same issue, this Court has held "the State need not set forth in an indictment the aggravating circumstances upon which it will rely in seeking a sentence of death." *State v. Young*, 312 N.C. 669, 675, 325 S.E.2d 181, 185 (1985). In *State v. Williams*, 304 N.C. 394, 422, 284 S.E.2d 437, 454 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982), we held N.C.G.S. § 15A-2000(e), which sets forth the aggravating circumstances the jury may consider, made the defendant fully aware of what the State had to prove before a death sentence could be imposed.

As to defendants' motions to disclose the aggravating circumstances, this Court has held a trial court may not require the State to disclose which aggravating circumstances it intends to rely on at the sentencing phase. *See State v. McKoy*, 323 N.C. 1, 44, 372 S.E.2d 12, 36 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *State v. Holden*, 321 N.C. 125, 153, 362 S.E.2d 513, 531 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In addition, we have stated that N.C.G.S. § 15A-2000(e) sets forth the only aggravating circumstances upon which the State may rely in seeking the death penalty, and the "notice provided by this statute is sufficient to satisfy the constitutional requirements of due process." *Holden*, 321 N.C. at 154, 362 S.E.2d at 531.

The United States Supreme Court's recent opinion in *Apprendi v. New Jersey*, — U.S. —, — L. Ed. 2d —, 68 U.S.L.W. 4576 (2000), does not affect our prior holdings regarding the inclusion of aggravating circumstances in an indictment. The Supreme Court cites its previous holding in *Almendarez-Torres* that differentiates aggravat-

ing circumstances from elements of a crime and notes that it "has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes." *Apprendi*, — U.S. at —, — L. Ed. 2d at —, 68 U.S.L.W. at 4584-85; *see also Almendarez-Torres*, 523 U.S. at 228, 140 L. Ed. 2d at 358.

Considering the Supreme Court's continued recognition of the difference between elements of a crime and the aggravating circumstances in a capital sentencing procedure, *see Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511 (1990), our prior holdings are consistent with the decisions in *Jones* and *Apprendi*. Therefore, as we stated previously, an indictment need not contain the aggravating circumstances the State will use to seek the death penalty, *see Young*, 312 N.C. at 675, 325 S.E.2d at 185, and the trial court may not order the State to disclose the aggravating circumstances upon which it intends to rely, *see Holden*, 321 N.C. at 153, 362 S.E.2d at 531. Thus, in the instant case, the lack of aggravating circumstances on the indictment did not create error, and the trial court did not err in denying defendants' motions to order disclosure of the aggravating circumstances. Accordingly, these assignments of error are overruled.

[6] By assignment of error, Tilmon argues the trial court committed error and denied him due process of law when it denied his pretrial motion to sever the cases and overruled his objections to improper joinder. We disagree.

The facts show that on 10 February 1998, Tilmon moved for severance of his case from that of Kevin to allow the pursuit of antagonistic defenses, to promote a fair determination of guilt or innocence, and to prevent a prejudicial outcome. Citing *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), Tilmon contended each defendant made out-of-court statements regarding the other defendant; and citing *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984), Tilmon argued he and Kevin had irreconcilable differences. Subsequently, on 16 February 1998, the State made a motion to join the cases on the grounds the several offenses charged were part of a common scheme or plan; were part of the same act or transaction; and were so closely connected in time, place, and occasion that it would be difficult to separate one charge from proof of the others.

At a pretrial hearing, Tilmon requested an *ex parte, in camera* hearing regarding severance on the ground he needed to divulge his

defense to the trial court in order to fully and effectively argue this motion. Tilmon also argued there were antagonistic defenses with Kevin. Over the State's objection, the trial court allowed his request. Thereafter, all persons left the courtroom except Tilmon, his counsel, security personnel, the clerk, the judge, and the court reporter.

After the excluded parties were returned to the courtroom, Tilmon argued the cases should be separated because the conflict between his and Kevin's respective positions was such that he would be denied a fair trial. Additionally, Tilmon argued, pursuant to *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980), that evidence concerning Kevin's seized luggage[1] should be held to conflict with Tilmon's defense and/or alleged motive. The trial court denied Tilmon's motion for severance and allowed the State's motion for joinder.

The North Carolina General Statutes provide for joinder of defendants subject to the following provisions:

> (b) Separate Pleadings for Each Defendant and Joinder of Defendants for Trial.
>
> (1) Each defendant must be charged in a separate pleading.
>
> (2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or

1. On 17 September 1997, Kevin was traveling from Richmond, Virginia, to South Carolina on a bus which stopped in Fayetteville, North Carolina. While the bus was stopped, Fayetteville Police Department officers seized Kevin's luggage on the suspicion the luggage contained illegal drugs. A drug-sniffing dog had alerted the officers to the possible presence of drugs in the luggage. The officers detained the luggage after Kevin refused to give them permission to search it. Kevin continued his trip to South Carolina without his luggage and without being arrested or charged.

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C.G.S. § 15A-926(b) (1999). "The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge." *State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994). The trial court's discretionary ruling will not be disturbed on appeal absent a showing that joinder deprived the defendant of a fair trial. *See id.*; *State v. Evans*, 346 N.C. 221, 232, 485 S.E.2d 271, 277 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998); *Nelson*, 298 N.C. at 586, 260 S.E.2d at 640.

Motions for severance and objections to joinder are governed by N.C.G.S. § 15A-927(c), which provides:

(c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant.

(2) The court, on motion of the prosecutor, or on motion of the defendant other than under subdivision (1) above must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or

b. If during trial, upon motion of the defendant whose trial is to be severed, or motion of the prosecutor with the consent of the defendant whose trial is to be severed, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

(3) The court may order the prosecutor to disclose, out of the presence of the jurors, any statements made by the defendants which he intends to introduce in evidence at the trial when that information would assist the court in ruling on an objection to joinder of defendants for trial or a motion for severance of defendants.

N.C.G.S. § 15A-927(c) (1999). Thus, "the trial court must deny joinder for trial or grant a severance of defendants whenever it is necessary to promote a fair determination of the guilt or innocence of one or more defendants." *Pickens*, 335 N.C. at 724, 440 S.E.2d at 556.

We have said the presence of antagonistic defenses does not, standing alone, warrant severance. *Id.* at 725, 440 S.E.2d at 556. Additionally, " '[t]he test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.' " *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (quoting *Nelson*, 298 N.C. at 587, 260 S.E.2d at 640); *see also Pickens*, 335 N.C. at 725, 440 S.E.2d at 556. To determine whether the positions of the defendants are so antagonistic, or conflicting, as to be prejudicial, this Court has stated the trial court should grant severance when necessary to avoid an evidentiary battle between the defendants "where the state simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.' " *Nelson*, 298 N.C. at 587, 260 S.E.2d at 640 (quoting *People v. Braune*, 363 Ill. 551, 557, 2 N.E.2d 839, 842 (1936)) (alteration in original).

The State in the instant case did not stand by and rely on Kevin's statement to prove its case. *See State v. Green*, 321 N.C. 594, 601, 365 S.E.2d 587, 591-92 (holding the State did not rely on the codefendant's testimony, but was able to show independent evidence of defendant's guilt), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). In his statement, Kevin claimed he was debilitated by pepper spray, and while in this condition, he heard gunshots. To rebut Kevin's claim, the State offered contrary evidence on the effects of pepper spray. Contrary to

Tilmon's argument and to his benefit, the State's rebuttal evidence actually disproves Kevin's statement. Moreover, there was overwhelming evidence, including the testimony of several eyewitnesses, of Tilmon's involvement in the crimes. *See Evans*, 346 N.C. at 232, 485 S.E.2d at 277 (holding there was plenary evidence, irrespective of the codefendant's statement, that defendant was involved). This rebuttal evidence, along with the direct evidence of Tilmon's involvement in the crimes, shows the State was not a mere witness to an evidentiary battle between Kevin and Tilmon.

Tilmon also argues the trial court should have severed defendants' trials because Kevin's out-of-court statement to police could not be adequately "sanitized" so as to avoid violating *Bruton*.

In *Bruton*, the United States Supreme Court held admission of a statement by a nontestifying codefendant, which incriminates the other defendant, at a joint trial, violated that defendant's Sixth Amendment right to confront the witnesses against him. *See Evans*, 346 N.C. at 231, 485 S.E.2d at 277. *Bruton* applies to the states by way of the Fourteenth Amendment. *See Pointer*, 380 U.S. at 403, 13 L. Ed. 2d at 926; *State v. Parrish*, 275 N.C. 69, 73-74, 165 S.E.2d 230, 234 (1969).

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant . . . , and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation."

State v. Tucker, 331 N.C. 12, 23-24, 414 S.E.2d 548, 554 (1992) (quoting *State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968)) (alteration in original).

Tilmon, however, waived any *Bruton* objection by signing the "Notice of Waiver of Right" in which he explicitly "waive[d] any constitutional or statutory objection that [he] may have under [*Bruton*] and N.C.G.S. § 15A-927 regarding the redaction and/or admission of the statement of a nontestifying co-defendant." Additionally, Tilmon's attorney stated in open court there was "no objection to the intro-

duction of the statement of Kevin Golphin [taken by the agents on the date of his arrest] as it relates to Tilmon Golphin." *See United States v. Flaherty*, 76 F.3d 967, 971 (8th Cir. 1996) (holding the defendant waived a *Bruton* challenge when he did not mention *Bruton* when the codefendant's statements were admitted and the trial court gave the cautionary instruction requested by defendant); *State v. Hutchins*, 303 N.C. 321, 341-42, 279 S.E.2d 788, 801 (1981) (holding constitutional guarantees are not absolute as defendants "may waive the benefit of constitutional guarantees by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it"). Therefore, we conclude Tilmon waived appellate review of severance based on a *Bruton* violation.

Tilmon further contends, pursuant to *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982), and *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *death sentence vacated sub nom. Carter v. North Carolina*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976), that severance was appropriate because he was precluded from offering exculpatory evidence that would have been available if the cases had not been joined. However, contrary to Tilmon's argument, this case is distinguishable from *Boykin* and *Alford*. In *Boykin*, this Court held the defendant "was prejudiced by the court's consolidation of cases because he was prevented from testifying as to his motive in making his 'false confessions.' " *Boykin*, 307 N.C. at 91, 296 S.E.2d at 260. The trial court allowed the State to introduce the admission, but because of the joint trial, the trial court did not permit the defendant to explain that the "confessions" were intended to protect the codefendant, who had previously been convicted of murder. *Id.* This Court also held the defendant was prevented from eliciting testimony that the codefendant had also confessed to the crime. *Id.* The instant case is distinguishable in that Tilmon was not prevented from providing a motive for his own statements as was the case in *Boykin*. Tilmon contends other witnesses did not wish to testify because of the negative effect on Kevin. Tilmon's inability to elicit information about a possible motive Kevin may have had is also dissimilar from the situation in *Boykin* where the defendant was prevented from actually testifying about his own motive for giving false confessions.

In *Alford*, this Court held the defendant was entitled to a separate trial where the codefendant's statement could have corroborated the defendant's alibi, but neither the State nor the defendant offered the statement into evidence, and the defendant could not force the codefendant to testify because of the codefendant's Fifth Amendment

right against self-incrimination. *Alford*, 289 N.C. at 387-88, 222 S.E.2d at 232. In the instant case, unlike in *Alford*, Tilmon was not prevented from offering evidence which would support an alibi. Tilmon merely contends some witnesses would not testify because of the negative statements they would have to make about Kevin; however, contrary to *Alford* where the defendant could not force the codefendant to testify, *see id.*, Tilmon could have subpoenaed the witnesses to testify for him. Tilmon also states he was prevented from asking questions about Kevin's motive to kill both victims. Such questioning would not exculpate Tilmon, or clear him from guilt, as would the alibi evidence in *Alford*. *See id.* Therefore, the instant case is distinguishable from both *Boykin* and *Alford*.

Additionally, the evidence in the instant case clearly supports consolidation of defendants' trials and the trial court's grant of the State's motion for joinder. Kevin and Tilmon were both charged with two counts of first-degree murder; two counts of robbery with a dangerous weapon; and one count each of assault with a deadly weapon with intent to kill, discharging a firearm into occupied property, and possession of a stolen vehicle. The evidence tended to show the offenses arose out of a common scheme and were part of the same transaction. *See* N.C.G.S. § 15A-926(b)(2). Therefore, the trial court did not err in denying Tilmon's motion for severance and granting the State's motion for joinder.

[7] In another assignment of error, Tilmon argues the trial court erred in denying his pretrial motion for discovery of Trooper Lowry's and Deputy Hathcock's personnel files. Tilmon relies on his federal constitutional right to material evidence which is in the hands of the prosecution. Additionally, Tilmon relies on the rules of evidence pertaining to the admissibility of relevant evidence in arguing he was entitled to the personnel files. Tilmon further argues the files may have shown prior acts of lethal force which might have impacted the jury on the issue of whether Tilmon had a reasonable belief that Kevin was the victim of excessive force by the law enforcement officers on the day in question. We disagree.

Initially, we note Tilmon claims the denial of this requested discovery violated his state and federal constitutional rights. However, Tilmon's motion for discovery of the personnel files did not allege any constitutional violations. As such, the trial court did not rule upon any possible constitutional violations. " 'This Court is not required to pass upon a constitutional issue unless it affirmatively appears that

the issue was raised and determined in the trial court.' " *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999) (quoting *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985)). Therefore, we need not address Tilmon's allegation that the denial of his motion was a violation of his state and federal constitutional rights. *See also* N.C. R. App. P. 10(b)(1).

Furthermore, discovery in the superior court is governed by chapter 15A, article 48 of the North Carolina General Statutes. N.C.G.S. § 15A-903 specifically governs disclosure of evidence by the State and provides in pertinent part:

> (d) Documents and Tangible Objects.—Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof which are *within the possession, custody, or control of the State* and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

N.C.G.S. § 15A-903(d) (1999) (emphasis added). We have previously held " '[w]ithin the possession, custody, or control of the State' as used in th[is] provision[] means within the possession, custody or control of the prosecutor or those working in conjunction with him and his office." *State v. Crews*, 296 N.C. 607, 616, 252 S.E.2d 745, 751-52 (1979); *see also State v. Pigott*, 320 N.C. 96, 102, 357 S.E.2d 631, 635 (1987).

In the instant case, on 10 February 1998, Tilmon filed a motion for discovery of personnel files in which he requested that the trial court conduct an *in camera* review and then provide defendant any evidence deemed exculpatory as part of discovery. In the motion, Tilmon referred to newspaper articles published after the crimes which concerned an incident involving disciplinary action against Trooper Lowry two years prior to the crimes. At a pretrial hearing, the trial court denied the motion stating there was no justification for an *in camera* examination at that time, but the trial court reserved the right to order the files' production at a later time.

There was no violation of this discovery statute in the instant case. The list of discoverable items in the statute does not include

victims' personnel files, *see* N.C.G.S. § 15A-903(d), and the personnel files were not in the possession, custody, or control of the prosecutor in this case, *see id. See also State v. Cunningham*, 344 N.C. 341, 352-53, 474 S.E.2d 772, 776 (1996) (holding regardless of whether the defendant had a right to an *in camera* inspection of the personnel file, he was not prejudiced by the trial court's refusal to allow it because the victim's conduct as a police officer would have no relevance to the question at issue in that case). Therefore, the trial court did not err in denying Tilmon's motion to discovery of the victims' personnel files.

[8] By assignments of error, both Kevin and Tilmon argue the trial court erred in denying Tilmon's pretrial motion to suppress the incriminating statement Tilmon made to law enforcement officers after his arrest. Tilmon argues the police continued the custodial interrogation of him after he had invoked his right to counsel. Based upon this alleged violation, Tilmon contends the trial court should have granted his motion to suppress and the trial court's error in admitting the statement entitles him to a new trial. Kevin concedes he has no standing to assert Tilmon's constitutional rights but claims he was prejudiced by the erroneous admission of Tilmon's statement. Kevin argues Tilmon's confession directly incriminated Kevin because of the acting in concert theory submitted to the jury, and the jury could have drawn inferences regarding Kevin's participation in Deputy Hathcock's murder from omissions in Tilmon's statement. We disagree.

As to Tilmon's argument on this issue, we have previously stated that a motion *in limine* was not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam). As a pretrial motion to suppress is a type of motion *in limine*, Tilmon's pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of his statement because he did not object at the time the statement was offered into evidence. *See id.* In addition, while Tilmon's assignment of error includes plain error as an alternative, his brief contains no specific argument that there is plain error in the instant case. Accordingly, Tilmon's argument is not properly before this Court. *See* N.C. R. App. P. 10(c)(4); *State v. McNeil*, 350 N.C. 657, 681, 518 S.E.2d 486, 501 (1999), *cert. denied*, — U.S. —, 146 L. Ed. 2d 321 (2000); *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).

However, given the constitutional nature of Tilmon's argument, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we will address the merits of Tilmon's argument.

Both the United States Supreme Court and this Court have held that during a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present "*unless the accused himself initiates further communication, exchanges, or conversations with the police.*" *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981) (emphasis added); *see also Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966); *State v. Warren*, 348 N.C. 80, 97, 499 S.E.2d 431, 440, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998); *State v. Jackson*, 348 N.C. 52, 55, 497 S.E.2d 409, 411, *cert. denied*, 525 U.S. 943, 142 L. Ed. 2d 301 (1998); *State v. Lang*, 309 N.C. 512, 521, 308 S.E.2d 317, 321 (1983).

The term "interrogation" is not limited to express questioning by law enforcement officers, but also includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 302, 64 L. Ed. 2d 297, 308 (1980); *see also State v. Coffey*, 345 N.C. 389, 400, 480 S.E.2d 664, 670 (1997); *State v. DeCastro*, 342 N.C. 667, 684, 467 S.E.2d 653, 661, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996). The focus of the definition is on the suspect's perceptions, rather than on the intent of the law enforcement officer, because *Miranda* protects suspects from police coercion regardless of the intent of police officers. *See Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308. However, because "the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 301-02, 64 L. Ed. 2d at 308.

Based on the Supreme Court's definition of interrogation in *Innis*, there is a limited exception to *Miranda* for routine questions asked during the booking process. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 L. Ed. 2d 528, 552 (1990) (plurality opinion) (where the accused made an incriminating statement prior to being read his *Miranda* rights, the Supreme Court held questions regarding a suspect's name, address, physical characteristics, date of birth, and current age constituted custodial interrogation, but were "nonetheless

admissible because the questions [fell] within a 'routine booking question' exception which exempts from Miranda's coverage questions to secure the 'biographical data necessary to complete booking or pretrial services' ") (quoting *United States v. Horton*, 873 F.2d 180, 181 n.2 (8th Cir. 1989)); *Clayton v. Gibson*, 199 F.3d 1162 (10th Cir. 1999) (where the suspect had been given his *Miranda* rights and had invoked his right to counsel, the Tenth Circuit Court of Appeals relied on *Muniz*, 496 U.S. at 601, 110 L. Ed. 2d at 552, in holding there was no constitutional violation because the questions asked fell within the booking exception); *State v. Ladd*, 308 N.C. 272, 286, 302 S.E.2d 164, 173 (1983) (where the suspect had been given his *Miranda* rights and had invoked his right to counsel, this Court relied on the language of *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308, to find an exception to "interrogation" for questions related to the booking process). This exception is consistent with *Innis* because the Supreme Court stated that interrogation includes express questioning as well as " 'any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *Ladd*, 308 N.C. at 286, 302 S.E.2d at 173 (quoting *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308) (alteration in original). In an effort not to infringe upon an accused's constitutional rights, however, the exception is limited "to *routine informational* questions necessary to complete the booking process that are *not* 'reasonably likely to elicit an incriminating response' from the accused." *Id.* at 287, 302 S.E.2d at 173.

In addition, responses to generalized questions by law enforcement officers, which are not reasonably likely to elicit incriminating responses, are admissible. *See State v. Gray*, 347 N.C. 143, 171, 491 S.E.2d 538, 549 (1997) (asking whether the defendant needed anything was not designed to elicit an incriminating response), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998); *State v. Vick*, 341 N.C. 569, 581, 461 S.E.2d 655, 662 (1995) (police captain's statements during the fingerprinting process that he would talk with the defendant later and answer any of the defendant's questions at that time were not intended or expected to elicit an incriminating response). Moreover, law enforcement officers can respond to questions posed by a defendant without violating *Innis* or *Edwards*. *See State v. McQueen*, 324 N.C. 118, 132, 377 S.E.2d 38, 46-47 (1989) (holding the law enforcement officer's willingness to respond to the defendant's questions and the actual answers given were not "words or actions . . . [the law enforcement officer] *should have known* were

reasonably likely to elicit an incriminating response" pursuant to *Innis*, 446 U.S. 291, 64 L. Ed. 2d 297, and the defendant's statements and questions were voluntary pursuant to *Edwards*, 451 U.S. 477, 68 L. Ed. 2d 378).

In the instant case, the transcript of the pretrial hearing concerning Tilmon's motion to suppress reveals that Agent Godfrey and Detective Casey questioned Tilmon on 23 September 1997. Agent Godfrey advised Tilmon of his constitutional rights. Tilmon stated he wanted to talk with a lawyer. Thereafter, Agent Godfrey informed Tilmon they could not ask Tilmon about his involvement in the shootings of Trooper Lowry and Deputy Hathcock because he had requested to speak with an attorney, but Agent Godfrey told Tilmon they did need to obtain biographical information and background data for the arrest report. Subsequently, Agent Godfrey asked Tilmon for his full name, address, height, weight, next of kin, place of employment, and grade of education he had completed. Then Tilmon asked Agent Godfrey where he would be kept until his trial. Agent Godfrey responded that he would be kept in the Cumberland County jail. Tilmon then informed Agent Godfrey that he was a vegetarian and that his religion allowed him to eat only fish and prohibited anyone from cutting his hair or taking anything from his body. Agent Godfrey asked the name of Tilmon's religion so he could inform jail management in order to justify Tilmon's request. In response, Tilmon stated he was a member of the Rastafarian religion. Next, based on the belief that a video camera in Trooper Lowry's car had recorded the incident, Tilmon asked Agent Godfrey and Detective Casey why they wanted to talk about what had happened because it should have been videotaped. Agent Godfrey responded that he still needed to know why it happened. Agent Godfrey testified that at the time he made this statement, he knew there was no videotape and that neither he nor Detective Casey ever indicated to Tilmon there was a videotape. Tilmon then stated he would tell Agent Godfrey and Detective Casey why it happened. Tilmon proceeded, over a lengthy interview process which included several breaks, to make a statement concerning the shooting incident.

After reviewing the motion, hearing the evidence offered by the State, and giving Tilmon an opportunity to present evidence, the trial court made findings of fact consistent with the above recitation of facts. Thereafter, the trial court concluded as a matter of law:

> Tilmon Golphin made a statement to law enforcement officers freely, voluntarily and understandingly, after being fully

advised by law enforcement officers of all appropriate constitutional and state statutory rights and federal statutory rights related to the right to counsel and related to rights concerning self-incrimination.

Two, Tilmon Golphin's motion to suppress his statement of the—on the twenty-third day of September, 1997, should be denied.

Based on the findings of fact and conclusions of law, the trial court denied Tilmon's motion to suppress.

A trial court is to make an initial determination as to whether a defendant waived his/her right to counsel. Those findings of fact " 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Peterson*, 347 N.C. 253, 255, 491 S.E.2d 223, 224 (1997) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995)). Conclusions of law which are supported by findings of fact are binding on appeal. *Id.* "Further, the trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

We conclude the trial court's findings of fact are supported by competent evidence and are, therefore, binding on appeal. *See Coffey*, 345 N.C. 389, 480 S.E.2d 664 (holding the Court was bound by the trial court's findings because, assuming *arguendo* there was an interrogation, there was competent evidence in the record to support the trial court's finding that the defendant initiated the conversation with police after invoking his right to counsel). In addition, the findings of fact support the conclusions of law.

This Court must also determine if the trial court's conclusions are legally correct. We conclude they are. Although Tilmon asserted his right to counsel and the police continued to ask Tilmon questions, *see Innis*, 446 U.S. at 302, 64 L. Ed. 2d at 308, the questions were included in the exception for questions used to elicit biographical information, *see Ladd*, 308 N.C. at 286, 302 S.E.2d at 172-73. In addition, it is unreasonable to say Agent Godfrey should have known his questions concerning Tilmon's biographical information were reasonably likely to elicit an incriminating response, and there was no reason Agent Godfrey should have known his response to Tilmon's questions about where he would be housed until the time of trial would elicit an

incriminating response. *See Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308; *McQueen*, 324 N.C. at 132, 377 S.E.2d at 46. Moreover, Tilmon initiated the further discussion when he asked why Agent Godfrey and Detective Casey wanted to talk about the incident when it had been videotaped. *See Edwards*, 451 U.S. at 484-85, 68 L. Ed. 2d at 386. Agent Godfrey merely responded to Tilmon's question that they needed to know why it happened. Nothing should have led Agent Godfrey to believe his response to the question would elicit an incriminating response. *See Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308.

As we have concluded that the trial court's findings of fact are supported by competent evidence, that the findings of fact support the conclusions of law, and that the conclusions of law are legally correct, we hold Tilmon's constitutional rights were not violated by the trial court's denial of his motion to suppress his statement to police. Therefore, this assignment of error is overruled.

[9] Concerning Kevin's assignment of error, it is well settled that "a defendant's right to counsel is personal" to the defendant. *State v. Peterson*, 344 N.C. 172, 179, 472 S.E.2d 730, 733 (1996). Kevin concedes he has no standing to assert Tilmon's constitutional right to counsel. Nevertheless, Kevin argues he was prejudiced by the erroneous admission of the allegedly unconstitutional confession.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires a party to present a timely request, objection, or motion to the trial court to preserve a question for appellate review. *See* N.C. R. App. P. 10(b)(1). However, Kevin did not make a motion *in limine* to suppress Tilmon's statement on the basis that both the state and federal constitutions require its exclusion. Nor did Kevin object at the time the statement was offered into evidence at trial. Thus, this issue was not properly preserved. Although Kevin's assignment of error includes plain error as an alternative, he does not argue specifically and distinctly, pursuant to N.C. R. App. P. 10(c)(4), that there was plain error. Therefore, this assignment of error is not properly before this Court.

JURY SELECTION ISSUES

[10] By assignments of error, both defendants argue, pursuant to N.C.G.S. § 15A-1214(a), the trial court violated its statutory duty to ensure jury selection was conducted in a random manner. Specifically, defendants contend both the trial court's use of panels

for jury selection and the trial court's placement of certain prospective jurors into particular jury panels violated the randomness requirement of jury selection, the purpose of which is to protect a defendant's state and federal constitutional rights to a fair and impartial jury.

Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal. *See Wallace*, 351 N.C. at 503, 528 S.E.2d at 340-41; *Nobles*, 350 N.C. at 495, 515 S.E.2d at 893. However, statutory violations, regardless of objections at the trial court, are reviewable. "When a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994).

In the instant case, defendants cite *Gray v. Mississippi*, 481 U.S. 648, 660, 95 L. Ed. 2d 622, 634 (1987) (holding the improper removal of prospective jurors for cause was a type of constitutional error which was not susceptible to harmless error analysis), and contend their constitutional rights to a fair and impartial jury were violated. However, defendants never objected, on constitutional grounds or otherwise, to the use of panels for jury selection or the manner in which the trial court placed prospective jurors into panels. Thus, defendants have waived review of the constitutionality of the trial court's actions. *See Nobles*, 350 N.C. at 495, 515 S.E.2d at 893.

Although defendants failed to object at trial, we review the alleged statutory violation. N.C.G.S. § 15A-1214(a) provides: "The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." N.C.G.S. § 15A-1214(a) (1999). A challenge to a jury panel: (1) "May be made only on the ground that the jurors were not selected or drawn according to law"; (2) "Must be in writing"; (3) "Must specify the facts constituting the ground of challenge"; and (4) "Must be made and decided before any juror is examined." N.C.G.S. § 15A-1211(c) (1999); *see also State v. Workman*, 344 N.C. 482, 498-99, 476 S.E.2d 301, 310 (1996) (where this Court found no merit in the defendant's assignment of error "[i]n light of the fact that defendant failed to follow the procedures clearly set out for jury panel challenges and further failed, in any manner, to alert the trial court to the alleged improprieties"). Defendants in the instant case failed to comply with N.C.G.S. § 15A-1211(c) to challenge the panels; therefore, as

this Court found in *Workman*, defendants have waived review of their assignments of error.

However, assuming, without deciding, that the trial court violated N.C.G.S. § 15A-1214(a), defendants cannot show prejudicial error. The facts surrounding this issue tended to show that the trial court informed both Kevin and Tilmon of its intention to place the prospective jurors into panels for jury selection. The trial court stated:

> I will hear from the state and the defendants as to each of the [hardship] requests, will rule on those. Then from those left, the court—the clerk will draw names and put them into panels. There will be thirty panels. The panels probably will not be of equal number. But the jurors will be randomly drawn and put into the thirty panels.

During jury selection, there were three prospective jurors whose hardship excuses were denied or who did not appear when called and who were placed into specific panels by the trial court. Defendants assigned error to such placement.

First, prospective juror Lance Peedin requested a hardship excuse because he did not have transportation to the courthouse. The trial court suggested placing Peedin in panel number thirty "because if worse came to absolute worse, we could provide him transportation." The trial court asked if anyone had a problem with placing Peedin in panel number thirty; counsel for both defendants responded, "No, sir." Peedin was never called to be questioned for inclusion on the jury.

Second, prospective juror Ronald Harris requested a hardship excuse because he was starting a new job as a deputy sheriff and would have to take unpaid days off to serve. The trial court denied the request and placed Harris into panel number thirty. After some courtroom discussion, Kevin's counsel stated, "We could be out of peremptories by group thirty." Harris was never called to be questioned for inclusion on the jury.

Lastly, prospective juror Jeffrey Beasley, who was selected to be in panel number two, did not appear in court when called. Beasley later informed the court that his work obligations prevented him from coming. The court listed the alternatives of how to respond to Beasley's absence: "move him to a later panel" or "go get him." Tilmon's counsel stated, "I guess on behalf of Tilmon Golphin, we're

satisfied if you move him to a much later group, and if we don't get to him at all, it will be a moot issue." Kevin's counsel stated, "Whatever the Court decides is fine." The court then asked if they would agree to move Beasley to panel number twenty-five. Counsel for both Tilmon and Kevin agreed. Beasley was later called and did appear. Based on his responses to questioning, Tilmon's counsel challenged Beasley for cause, and counsel for Kevin joined the challenge. The trial court excused Beasley for cause.

There were also prospective jurors who had made written requests to be excused, some of which were denied. Those whose requests were denied were placed into a separate panel, number thirty-one. Reflecting the intent of the court, the judge stated:

> Then it is then the intent of the court to draft a letter to be sent to the address of these jurors with the jury reporting instructions informing them that they are on panel thirty-one; that it—that they are to call in each day after five; that if their panel is called in, they are to come at the appointed time at which time they will receive—that they will go through the orientation procedure and then be considered for service in this case. That letter will go out over my signature to these jurors. We will simply mail them the letter since we're not going to need them any time soon. Does anyone object to that procedure?

Both defendants stated there was "[n]o objection." Defendants now assign error to the placement of these prospective jurors into panel number thirty-one.

Defendants were not prejudiced by the use of panels in the jury selection process. Neither Tilmon nor Kevin objected when the trial court indicated its intention to use panels for jury selection or when the trial court stated how the prospective jurors were to be placed into panels. *See State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (holding there was a statutory violation, but the defendant could not show he was prejudiced); *State v. Hyde*, 352 N.C. 37, 49, 530 S.E.2d 281, 290 (2000) (holding the defendant requested and consented to any deviation in the statutory jury selection process).

In addition, defendants cannot show they were prejudiced by the trial court's placement of Beasley, Peedin, and Harris into specific panels. When the trial court was discussing Beasley with all parties, Tilmon's counsel suggested moving Beasley to a later panel, and Kevin's counsel stated he would agree with the court's decision.

Regarding Peedin, both defendants replied "no" when the trial court asked if there was a problem moving Peedin into panel number thirty. Neither defendant objected when the trial court indicated its intention to move Harris into panel number thirty. *See Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815; *Hyde*, 352 N.C. at 49, 530 S.E.2d at 290. Additionally, with regard to Beasley, Peedin, and Harris, defendants argue the trial court's only options were to excuse or defer them. However, Beasley was subsequently excused for cause on a challenge by defendants, and because Peedin and Harris were never called for questioning, it is inconsequential that the trial court did not excuse or defer Peedin and Harris. Thus, defendants were not prejudiced.

Moreover, defendants cannot show they were prejudiced by the trial court's placement of the prospective jurors whose written excuses were denied into panel number thirty-one. Although defendants argue the makeup of the jury might have differed if those prospective jurors had been randomly placed into panels, "defendant[s] [are] not entitled to any particular juror. [The] right to challenge is not a right to select but to reject a juror." *State v. Harris*, 338 N.C. 211, 227, 449 S.E.2d 462, 470 (1994). In *Harris*, this Court noted that the defendant conceded that neither he nor the State exhausted their peremptory challenges, "evidenc[ing] satisfaction with the jury which was empaneled." *Id.* In the instant case, neither defendant exhausted the statutory number of peremptory challenges. *See* N.C.G.S. § 15A-1217(a) (1999). Thus, neither defendant can show he was prejudiced because neither was forced to accept a juror he felt was undesirable. *See Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815 (noting that the defendant did not exhaust his peremptory challenges and was not forced to accept an undesirable juror); *see also Harris*, 338 N.C. at 227, 449 S.E.2d at 470.

Therefore, we conclude defendants failed to preserve any arguments as to a constitutional violation or a statutory violation. Nevertheless, assuming *arguendo* there was error, defendants have failed to show they were prejudiced by the trial court's use of panels in jury selection or the trial court's placement of particular jurors into specific panels.

[11] By assignments of error, both Tilmon and Kevin argue the trial court violated their state and federal constitutional rights to be present at every stage of their capital trial. Defendants contend the trial court's direction to the clerk of court to meet privately with jurors about transportation and other logistical matters violated their

constitutional rights because transportation was a substantive issue which was not "merely administrative" in nature. We disagree.

As we noted above, defendants are guaranteed the right to be present at every stage of their trial by the Confrontation Clause of the Sixth Amendment to the United States Constitution. *See Allen*, 397 U.S. at 338, 25 L. Ed. 2d at 356. Similarly, the Confrontation Clause in Article I, Section 23 of the North Carolina Constitution provides defendants the right to be present at every stage of the trial. *See Call*, 349 N.C. at 397, 508 S.E.2d at 506; *Chapman*, 342 N.C. at 337, 464 S.E.2d at 665; *Payne*, 320 N.C. at 139, 357 S.E.2d at 612. This right cannot be waived when a defendant is being tried capitally, *see Buckner*, 342 N.C. at 227, 464 S.E.2d at 430, and extends to jury selection, *see State v. McCarver*, 329 N.C. 259, 261, 404 S.E.2d 821, 822 (1991); *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990).

While this Court has held a "trial court's *ex parte* admonitions to the jury amounted to error requiring a new trial," *Payne*, 320 N.C. at 140, 357 S.E.2d at 613, this Court has also held a defendant's right to presence is not violated when a clerk communicates with a jury about administrative matters, *see State v. Bacon*, 337 N.C. 66, 86, 446 S.E.2d 542, 551 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). In *Bacon*, the defendant argued his right to presence was violated by the trial court's instructions to the bailiff to " 'put the jurors in the jury room on break' " and " 'have them to return back to the jury room' at some specific time," as well as the administrative duties of the clerk of calling jury roll and informing jurors what time they needed to arrive at court. *Id.* This Court concluded "that these challenged communications were of an administrative nature and did not relate to the consideration of defendant's guilt or innocence." *Id.* This Court held the defendant's presence would not have had a reasonably substantial relation to his opportunity to defend. *Id.*

Similarly, in *State v. Lemons*, 348 N.C. 335, 346, 501 S.E.2d 309, 316 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999), the defendant argued the clerk's *ex parte* contact with jurors violated his right to presence because there was no record of the clerk's contact with the jurors, and there was no showing the clerk's contact was limited to the jury questionnaire inquiry. This Court held there was no violation of the defendant's constitutional rights because "[i]n distributing and gathering the questionnaires, the clerk merely sought to carry out the administrative duties which the trial court had requested," and the defend-

ant failed to show " 'how his presence would have been useful to his defense.' " *Id.* at 348, 501 S.E.2d at 317 (quoting *Bacon*, 337 N.C. at 86, 446 S.E.2d at 551-52); *see also State v. Gay*, 334 N.C. 467, 482-83, 434 S.E.2d 840, 848 (1993) (holding the trial court's order to the bailiff to remind jurors to follow the court's instructions is not an instruction as to the law, and such communications do not relate to the defendant's guilt or innocence because the defendant's right to presence would not have been useful to his defense as demonstrated by the fact that defendant's attorney had no objection; thus, while the trial court's order to the bailiff "may run the risk of violating defendant's right to be present," there was no reversible error in the case).

In another case, the defendant argued his right to be present was violated when the bailiff, pursuant to the trial court's instructions, told the jurors to take a fifteen minute break. *See State v. May*, 334 N.C. 609, 614, 434 S.E.2d 180, 183 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661 (1994). The defendant contended that because there was no record of the bailiff's conversation with the jury, this Court could not know the nature of the conversation, and it would be impossible to reconstruct. *See id.* at 614-15, 434 S.E.2d at 183. This Court held:

> Without anything in the record to show something else happened, we will assume the bailiff followed the court's instructions. . . . It would impose a heavy burden on our courts if a court reporter were required to accompany a bailiff every time he is with a jury in order to make a record of what was said.

Id. at 615, 434 S.E.2d at 183.

In the instant case, after the first three jurors were selected, the trial court instructed the jurors on several matters, including:

> Now, in all candor, I anticipate that that is going to take between another three and four weeks to complete it. And I think from your standpoint, having participated in the jury selection process this week, in projecting it out over the selection of basically an additional thirteen jurors, you can believe that that's probably a fair estimate. Now, I'm not going to ask you to wait, as I promised you in the beginning, in the jury deliberation room while we do this. You will be placed on telephone standby.
>
> When court is recessed, please go to the jury room. The courtroom clerk and the trial court administrator from Cumberland County who are coordinating aspects relating to the

jury will come into the jury deliberation room to talk with you and to get some information from you. The information that they will want will include telephone numbers where you can be reached during the day or in the evening. We need them. And they may ask questions about the best times to reach you and the best numbers to do that. So they will want some fairly complete information about places that we can reach you.

And it may be that if you know between now and then there will be, you know, a couple days where you may be out of town and be at a different number, that will be fine if we can know where to reach you. So they will be trying—they will be getting more information about how to get up with you than we have been getting from the jury generally because you have been selected as jurors in this case.

They will also be giving you some information about the transportation procedure and about the lunch procedure during the trial, including the menu that you will be able to choose from during the trial and the menu selection sheets. So I would ask that you cooperate with them in furnishing the information that they have requested, and if you have questions about the logistics of reporting, you may ask them and they will probably have the answers.

One thing we do not know at this point is exactly the precise location here at the courthouse where you will report. We will have a place and there will be parking provided at that place, but we cannot tell you right now the precise location. When you are called and told to come in, you will be told specifically when to report. The reporting time will be 8:15. That is on the sheet. That will be basically the reporting time each day unless there is something unusual for that day about the court schedule. So the reporting time here at the courthouse in Johnston County or some location near this will be 8:15 in the morning.

The court schedule again 10:00 to 4:00 with an hour for lunch probably from 12:30 to 1:30. There will be a short break in the middle of the morning, short break in the middle of the afternoon. And then at 4:00 go back to the bus, take you back to the same place—well, the place where your car is here in Johnston County. If somebody is driving you here, that is fine. You should be back at the same place. The bus will leave from the same place and come back to the same place which is near where the cars

> will be parked. So if somebody is going to pick you up, they could do so at that location.

The trial court gave similar instructions after each of the remaining nine jurors and four alternate jurors were selected.

Defendants argue the clerk's communication with selected jurors was not merely administrative in nature in that there is a possibility the jurors asked the clerk substantive questions. In support of this argument, defendants point out that, in its instructions to jurors Kirsti Lovette Kearney, Sharon Seals Waugh, and Alice Rayne Stephenson, the trial court added:

> If you have questions about the logistics of when you report, where you report—no one can answer or would answer any questions about any other aspect of the trial—but if you have questions about those kind of logistical matters that [the clerk] may be able to answer those questions for you.

Defendants argue this additional instruction indicates there was a problem limiting jurors' questions to those concerning logistical matters. Defendants also state the trial court did not give this additional instruction to any other group of selected jurors.

The clerk of court's contact with the selected jurors in the instant case is similar to that in *Bacon*, *Lemons*, and *May*. The clerk was performing an administrative duty in providing logistical information to newly selected jurors. The clerk obtained telephone numbers of the selected jurors, who were placed on telephone standby and were provided information about where to park and the lunch menu during trial. While the trial court did instruct three jurors with the additional statements as defendants indicated, the trial court also made a similar statement when instructing juror Timothy Hugh Renfrow, but to no other jurors. Later, however, when the trial court instructed alternate juror Audrey Pittman, it stated:

> if you will go to the jury deliberation room and wait there for the courtroom clerk, she will come there with the instruction material, with the menu, with the order sheets for the first couple of days, to get your telephone numbers and then *answer any other questions that you have.*

Contrary to defendants' contentions, the trial court's failure to make a statement to the jurors that followed, similar to the one made to jurors Kearney, Waugh, Stephenson, and Renfrow, and the one given

to alternate juror Pittman, shows there was no such concern that the jurors were asking the clerk inappropriate questions. Moreover, as there is nothing in the record to suggest that anything other than logistics was discussed, and the fact that defendants failed to object, we assume the clerk engaged only in the administrative duties assigned. *See May*, 334 N.C. at 615, 434 S.E.2d at 183.

Defendants also argue the trial court indicated the clerk would be discussing transportation procedures, which defendants contend was a substantive issue. Defendants made pretrial motions concerning the route jurors would take to Cumberland County and requested that jurors not be driven by the scene of the crime. These motions were allowed. Defendants contend any discussion of transportation with the clerk could have generated questions about the route and time required to travel from one county to the other.

Defendants speculate that discussion may have arisen about the bus route to Cumberland County. Regarding the subject of transportation, the record indicates the clerk was to inform the jurors where to park their cars in the morning and where the bus would drop them off in the evening. Defendants can focus only on what jurors *may* have asked the clerk about the transportation route and the time necessary to travel from Johnston County to Cumberland County. Based on defendants' failure to object and because the record contains nothing to suggest the clerk spoke with jurors about the bus route or any other substantive issue, we assume the clerk limited any conversation to the logistics of jury service and any other administrative matters. *See id.* at 614-15, 434 S.E.2d at 183. Therefore, we conclude defendants' assignments of error are without merit and are overruled.

[12] By assignments of error, both defendants contend the trial court erred by excusing for cause prospective jurors Timothy Ray, Sandra Parker, Jarrell Etheridge, Pamela Sessions, Lester Brown, Michael Hood, Richard Coppedge, Brenda Pone, Paquita Raynor, Edward Blackmon, Robert Batts, and Clifton Cooley because they were qualified to serve and could be fair and impartial. In their briefs, however, defendants argue only that the trial court erred in excusing prospective juror Sandra Parker. As to the remaining prospective jurors defendants included in their assignments of error, any claims are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5).

In his brief, Tilmon argues the trial court erred in excusing prospective juror Parker for cause without allowing an opportunity

to ask further questions. Tilmon contends this error stripped him of his constitutional rights by precluding him from making a full and fair inquiry during the jury selection process. Kevin incorporates Tilmon's argument and contends the trial court erred in excusing Parker for cause in violation of his constitutional rights. Specifically, Kevin argues the trial court's inquiry into Parker's state of mind was cursory, overly general, and not adequate to demonstrate Parker lacked the ability to be fair and impartial.

A defendant's due process rights guarantee the right to a trial by a fair and impartial jury. *See State v. Boykin*, 291 N.C. 264, 269, 229 S.E.2d 914, 917 (1976). Either party may challenge an individual juror for cause if the juror is "unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (1999). "It has long been held that the 'granting of a challenge for cause rests in the sound discretion of the trial court.' " *State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996) (quoting *State v. Cunningham*, 333 N.C. 744, 753, 429 S.E.2d 718, 723 (1993)), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997); *see also State v. Burrus*, 344 N.C. 79, 88, 472 S.E.2d 867, 874 (1996); *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Therefore, absent a showing of abuse of discretion, we will not disturb the trial court's ruling on a challenge for cause. *See Hartman*, 344 N.C. at 458, 476 S.E.2d at 335.

To determine whether a prospective juror is able to render a fair and impartial verdict, the trial court must be able to " 'reasonably conclude from the *voir dire* . . . that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence.' " *State v. Sokolowski*, 351 N.C. 137, 148, 522 S.E.2d 65, 72 (1999) (quoting *Jaynes*, 342 N.C. at 270, 464 S.E.2d at 461). In the context of excusing jurors for cause because their views on the death penalty would substantially impair the performance of their duties as a juror, this Court has held:

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

State v. Oliver, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981).

In the instant case, Parker indicated to the prosecutor she could find defendants guilty, the relatively young ages of defendants would not cause her any problem, she could fairly evaluate the evidence despite having family members in law enforcement, she could consider both possible punishments, she could impose a sentence of life imprisonment without the possibility of parole for someone convicted of first-degree murder, she could recommend the death penalty if she felt it was the appropriate punishment, and she could be fair. The prosecutor accepted Parker.

Tilmon's counsel then questioned Parker. Parker indicated she could render a fair judgment from the facts presented; she could maintain impartiality despite seeing the photographs and other evidence; she could maintain impartiality regardless of defendants' or the victims' race or defendants' religion; and she could weigh the aggravating and mitigating circumstances, follow the trial court's instructions, and fairly consider both life imprisonment without parole and the death penalty. Tilmon's counsel accepted Parker.

When Kevin's counsel questioned Parker, however, she became emotional and began to doubt her impartiality.

> [COUNSEL FOR KEVIN]: . . . Do you think your—let's go to that, do you think your nerves might cause you some problems in this trial? Do you think—I mean do you think there might be something about this trial that will cause you to be so emotional or so distraught that you just won't be able to give it your full attention and be a fair and impartial juror?
>
> [PROSPECTIVE JUROR PARKER]: At the beginning of the week, I probably would have said no, but it seems like the closer it gets, the longer it goes, the more it weighs on my mind, what is actually happening here.
>
> [COUNSEL FOR KEVIN]: You understand this is a serious charge obviously and this is serious business that we're here about. Do you mind expanding on that a little? I mean do you think there is something about the trial that may be so emotionally trying for you or so devastating that you wouldn't be able to give it your full attention or that you wouldn't be able to render a fair and impartial verdict or consider the evidence fairly and consider the defendants guilty—innocent until proven guilty, weigh the death penalty and life imprisonment without parole? Do you think some

of that might be a problem because of emotions? Tell us now. Now is the time.

[PROSPECTIVE JUROR PARKER]: Like I said, I have a daughter. She's eight years old. And it weighs on my mind that one day she's going to be a teenager and that she may—something may happen where she gets in trouble and I may be sitting behind her in the courtroom and I don't think I can pass a judgment on another person's child. I can't do that. (Juror crying.)

The trial court then intervened and asked questions of Parker.

THE COURT: Ma'am, let me ask you this. Do you feel that the concern that you just raised would interfere substantially with your ability to be fair and impartial to all the parties in this case?

[PROSPECTIVE JUROR PARKER]: (Nodding head.)

THE COURT: Now, let me ask you this. Understanding that it would be hard for you, understanding that you would give it your best efforts, right now, those are not really the questions, whether it would be hard because it may very well be hard to do, you know. And I recognize that you would absolutely give it your best effort. Given that, do you have a question about your ability to be fair to everyone involved in this case?

[PROSPECTIVE JUROR PARKER]: I have doubts.

THE COURT: Well, there's a way that I have asked this to some other jurors that have gone on, so I'm going to ask you, are you confident—are you confident of your ability to be fair and impartial to everyone involved in this case or do you have a serious doubt, a substantial doubt concerning your ability to be fair and impartial?

[PROSPECTIVE JUROR PARKER]: I have a substantial doubt.

The trial court then excused Parker to return to the jury deliberation room. Parker left the courtroom, and the attorneys for all parties discussed her responses.

THE COURT: Anybody got anything?

[COUNSEL FOR KEVIN]: Nothing from us.

[PROSECUTOR]: Yes, sir, Judge. The state would challenge her for cause based on her remarks, if I understand her correctly—

THE COURT: Okay.

[PROSECUTOR]: —as to what she said.

THE COURT: I will hear from the defendant Kevin Golphin.

[COUNSEL FOR KEVIN]: Well, Your Honor, I guess I would like to ask her a few more questions if I could. I'm not sure she has exactly said she couldn't render a fair and impartial verdict in weighing the evidence and after hearing the evidence.

THE COURT: Mr. Parish?

[COUNSEL FOR TILMON]: I have nothing to add.

The trial court then issued its ruling on the State's motion to excuse Parker for cause and Kevin's request to ask additional questions, saying:

> The question of the ability to be fair and having substantial doubt, concerning the ability to be fair has sort of been my litany in this case throughout and it has been my inclination to allow that to be the standard, and it would be my intent when we come down with the question of any juror to keep that as the standard. Therefore, in the Court's discretion, I'm going to decline the permitting of additional questions and excuse the juror for cause.

Based on our review of the transcript in the instant case, we note that Tilmon did not request from the trial court an opportunity to ask Parker more questions. Although Tilmon states that both he and Kevin requested such an opportunity, the transcript reveals that Kevin's counsel indicated a desire to ask more questions, but Tilmon's counsel stated, "I have nothing to add." The statement by Tilmon's counsel does not express an intent to join the request made by Kevin's counsel. Therefore, Tilmon has not preserved appellate review of this argument pursuant to N.C. R. App. P. 10(b)(1). Moreover, as Tilmon claims the trial court's excusal of Parker violates his constitutional rights, we note that this Court is not required to rule on a constitutional issue unless it was raised and determined by the trial court. *See Nobles*, 350 N.C. at 495, 515 S.E.2d at 893. Tilmon's counsel did not raise a constitutional issue with the trial court concerning the trial court's decision to excuse Parker, and the trial court did not have an opportunity to rule on any constitutional issue. Therefore, we need not address Tilmon's argument as to the

trial court's decision to exclude Parker for cause. As Kevin did request an opportunity to ask Parker further questions, we address his argument.

Parker initially indicated that she could be fair and impartial but then expressed some doubt. The trial court asked Parker more than once whether she doubted her ability to be impartial. In each instance, Parker indicated either that she felt her concerns would interfere with her ability to be fair and impartial or that she doubted her ability to be fair and impartial. Based on the *voir dire* of Parker, the trial court correctly concluded that she could not render a fair and impartial decision. *See Sokolowski*, 351 N.C. at 148, 522 S.E.2d at 72. In addition, there was no showing that further questioning by Kevin's counsel would have produced different answers. *See Oliver*, 302 N.C. at 40, 274 S.E.2d at 191. Kevin has not shown that the trial court abused its discretion in refusing to allow him to further question Parker and in excusing Parker for cause. Kevin's assignment of error is overruled.

[13] By assignment of error, Tilmon argues the trial court erred in excusing prospective juror Belinda Smith as not qualified. Tilmon specifically argues that because more than two years had elapsed between the end of Smith's prior jury service and the time she would have been empaneled in the instant case, she was "qualified" to serve as a juror, and the trial court's actions in excusing her violated his state and federal constitutional rights. We disagree.

The transcript reveals that at the time jury selection commenced, Smith had previously served on a federal jury within two years and was not immediately qualified to serve in the instant case. In addition, Tilmon suggested that the trial court excuse her from service. Tilmon cannot now complain that the trial court's excusal of Smith violated his constitutional rights. As we have previously stated, this Court will not ordinarily consider constitutional questions not raised and passed on by the trial court. *See Wallace*, 351 N.C. at 503, 528 S.E.2d at 340-41. Therefore, Tilmon has failed to preserve this question for appellate review.

Assuming *arguendo* that the question was preserved for appellate review, Tilmon's argument must fail.

> All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have *not* served as jurors during the preceding two

> years . . . . Persons not qualified under this section are subject to challenge for cause.

N.C.G.S. § 9-3 (1999) (emphasis added). Additionally, "[t]he clerk *shall, at the beginning of court*, swear all jurors who have not been selected as grand jurors." N.C.G.S. § 9-14 (1999) (emphasis added). In the context of swearing in prospective jurors, we have previously defined the phrase "at the beginning of court" as "the beginning of the [session] of court." *State v. McNeill*, 349 N.C. 634, 643, 509 S.E.2d 415, 420 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 87 (1999).

In the instant case, Tilmon argues the trial court should have moved Smith to a later panel and then sworn her in at the time she was called, which would have been two years after her prior jury service. However, N.C.G.S. § 9-14 mandates that prospective jurors be sworn in at the beginning of court, which we have held refers to the beginning of the session of court. *See* N.C.G.S. § 9-14; *McNeill*, 349 N.C. at 643, 509 S.E.2d at 420. Therefore, the trial court did not have the authority to swear Smith in at a later time. Because Smith could not be sworn in at the beginning of the session of court as the statute requires, the trial court did not err in excusing her for cause. Tilmon's assignment of error is overruled.

[14] By assignments of error, both Kevin and Tilmon argue the trial court erred by allowing the State to exercise peremptory challenges in a racially discriminatory manner in violation of their state and federal constitutional rights. Specifically, defendants contend the State's reasons for excusing prospective jurors Deadra Holder and John Murray were pretextual, and the trial court did not conduct an adequate inquiry. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Constitution of North Carolina forbid the use of peremptory challenges for a racially discriminatory purpose. *See Batson v. Kentucky*, 476 U.S. 79, 86, 90 L. Ed. 2d 69, 80 (1986); *State v. White*, 349 N.C. 535, 547, 508 S.E.2d 253, 262 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). "In *Batson* the United States Supreme Court set out a three-pronged test to determine whether a prosecutor impermissibly excluded prospective jurors on the basis of their race." *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 574 (1998) (citing *Hernandez v. New York*, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991)), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999).

In the first prong of the *Batson* test, a criminal defendant must establish a *prima facie* case that a peremptory challenge was exercised on the basis of race. *Hernandez*, 500 U.S. at 358, 114 L. Ed. 2d at 405. All relevant circumstances are considered, including the "defendant's race, the victim's race, the race of key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors." *White*, 349 N.C. at 548, 508 S.E.2d at 262; *see also State v. Hoffman*, 348 N.C. 548, 550, 500 S.E.2d 718, 720 (1998).

In the second prong, the burden shifts to the State to articulate a race-neutral reason for striking the particular juror. *Hernandez*, 500 U.S. at 358-59, 114 L. Ed. 2d at 405; *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574. The State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. *See Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574; *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990). Moreover, " '[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574-75 (quoting *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406); *see also Purkett v. Elem*, 514 U.S. 765, 768-69, 131 L. Ed. 2d 834, 839-40 (1995); *State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). In addition, the second prong provides the defendant an opportunity for surrebuttal to show the State's explanations for the challenge are merely pretextual. *See State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

When the trial court explicitly rules that a defendant failed to make out a *prima facie* case, review by this Court is limited to whether the trial court's finding was error. *See State v. Fletcher*, 348 N.C. 292, 320, 500 S.E.2d 668, 684-85 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). However, when the trial court does not explicitly rule on whether the defendant made a *prima facie* case, and where the State proceeds to the second prong of *Batson* by articulating its explanation for the challenge, the question of whether the defendant established a *prima facie* case becomes moot. *See State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997); *State v. Lyons*, 343 N.C. 1,

11-12, 468 S.E.2d 204, 208, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996).

In the third prong of *Batson*, "the trial court must determine whether the defendant has satisfied his burden of proving purposeful discrimination." *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 575 (citing *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405). In determining the presence or absence of intentional discrimination, this Court will consider various factors including the "susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors." *White*, 349 N.C. at 548-49, 508 S.E.2d at 262. A trial court's rulings regarding race neutrality and purposeful discrimination are largely based on evaluations of credibility and should be given great deference. *See Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21; *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 575. We will uphold the trial court's determination unless we are convinced it is clearly erroneous. *See State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996).

In the instant case, the State peremptorily challenged Holder. Tilmon's counsel contended the challenge was not race-neutral, stating it was impermissible pursuant to *Batson* because Holder appeared to be African-American, she gave no inappropriate responses, she had no prior criminal record, she was gainfully employed, and there were no criminals in her family. Kevin's counsel also noted that Holder appeared to be African-American and that *Batson* was controlling unless the State could provide race-neutral reasons for the challenge.

Without ruling, the trial court stated it would hear from the State. The following dialogue took place:

> [PROSECUTOR]: Judge, our first contention would be that that doesn't rise to the level of prima facie showing. However, if the state—if the Court would allow me to and thinks it's appropriate at this time, I would be glad if the Court sees fit to state my reasons for excusing that juror.
>
> THE COURT: If you will proceed.

[PROSECUTOR]: Yes, sir. One—I have several reasons for that excuse, Your Honor, and one of [] them is that as I talked to Ms. Holder, I attempted to draw her out and to engage her in more than one-word answers or simply short-phrased answers in a number of ways, not only with the questions that were in the pool of questions I was asking, but also questions that related to her and her family relationship and so on.

She—she did not respond to that. I frankly don't know if that's because she's shy or because she didn't want to tell us or perceived it as her personal business or whatever. But I never was able to draw her out in that manner.

. . . .

. . . And so that was one of the reasons that the state considered excusing Ms. Holder. Another is the age of Ms. Holder. She indicated that she is 22 and that she has a sister who is 18. The relative ages of those individuals and the fact that they still live together in view in particular, Your Honor, of what the state perceives the defendant[s] to be questioning jurors about and the state's perception of what the defendant[s] [are] likely to assert as a defense or as an argument in this case, the defendant[s] [have] consistently asked jurors about their brothers and their sisters and the age differences between them and the relationships, how close they were, how close they were growing up, those sorts of things.

THE COURT: You—you're contending here that this individual has a brother the approximate age range of these defendants?

[PROSECUTOR]: She said she has a sister who is 18 and she is 22. They both still live at home with their parents. They both work in the same place.

THE COURT: That she has a sibling in the age range of the defendants?

[PROSECUTOR]: Yes, sir. And in view of what the state perceives and has gathered from the line of questioning—consistent line of questioning of the defense attorneys of the prospective jurors to this point, the state felt that this juror was one that we wanted to consider and think about in terms of what we perceive the defendant[s'] defense to be.

> Also I noted in my notes and I remember at the time when I asked her about the death penalty, she paused and she said, well, I guess if someone found—and then she said reasonable doubt, the death penalty might be—is appropriate. Then I see nothing wrong with it. She had a pause there that also we had some concern about. And the—but mainly the concerns that we had regarding what the state perceives the defense to be proceeding on is our concern.

The trial court then gave Tilmon's counsel an opportunity to respond. Tilmon's counsel stated that the State had not asked other prospective jurors whether they had siblings in this age group; that Holder answered the closed-ended questions posed to her with "yes, ma'am," and "no, ma'am," answers; and that Holder did not hesitate when answering the State's questions regarding the death penalty, to which she indicated she could vote for the death penalty if someone was proven guilty beyond a reasonable doubt. Kevin's counsel reiterated Tilmon's counsel's comments and noted that he had not heard the State ask other prospective jurors about their siblings, the State asked nothing but yes or no questions, and Holder answered the death penalty questions appropriately.

The trial court then ruled:

> It is the Court's belief that the articulated reason that the juror was relatively young and close to the age range of the defendants and that the juror had a sibling at approximately the age range of the defendants constitutes an articulable race neutral reason for exercising a peremptory challenge, and so the motion is, therefore, denied.

The following day, the State peremptorily challenged Murray. Kevin's counsel challenged the State's peremptory challenge of Murray based on *Batson*. Kevin's counsel indicated there was no articulable basis for the challenge; both Murray and Kevin were black males; and over one-quarter, and almost one-third, of the State's peremptory challenges were against African-Americans. Tilmon's counsel joined the motion and stated the State had passed only one minority juror at that point. The trial court then indicated that because it had required an articulable reason for the previous *Batson* challenge, it was going to require an articulable reason for each *Batson* challenge thereafter.

The State then provided the following reasons for its peremptory challenge:

[PROSECUTOR]: . . . Your Honor, we would challenge Mr. Murray on the cumulative effect of three things. One, he has a prior conviction himself for driving while impaired. Two, his father has a prior conviction for robbery for which he served, if I remember correctly, six years in the Department of Corrections. And three, Mr. Murray's statement that he attributed to a male and a female white juror in the courtroom with respect to what he viewed as a challenge to the due process rights of the defendants. The cumulative effect of that we contend makes him challengeable by the state from our point of view peremptorily.

I would also note that during the course of his answers at no time other than answering the questions and facing the person that was asking him the questions, while I certainly don't expect to be afforded any courtesy or recognition of authority because I don't have any authority, so to speak, but I noticed that when he spoke, he did not refer to the Court with any deferential statement other than saying "yes" or "no" in answering your questions when you asked them.

In addition, in my view with respect to his demeanor, I noted that he had a gold earring in his left ear. I also noted and perceived from my point of view a rather militant animus with respect to some of his answers. He elaborated on some things. Other things, he gave very short, what I viewed as sharp answers and also noted that when he spoke to the Court, that he did not defer, at least in his language, to the Court's authority, did not refer to the Court in answering yes, sir or no, sir. Did not address the Court as Your Honor. He just simply gave rather short, cryptic answers.

The trial court then allowed defendants an opportunity to respond. Kevin's counsel stated: the State's argument relying on comments of others was unfair in our system of justice; a prospective juror who was Caucasian had convictions for breaking and entering and trespassing but had not been challenged by the State; Murray stated the situation with his father would not affect him as a juror; and because there were fewer than ten percent minority members of prospective jurors to be chosen in this case, with this challenge, the State had challenged one-third of the prospective minority jurors. Tilmon's counsel noted: the State accepted another prospective Caucasian juror with a driving while impaired conviction; Murray indicated to the State and to the trial court that the conversation he

overheard would not impact his ability to be fair; and the State did not ask questions which would show the impact of Murray's father's conviction, such as whether his father was treated fairly and whether the conviction affected Murray.

The trial court then held: "The Court determines that the state has established a non-racial basis for the peremptory challenge and the objection to that peremptory challenge based on *Batson* is overruled and denied." Following defendants' objections, the trial court stated:

> I would just note for the record that I did not perceive—since this has been raised, I did not perceive any conduct of the juror to be less than deferential to the Court. I think that the juror did demonstrate a consistent reticence to elaborate on questions, but all of his responses were appropriate to the specific questions asked. And probably that—there was a substantial degree of clarity and thoughtfulness in the juror's responses.
>
> And the Court will note for the record that it is primarily relying upon the defendant's prior record, specifically which it involved an interaction with a traffic law enforcement officer, and the potential empathy that might be engendered from a father who was a criminal defendant as the basis for the exercise of the peremptory challenge.
>
> I would note further I am not relying upon the impact of the incident in the courtroom as providing a basis for this and frankly is not—I do not consider it to be appropriate for even the exercise for a peremptory challenge.

The State in the instant case gave reasons for peremptorily challenging both Holder and Murray. Therefore, " 'we need not address the question of whether defendant[s] met [their] initial burden of showing discrimination[,] and [they] may proceed as if a *prima facie* case had been established.' " *Bonnett*, 348 N.C. at 434, 502 S.E.2d at 575 (quoting *State v. Harden*, 344 N.C. 542, 557, 476 S.E.2d 658, 665 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997)).

As to the second prong of *Batson*, the State provided race-neutral reasons for the peremptory challenges of both Holder and Murray. With regard to Holder, we perceive no inherent discriminatory intent in the State's explanation that Holder was young, within the age range of defendants, and had a sister who was also within the age range of defendants. *See Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574-75.

Defendants have failed to show the State's reasoning was pretextual. *See Gaines*, 345 N.C. at 668, 483 S.E.2d at 408. The State relied on previous questions by defense counsel to formulate what it believed to be the defense theory in this case and then proceeded to ask questions similar to those asked by defense counsel. There was no evidence of pretext, as the State sought to exclude Holder because she might be able to empathize with defendants because she and her sister were within the same age range as defendants. Therefore, the trial court did not err in concluding that the State's reasoning was race-neutral.

With regard to Murray, we perceive no inherent discriminatory intent in the State's explanation that Murray had been convicted of driving while impaired and that his father had a prior conviction for robbery for which he had served six years in the Department of Correction. *See Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574-75. Defendants did not show the State's explanation to be pretextual. *See Gaines*, 345 N.C. at 668, 483 S.E.2d at 408. While defendants pointed to two other Caucasian prospective jurors who had criminal convictions and were accepted by the State, those other prospective jurors did not also have a parent who was convicted of robbery for which he or she was incarcerated. There is no evidence of pretext, as the State sought to exclude Murray because he might empathize with defendants because of his own experience with traffic law enforcement and his father's incarceration in the Department of Correction. Therefore, the trial court did not err in finding the State's reasoning to be race-neutral.

As the State provided race-neutral reasons for its peremptory challenges of Holder and Murray, we move to the third prong of *Batson*. In light of the factors we consider in evaluating whether there is purposeful discrimination, we note that this case may be one susceptible to racial discrimination because defendants are African-Americans and the victims were Caucasian. *See White*, 349 N.C. at 548-49, 508 S.E.2d at 262. However, the State did not exhaust the statutory number of peremptory challenges allowed for the first twelve jurors, nor did it exhaust its challenges in selecting the four alternate jurors. *See* N.C.G.S. § 15A-1217; *White*, 349 N.C. at 548-49, 508 S.E.2d at 262. In addition, based on the discussion which occurred at the time the State challenged Holder, the State had exercised nine peremptory challenges, only three of which were against African-Americans; the next day, when Murray was challenged, the State had exercised eleven peremptory challenges, only four of which

were against African-Americans, one being Holder. The State had accepted six prospective jurors, one of whom was African-American. This constituted a higher percentage of African-Americans accepted by the State than were in the jury pool. In selecting the twelve jurors and four alternates, the State exercised twenty-seven peremptory challenges, only four of which were against African-Americans. This ratio represents a percentage of African-Americans equivalent to the percentage of African-Americans in the jury pool. Moreover, during jury selection, the State made no comments which would support an inference of discrimination in the instant case.

From our review of the transcript in the instant case, it is apparent the trial court gave great consideration to the arguments by all parties with regard to these two *Batson* challenges before concluding the State did not purposefully discriminate against Holder or Murray. We give great deference to the trial court's rulings. *See Bonnett*, 348 N.C. at 433, 502 S.E.2d at 575. Given the foregoing, we are convinced the State did not discriminate on the basis of race in exercising its peremptory challenges against Holder and Murray. *See Kandies*, 342 N.C. at 434-35, 467 S.E.2d at 75. Defendants' assignments of error are overruled.

GUILT-INNOCENCE PHASE

[15] By assignment of error, Kevin argues the trial court erred in allowing the State, during its presentation of rebuttal evidence, to demonstrate the effects of pepper spray in an experiment under circumstances dissimilar to those that actually occurred and with the use of law enforcement officers trained in the use of pepper spray. Kevin contends the experiment prejudiced his defense. We disagree.

This Court has recognized a distinction between demonstrations and experiments. An experiment is " 'a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried.' " *State v. Allen*, 323 N.C. 208, 225, 372 S.E.2d 855, 865 (1988) (quoting *State v. Hunt*, 80 N.C. App. 190, 193, 341 S.E.2d 350, 353 (1986)), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). "Experimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence." *State v. Locklear*, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); *see also State v. Jones*, 287 N.C. 84, 97, 214 S.E.2d 24, 33

(1975); *State v. Carter*, 282 N.C. 297, 300, 192 S.E.2d 279, 281 (1972). However, exclusion is not required when the conditions are not exactly similar; rather, it goes to the weight of the evidence with the jury. *See Locklear*, 349 N.C. at 147, 505 S.E.2d at 294. Generally, the trial court is given broad discretion to determine if the conditions are sufficiently similar. *See id.*; *State v. Bondurant*, 309 N.C. 674, 686, 309 S.E.2d 170, 178 (1983).

A demonstration on the other hand is " 'an illustration or explanation, as of a theory or product, by exemplification or practical application.' " *Allen*, 323 N.C. at 225, 372 S.E.2d at 865 (quoting *Hunt*, 80 N.C. App. at 193, 341 S.E.2d at 353). The test for admissibility of evidence regarding a demonstration is whether, if relevant, the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." *Id.*; *see also* N.C.G.S. § 8C-1, Rules 401, 403 (1999). In general, we note that all evidence offered by the State will have a prejudicial effect on a defendant; however, the prejudicial effect will vary in degree. *See State v. Hedgepeth*, 350 N.C. 776, 785, 517 S.E.2d 605, 611 (1999), *cert. denied*, — U.S. —, 146 L. Ed. 2d 223, (2000); *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 512-13 (1996); *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). The determination of whether relevant evidence should be excluded pursuant to Rule 403 "is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *Wallace*, 351 N.C. at 523, 528 S.E.2d at 352-53; *see also State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997).

This issue originated when the prosecutor asked First Sergeant George Williamson, a training officer with the North Carolina State Highway Patrol, to spray the prosecutor's arms with pepper spray. Kevin objected to the prosecutor being the subject of the demonstration because he would become a witness. Thereafter, during a lengthy discussion on the issue and after the trial court had indicated a willingness to allow the pepper spray demonstration with witnesses other than the prosecutor, Kevin again voiced an objection based on the use of law enforcement officers who have experience being sprayed with pepper spray because "[t]hat would skew the results, unless the demonstration—or the sample is sufficiently large that you would find some of these variable reactions in there." The trial court overruled that objection. Kevin modified his objection and moved "that whoever the state uses to spray be a person who does not have

prior experience with being sprayed." The trial court overruled the objection and stated it would not limit either side as to who is sprayed because the opposing side could point out the prior experience to the jury during cross-examination. The trial court further limited the testimony to the subject's reaction to being sprayed.

When the State presented six possible witnesses to be sprayed, Kevin objected to all six as they were all trained law enforcement officers and objected to the "demonstration in total as being inappropriate, improper and not a valid sampling of the general population as to the effects of pepper spray." The trial court sustained the objection as to two Cumberland County sheriff's deputies who had provided security to the jury, but overruled the objection as to four members of the State Highway Patrol.

Thereafter, Sgt. Williamson sprayed Troopers Raymond Battle and Curtis Toler with foam pepper spray. The State asked Sgt. Williamson to spray Trooper Battle in a manner so that some of the spray got on his face and in his ear but not in his eye. The State then asked Sgt. Williamson to spray Trooper Toler in a manner so that some spray got on his face, in his ear, and in his eye. Trooper Battle then testified that he felt no burning sensation on his face or in his ear. He further testified that in 1993, he was sprayed with stream pepper spray, rather than foam pepper spray, directly in his eyes. Trooper Battle indicated the prior spraying had been incapacitating and that it had taken approximately twenty-five minutes before he could see well enough to function.

Trooper Toler then testified to his reaction. He indicated that he felt an intense burning sensation when the spray hit his left eye, and he closed his eye. He stated he could still use his right eye and felt no burning sensation in the right eye. In 1993, Trooper Toler was sprayed in both eyes, and it had taken approximately twenty to twenty-five minutes for him to recover. Trooper Toler then stated that if he had been sprayed in both eyes, as he was in 1993, he would not have been able to walk to his chair unassisted as he was able to do following the instant demonstration. Trooper Toler also indicated that in 1993, a lot of pepper spray had gotten into his nose causing "material" to come out of his nose; however, during the instant demonstration, only a little spray got into his nose which caused him to have only a minor "sniffle." Following the State's demonstration, both defendants were given an opportunity to present additional witnesses to be sprayed with pepper spray and then to testify about their reaction. Neither

defendant chose to present evidence in response to the State's demonstration.

We hold the evidence at issue here was a demonstration. In arguing for the pepper spray demonstration, the State contended that "at this point all we're trying to do is, first of all, explain to this jury what this stuff is. It's not some fancy compound. It's just, uh, cayenne peppers," and that the jury "needs to have some reality to this issue." The presentation by the State was to illustrate or explain to the jury the effects of pepper spray by practical application. *See Allen*, 323 N.C. at 225, 372 S.E.2d at 865.

The evidence of the pepper spray demonstration was relevant as Kevin had made the effects of pepper spray an issue in the instant case. *See* N.C.G.S. § 8C-1, Rule 401. During the State's presentation of evidence, Kevin repeatedly asked witnesses on cross-examination questions pertaining to pepper spray. On cross-examination of Sergeant Jimmie Turbeville of the State Highway Patrol, Kevin asked what the effects of being sprayed in the face with pepper spray would be, and Sgt. Turbeville responded that it was very painful and irritating to the eyes. On cross-examination of Sergeant Danny Williams of the Harnett County Sheriff's Department, Kevin asked about the use of pepper spray and the varying reactions people with different sensitivities can have to being sprayed. Sgt. Williams also indicated that if someone was not sprayed in the eyes, the person might experience mild burning depending on the sensitivity of the individual's skin. On cross-examination of Trooper Vincent Terry of the State Highway Patrol, Kevin asked whether Trooper Terry himself had been sprayed and whether he had ever used pepper spray on anyone else. Trooper Terry stated that when he was sprayed, he experienced a burning sensation in his eyes; and when he sprayed someone during a traffic stop, the person began crying and screaming, and he assumed she was feeling pain from being sprayed.

In addition, Kevin's entire presentation of evidence related to the use of pepper spray. The sole focus of Kevin's opening statement was pepper spray. Kevin's counsel read the warning label from the container of pepper spray as well as instructions for use of the product. Thereafter, Kevin offered a pepper spray demonstration by a private investigator and then called Sergeant William Ellis of the Cumberland County Sheriff's Department to testify about pepper spray. Kevin asked Sgt. Ellis several questions about the proper use of pepper spray and then asked him to read portions of the instructions for the use of pepper spray, which included: "Number six, extreme cau-

tion should be exercised when using an aerosol irritant projector against persons who have reduced sensitivity to pain. If such persons are not disabled with an aerosol irritant projector, they may react with violence."

As Kevin continually asked questions on cross-examination of State witnesses about the effects of pepper spray, and on direct examination offered only evidence concerning the use of pepper spray, the effects of pepper spray, and the warnings for pepper spray, the State's rebuttal demonstration showing the effects of pepper spray was relevant pursuant to N.C.G.S. § 8C-1, Rule 401.

Having determined the evidence of the demonstration was relevant, we must now determine whether the evidence should have been excluded because the probative value was substantially outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403. Although Kevin argues the circumstances surrounding the demonstration were dissimilar to those surrounding the incident, that is not the focus of our review in the instant case. Kevin has not shown that the prejudicial effect of the demonstration substantially outweighed its probative value. Based on our review of the transcript, we cannot conclude the trial court abused its discretion in allowing the demonstration of the effects of pepper spray. Therefore, the trial court did not err in allowing the demonstration.

With regard to Kevin's argument about the use of law enforcement officers for the demonstration, he cannot show prejudice. When the trial court decided to allow the State to present the demonstration, it informed Kevin he would also be given an opportunity to present witnesses to be sprayed and then to testify. Kevin even indicated to the court that he would call his own witnesses to be sprayed and to testify. However, at the conclusion of the State's presentation, Kevin decided not to introduce alternative participants. In addition, the trial court stated, "Both sides may cross[-]examine each person as to their bias, and that they are, therefore, uh, not completely credible as to their description of their subjective experience." With Kevin's opportunity to offer alternative people to participate in the demonstration and his ability to cross-examine the law enforcement officers regarding their potential bias, he cannot show he was prejudiced by the use of law enforcement officers during this demonstration. This assignment of error is overruled.

By assignments of error, Kevin argues the trial court erred by admitting evidence offered, first, by the State and, second, by Tilmon

regarding seizure of his luggage by the Fayetteville police a week prior to the murders. Kevin contends the evidence offered by the State concerning the alleged misconduct was hearsay, did not corroborate the witness' testimony, was irrelevant as it showed only bad character, and violated his Confrontation Clause rights. He further contends the evidence offered by Tilmon concerning the alleged misconduct was irrelevant as it had no bearing on Tilmon's guilt. Both Tilmon and the State relied on this evidence to show Kevin's motive for stealing the Toyota Camry and to show why the brothers were unable to take the bus back to Richmond. We disagree with Kevin's contentions.

In a pretrial motion *in limine*, Kevin requested a hearing on the admissibility of any information regarding seizure of drugs from Kevin on 17 September 1997. In the motion, Kevin indicated that on 17 September 1997, the Fayetteville Police Department stopped him at the Fayetteville Greyhound bus station and requested to search his luggage. Kevin refused. The Fayetteville police retained Kevin's luggage, and Kevin proceeded to South Carolina without being arrested or charged. Thereafter, the police obtained a search warrant and searched Kevin's luggage. The police allegedly discovered eighty grams of marijuana in Kevin's bag. In the motion, Kevin asked the trial court to prevent the State from mentioning the seizure of marijuana because there never was a conviction, the seizure was not connected to the instant case, and the introduction of the evidence would be unfairly prejudicial. The trial court deferred ruling on the motion until it became an issue in the case.

[16] We begin our discussion with Kevin's argument that the trial court erred by allowing the State to introduce evidence concerning the seizure of Kevin's luggage. When the State was questioning Lt. Kirby about the investigation of the 23 September 1997 armed robbery in Kingstree, South Carolina, the prosecutor sought to introduce the armed robbery report. Kevin asked to view the report and stated that if it referenced only the armed robbery, then he had no objection. After viewing the exhibit, Kevin objected to it "in part." The trial court overruled the objection and received the report into evidence.

Generally, the report includes information similar to Lt. Kirby's testimony. In his testimony, Lt. Kirby stated that he investigated the armed robbery by canvassing the businesses near Financial Lenders, including the bus station. In the bus station, an employee gave him

information on the robbery suspects. Based on this information, Lt. Kirby drove to Greeleyville, South Carolina, to the home of Kevin and Tilmon's grandparents.

The robbery report, however, further provides what people told Lt. Kirby, which Kevin argues to this Court is inadmissible hearsay and violates the Rules of Evidence, as well as his rights under the Confrontation Clause. The report indicates, in pertinent part:

> During the course of investigating the above case number, this r/o went to Marcus Department Store, after hearing that Mr. Marcus did talk with the two b/m's before the robbery took place. While in the store Mr. Marcus was not there, so this r/o asked Mr. Jimmy if he knew anything about the two b/m's. Mr. Jimmy stated that the suspects came up to file a report that their luggage got lost on the Bus. Mr. Jimmy stated that he asked the two b/m's what happened to their luggage. Mr. Jimmy stated that the two males stated that the police in Fayetteville, N.C. took their luggage. Mr. Jimmy stated that he asked them did they have any drugs in their luggage. Mr. Jimmy stated they said nothing. Mr. Jimmy stated he told them if they had drugs in the bags that they would not get their luggage back. Mr. Jimmy gave me a copy of a paper with a name of a Thomas Jr. and an address of Rte. 2 Box 66-B Greeleyville, S.C. 29056.

Regarding the alleged violation of Kevin's Confrontation Clause rights, we initially note that in the motion *in limine* requesting a hearing on the admissibility of evidence, Kevin did not raise any constitutional issues. In addition, the objection Kevin made to the introduction of the police report was a general objection—he did not raise any constitutional issues and did not provide the trial court with an opportunity to rule on any constitutional issues. As " '[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,' " *Nobles*, 350 N.C. at 495, 515 S.E.2d at 893 (quoting *Creason*, 313 N.C. at 127, 326 S.E.2d at 27), we need not address Kevin's argument that admission of the robbery report violated his Confrontation Clause rights.

[17] Next, we turn to whether admission of the robbery report violated the Rules of Evidence. Kevin objected to the introduction of the robbery report without specifying the grounds for the objection; therefore, we rely on the rules governing general objections. We have previously stated that a general objection is "ineffective unless there

is no proper purpose for which the evidence is admissible. The burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted." *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986) (citation omitted); *see also State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995).

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401; *see also State v. Perry*, 298 N.C. 502, 510, 259 S.E.2d 496, 501 (1979) (holding, "[g]enerally, evidence is relevant if it has *any* logical tendency, however slight, to prove a fact in issue in the case"). Evidence which has no tendency to prove a fact in issue is, however, inadmissible. *See* N.C.G.S. § 8C-1, Rule 402 (1999); *Perry*, 298 N.C. at 510, 259 S.E.2d at 501. Pursuant to Rule 403, "the determination of whether relevant evidence should be excluded is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *Wallace*, 351 N.C. at 523, 528 S.E.2d at 352-53; *see also Pierce*, 346 N.C. at 490, 488 S.E.2d at 587.

Furthermore, evidentiary rules 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) (1999). Out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. *State v. Thomas*, 350 N.C. 315, 339, 514 S.E.2d 486, 501, *cert. denied*, — U.S. —, 145 L. Ed. 2d 388 (1999). We have held "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." *Id.*; *see also State v. Morston*, 336 N.C. 381, 399, 445 S.E.2d 1, 11 (1994); *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

The robbery report in the instant case is relevant evidence. The statements made to Lt. Kirby were vital to the identification of Kevin and Tilmon as the suspects in the armed robbery. The declarant provided the background information in order to show his knowledge of the suspects. Moreover, the report does not indicate the Fayetteville police actually discovered drugs in Kevin's luggage. The declarant merely informed Kevin and Tilmon that if the police discovered drugs in the luggage, then the luggage would not be returned to them. In

addition, the report was admissible for nonhearsay purposes. The report was not offered to prove the truth of the statements made by the declarant to police, but to help explain the subsequent actions taken by Lt. Kirby in traveling to the home of Kevin and Tilmon's grandparents, which in turn furthered the investigation of this case. As we have found that the robbery report was admissible, Kevin has not met his burden of showing "there was no proper purpose for which the evidence could be admitted." *Young*, 317 N.C. at 412, 346 S.E.2d at 635. Therefore, we conclude Kevin's general objection was ineffective, and the trial court did not err in admitting the robbery report into evidence.

[18] We now turn to Kevin's argument that the trial court erred in admitting Tilmon's evidence concerning the seizure of Kevin's luggage by the Fayetteville police. Tilmon sought to call Sam Willie McCray, Kevin and Tilmon's grandfather, as a witness. Tilmon initially reminded the trial court of Kevin's motion *in limine* concerning the admissibility of evidence that Fayetteville police seized drugs from Kevin's luggage. In indicating an intent to call McCray as a witness, Tilmon stated that in a prior interview, "McCray indicated that Kevin told him that he'd been stopped in Fayetteville on the bus; that the cops had taken his luggage but didn't say why the law enforcement officers had taken his luggage." Tilmon further stated he believed "McCray would testify, if asked, that Kevin told him that he was stopped at the bus station, talked to some of the officers and that they left his luggage there—they seized his luggage after a dog alerted to it." Kevin's counsel then responded: "We haven't put anything on from Kevin that they could use that to impeach. I think under a 404 or 403 balancing test, it still fails the test to come in. And it now becomes, at least for practical purposes here, double hearsay." Kevin's counsel further argued: "It may be a prior bad act statement of the defendant. It's not something Mr. McCray independently knows about." The trial court allowed Tilmon's counsel an opportunity to rebut, and Tilmon's counsel stated: "It is our contention that it bears on the need to take the car; that it was not our client's need; that—again, that the inability to take the bus back up through Fayetteville was based on Kevin Golphin's problems when he encountered the law enforcement officers in Fayetteville." Tilmon's counsel further indicated that while McCray was not told whether there were drugs in Kevin's luggage, McCray did have a conversation with Kevin about what happened to Kevin's luggage. The trial court then denied Kevin's objection.

Tilmon then called McCray, and the following exchange took place, in pertinent part:

Q Did you ask Kevin about how he got down [to Greeleyville, S.C.]?

A Yeah—yes, I did.

Q What did he tell you?

A He tell me he came on the bus.

Q All right. From Richmond?

A Yes.

Q Did he indicate any stops along the way?

A Well, he told me—he said the bus stop in Fayetteville.

Q Fayetteville, North Carolina?

A Yes, sir.

Q All right. When you saw Kevin, did he have any luggage with him at all?

A No, sir.

Q Kevin tell you anything about why he didn't have any luggage?

A Well, he said the police had took his luggage in Fayetteville.

Q Did he tell you why?

A Uh, no. He just say they take his luggage.

Q All right. Did they give it back to him?

A No, sir.

Q Did he indicate to you why they took the luggage?

[KEVIN'S COUNSEL]: Objection, asked and answered.

A No, he didn't—he didn't stated [sic] why they take—

THE COURT: Overruled.

A —his luggage.

THE COURT: Overruled.

Although Kevin does not specifically argue the admission of this testimony violates his constitutional rights, he makes a general argument to that effect. However, as previously noted, this Court will not address any constitutional issue with regard to the admission of McCray's testimony concerning the seizure of Kevin's luggage because Kevin did not give the trial court an opportunity to pass on any such constitutional issue. *See Nobles*, 350 N.C. at 495, 515 S.E.2d at 893.

We now turn our focus to answering the questions of whether McCray's testimony was inadmissible as it pertained to unrelated misconduct and whether it was irrelevant as it had no bearing on the question of Tilmon's guilt. As to the argument that McCray's testimony was inadmissible because it related to prior misconduct,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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) (1999) (emphasis added). Rule 404(b), as we have previously held, 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.

Coffey, 326 N.C. at 278-79, 389 S.E.2d at 54.

On the issue of the relevance of McCray's testimony, we have previously stated:

> "[I]n 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); *see also State v. Brown*, 350 N.C. 193, 202, 513 S.E.2d 57, 63 (1999).

In the instant case, McCray's testimony concerning Kevin's luggage is both admissible pursuant to Rule 404(b) and relevant. Pursuant to Rule 404(b), the testimony was admissible to prove Kevin's motive for not wanting to return to Richmond by bus. *See* N.C.G.S. § 8C-1, Rule 404(b); *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54. The testimony was also relevant as it involved a circumstance surrounding Kevin's trip from Richmond to Greeleyville which then revealed information concerning the motive for his future actions. *See Jones*, 336 N.C. at 243, 443 S.E.2d at 54. From this evidence, the jury could infer that Kevin did not wish to take the bus back to Richmond because it would stop in Fayetteville where his luggage had been seized by police. *See id.*

As we previously concluded that the State's evidence of the robbery report was admissible for a proper purpose and we now conclude that Tilmon's evidence of McCray's testimony was admissible and relevant, we hold the trial court did not err. These assignments of error are overruled.

[19] By assignment of error, Kevin argues the trial court violated his state and federal constitutional rights by admitting into evidence a statement made by Tilmon which implicated Kevin. Specifically, Kevin argues admission of the statement violated *Bruton*, 391 U.S. 123, 20 L. Ed. 2d 476, which held the defendant's Confrontation Clause rights were violated by the admission of a nontestifying codefendant's confession. We disagree.

This issue arose when the State called Howard Kinlaw as a witness and began to question him about being in an isolation cell beside Tilmon in the Cumberland County jail. Kevin's counsel objected and indicated there were potential *Bruton* problems because of a statement made by Tilmon to Kinlaw. On *voir dire*, Kinlaw stated that Tilmon said, in pertinent part:

> that they had, uh—were on their way to Virginia to rob a Food Lion so that they could get some money to go to Jamaica. And, uh, they got pulled and, uh, his brother was, uh, being roughed up and sprayed with Mace by this cop. And a deputy sheriff came up and jumped out and went running over there and started to pull his Mace out. And when he seen that, he took a AK-47 and jumped

out of the car and shot him, and then his brother got up and took a pistol and shot the cop and they left.

In addition to an objection based on hearsay, Kevin's counsel stated:

> We object to the part that says they stole—not to the part about stealing the car—to rob a Food—where it starts "to rob a Food Lion." "He stated that they had already planned to rob—they had already planned to rob the Food Lion in Richmond, Virginia. He stated that they were going to rob the Food Lion in order to get money to go to Jamaica." We object to that under *Bruton* grounds. The next part we object to is his brother—his description of "his brother then got up off the ground, took the officer's pistols and shot him—pistol and shot him." That's all we object to in the statement.

After discussing the issue with all the parties, the trial court issued its ruling.

> [THE COURT:] In dealing with the specifics of *Bruton* as to this witness, there are, um—there are two things in particular. The discussion of the Richmond armed robbery. Now—(pause)—now, I will suggest a redaction of that so that he stated that there was a plan to rob the Food Lion in Richmond in order to get money to go to Jamaica. He stated that they stole a car on the way to Richmond. I don't require a redaction of that.
>
> [KEVIN'S COUNSEL]: We're not objecting to that.
>
> THE COURT: There's not a serious issue to—all right. Stated that they stole a car on the way to Richmond. There was a plan to rob the Food Lion in Richmond, Virginia, in order to get money to go to Jamaica.
>
> And then the other *Bruton* objection is—
>
> [KEVIN'S COUNSEL]: His brother then got off—
>
> THE COURT: Yeah, that his brother got off the ground and took the officer's pistol and shot him. And I am going to sustain that objection and require that redaction.

Subsequently, the trial court explained the ruling to Kinlaw.

> THE COURT: All right. Let me—just be patient for a moment. Now, the first issue concerns the testimony related to the Food

> Lion in Richmond, Virginia. And as it relates to that, you can testify that they stole a car on the way to Richmond; that there was a plan to rob the Food Lion in Richmond in order to get money to go to Jamaica. Not that "they planned" but that "there was a plan."
>
> WITNESS: Um-hum. I understand that.
>
> THE COURT: Now, you understand the difference between that—
>
> WITNESS: I understand.
>
> THE COURT: Now, you are not to relate the part of your testimony in which you assert that the statement was made that the defendant said his brother then got off the ground, took the officer's pistol and shot him.

Thereafter, with the jury present, Kinlaw testified regarding Tilmon's statement to him as follows:

> [H]e had stolen a car and, uh, *there was a plan* to go to Richmond to rob a Food Lion so that he could get money to go to Jamaica. And that, uh, he had gotten pulled over.
>
> . . . .
>
> By a state trooper.
>
> . . . .
>
> And that his brother was getting Maced, and that a deputy sheriff had pulled up and got out. And as he [the deputy sheriff] was running over to where the trooper, uh, and his brother were, he was—
>
> . . . .
>
> . . . He was pulling out his Mace. And when he seen that, he got out of the car with a AK-47 and shot the two officers.

(Emphasis added.)

On appeal, Kevin contends the trial court's redactions were not sufficient to preserve Kevin's rights under *Bruton* because the reference to "a plan" implicated him. Pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, however, "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" in order to preserve a question for appellate review. N.C. R. App. P. 10(b)(1). Kevin's only objection came prior to the *voir dire* of Kinlaw. Kevin did not object to the trial court's suggested redaction, nor did he object when Kinlaw actually testified as instructed by the trial court. As there was no further objection to the trial court's response to the original objection, Kevin violated Rule 10(b)(1). Because of the constitutional nature of Kevin's argument, in our discretion pursuant to N.C. R. App. P. 2, we will address the merits of Kevin's argument.

As we have previously stated, the Supreme Court in *Bruton*, 391 U.S. 123, 20 L. Ed. 2d 476, held the defendant's Confrontation Clause rights were violated by the admission of a nontestifying codefendant's confession that implicated the defendant in the crime. *See Barnes*, 345 N.C. at 214, 481 S.E.2d at 60. The Supreme Court noted that the confession was "powerfully incriminating" and then explained that because there was a substantial risk the jury would look to the extrajudicial statements in determining the defendant's guilt, despite instructions to the contrary, admission of the codefendant's confession violated the defendant's right of cross-examination guaranteed by the Confrontation Clause of the Sixth Amendment. *See id.* at 214-15, 481 S.E.2d at 60.

Kevin contends the instant case is more like *Gray v. Maryland*, 523 U.S. 185, 140 L. Ed. 2d 294 (1998). In *Gray*, the Supreme Court held *Bruton*'s protective rule applied to the codefendant's confession, which merely substituted blanks and the word "delete" for the defendant's actual name. *See id.* at 188, 140 L. Ed. 2d at 298. The State, on the other hand, argues the case is more similar to *Richardson v. Marsh*, 481 U.S. 200, 95 L. Ed. 2d 176 (1987). In *Richardson*, the Supreme Court held the Confrontation Clause was not violated where a nontestifying codefendant's confession was redacted so as to eliminate the defendant's name as well as any reference to the defendant's existence. *See id.* at 211, 95 L. Ed. 2d at 188.

We find the instant case more similar to *Barnes*, 345 N.C. at 217, 481 S.E.2d at 62, wherein this Court found *Bruton* distinguishable. A codefendant in *Barnes* stated, "I shouldn't have gone with them," and the defendant argued that the statement was prejudicial in that it was "particularly significant" and that it violated his due process and confrontation rights. *Id.* This Court recognized that while the Supreme Court in *Bruton* held the introduction of a codefendant's hearsay

statement "posed a substantial threat to [the defendant's] right to confront the witnesses against him" and therefore constituted reversible error, *Bruton*, 391 U.S. at 137, 20 L. Ed. 2d at 486, the Supreme Court also stated that " '[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information.' " *Barnes*, 345 N.C. at 218, 481 S.E.2d at 62 (quoting *Bruton*, 391 U.S. at 135, 20 L. Ed. 2d at 484-85). We stated that the statement the defendant complained of was not "powerfully incriminating" when viewed in the context of the evidence against him, that the reference to "them" in the statement was not made in the context of any specific statements about the killings, and that the trial court cautioned the jury with respect to the statement. *Id.* at 217-18, 481 S.E.2d at 62. We concluded that the statement did not clearly identify the defendant or create a substantial risk that the jury would ignore the trial court's instructions in its determination of the defendant's guilt. *Id.* at 218, 481 S.E.2d at 62.

Similarly, in the instant case, considering the evidence against Kevin, Tilmon's statement to Kinlaw was not "powerfully incriminating" toward Kevin. Kinlaw testified that Tilmon told him that *Tilmon* stole the car, that there was a plan to rob a Food Lion in Virginia so *Tilmon* could get money to go to Jamaica, and that *Tilmon* got out of the car with an "AK-47" and shot the two officers when he saw them attempting to spray Kevin with "Mace." Although the statement did not eliminate all reference to Kevin and his existence, as was the situation in *Richardson*, 481 U.S. at 211, 95 L. Ed. 2d at 188, the reference to "they" in the statement was not in connection with the "plan" to rob the Food Lion to get money to go to Jamaica, as Kevin argued, *see Barnes*, 345 N.C. at 217-18, 481 S.E.2d at 62. In addition, the trial court repeatedly cautioned the jury to consider the evidence against each defendant separately. As in *Barnes*, we conclude Tilmon's statement to Kinlaw did not clearly make reference to Kevin in relation to the plan or create a substantial risk that the jury would ignore the trial court's instructions in its determination of Kevin's guilt. *See id.* Therefore, Kevin's assignment of error is overruled.

[20] By assignment of error, Kevin argues the trial court erred in admitting into evidence a portion of his statement to police in violation of his state and federal constitutional rights. Specifically, Kevin contends he had invoked his right to silence with respect to a partic-

ular topic, and the investigator continued to ask him questions regarding that topic. We disagree.

Prior to trial, Kevin made a motion to suppress his statement to law enforcement officers on the basis that he did not waive his right to have a parent, guardian, or custodian present during questioning. Following a hearing, the trial court denied the motion, concluding that Kevin freely, voluntarily, and understandingly waived his rights including the right to have a parent, guardian, or custodian present.

Thereafter, during trial, Agent Tilley testified concerning the interview he conducted with Kevin on 23 September 1997. Agent Tilley stated that prior to asking any case-specific questions, he informed Kevin of his juvenile rights, which include the rights to remain silent; to have a parent, guardian, or custodian present during questioning; and to have an attorney. Agent Tilley then read Kevin the waiver of rights form, which Kevin subsequently signed.

Agent Tilley testified that Kevin then told him of the events of 23 September 1997. After Kevin completed his recitation of the events, Agent Tilley informed him he was aware of an incident involving a Jeep. Agent Tilley testified that Kevin said "he didn't want to say anything about the jeep. He did not know who it was or he would have told us." Agent Tilley then asked about the Jeep incident, and Kevin stated that Tilmon shot at the Jeep while Kevin drove past it.

On appeal, Kevin argues his rights were violated because questioning resumed after he had invoked his right to silence regarding the Jeep incident. Kevin did not object to Agent Tilley's testimony on the basis of waiver or on the basis of resumption of questioning. As we stated previously, a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. *See Hayes*, 350 N.C. at 80, 511 S.E.2d at 303. Therefore, Kevin has not properly preserved this issue for appellate review. *See* N.C. R. App. P. 10(b)(1).

Nonetheless, as Kevin argues the trial court committed plain error with regard to this assignment of error, he is entitled to relief if he can demonstrate plain error. *See* N.C. R. App. P. 10(c)(4). " 'Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Roseboro*, 351 N.C. 536, 553,

528 S.E.2d 1, 12 (2000) (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

The United States Supreme Court, in *Miranda*, 384 U.S. 436, 16 L. Ed. 2d 694, held "a suspect must be informed of his rights upon being arrested: that is, to remain silent, to an attorney and that any statement made may be used as evidence against him." *State v. Miller*, 344 N.C. 658, 666, 477 S.E.2d 915, 920 (1996). Additionally, juveniles have the right to have a parent, guardian, or custodian present during questioning. *See* N.C.G.S. § 7B-2101(a)(3) (1999); *Miller*, 344 N.C. at 666, 477 S.E.2d at 920. Pursuant to *Miranda*, 384 U.S. 436, 16 L. Ed. 2d 694, and *Edwards*, 451 U.S. 477, 68 L. Ed. 2d 378, the Fifth and Fourteenth Amendments to the United States Constitution "require that during custodial interrogation, if the individual 'indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' " *Fletcher*, 348 N.C. at 305-06, 500 S.E.2d at 676 (quoting *Miranda*, 384 U.S. at 473-74, 16 L. Ed. 2d at 723); *see also Edwards*, 451 U.S. at 482, 68 L. Ed. 2d at 384.

Recently, however, based on the United States Supreme Court's case involving ambiguous invocations of a suspect's right to a lawyer, *Davis v. United States*, 512 U.S. 452, 129 L. Ed. 2d 362 (1994), the Fourth Circuit Court of Appeals addressed the issue of ambiguous invocations of a defendant's right to remain silent in *Burket v. Angelone*, 208 F.3d 172 (4th Cir.), *cert. denied*, —— U.S. ——, 147 L. Ed. 2d 1022 (2000). In *Burket*, the Fourth Circuit held it was not clear the defendant wished to remain silent and, considering the circumstances as a whole, the investigator had every reason to believe the defendant wished to talk and, thus, concluded that the police did not violate *Miranda* because the defendant never invoked his right to remain silent. *Id.* at 200. The Fourth Circuit stated:

> The Supreme Court's most recent exposition on ambiguous invocations was in the context of whether a suspect invoked his Sixth Amendment right to counsel. In *Davis*, the Court held that the determination of whether a suspect invoked his right to counsel is an objective one. The question is whether the suspect "articulate[d] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." [*Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371.] Other circuits have

> held that this "objective inquiry" into ambiguity is applicable to invocations of the right to remain silent.

Burket, 208 F.3d at 200. The Fourth Circuit then noted that the Second, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal have relied on the Supreme Court's analysis in *Davis* to determine whether a suspect's invocation of the right to remain silent was ambiguous. *Id.* The Fourth Circuit then noted that it had not yet decided whether *Davis* applied to invocations of the right to remain silent, but held that it was not necessary to do so in *Burket* because that case specifically focused on federal law. *Id.* However, the Fourth Circuit then held, "[i]n light of the language and logic of the Supreme Court's decision in *Davis*," the Virginia Supreme Court's decision to admit the defendant's statement was not "contrary . . . to clearly established federal law as determined by the Supreme Court." *Id.* In so holding, the Fourth Circuit stated:

> *Davis* held that when faced with an ambiguous invocation of a right, an interrogator was not required to ask clarifying questions. In this case, however, [the defendant] said to the officers "I just don't think that I should say anything" and "I need somebody that I can talk to." These statements do not constitute an unequivocal request to remain silent. In fact, [the defendant's] statements are quite similar to the defendant's statement in *Davis* ("Maybe I should talk to a lawyer"), which the Supreme Court found ambiguous.

Id. (citation omitted).

Similarly, in the instant case, Kevin's statement did not constitute an unequivocal request to remain silent. When Agent Tilley asked Kevin about an incident involving a Jeep, which Kevin had not mentioned previously during his statement, Agent Tilley stated that Kevin said "he didn't want to say anything about the jeep. He did not know who it was or he would have told us." This statement is not an unambiguous invocation of Kevin's right to silence, as he indicated that had he known who the incident involved, he would have made a statement concerning that incident. *See id.* Under the circumstances, it was not unreasonable for Agent Tilley to believe Kevin wanted to talk and to then inquire as to what happened involving the Jeep. Kevin's rights were not violated, as the police did not act contrary to clearly established federal law.

Because Kevin did not unambiguously invoke his right to remain silent, the trial court did not err in admitting the portion of his

statement concerning the Jeep. Thus, Kevin has failed to satisfy the first part of plain error review, that there be error. *See Roseboro*, 351 N.C. at 553, 528 S.E.2d at 12. Therefore, this assignment of error is overruled.

By assignments of error, both Kevin and Tilmon argue the State's improper closing argument violated their state and federal constitutional rights. Specifically, they argue the State's closing argument was so grossly improper that the trial court should have intervened *ex mero motu*. In addition, Tilmon argues the State further violated his rights by categorizing the portions of his statement, which the State had introduced into evidence, as lies. We disagree.

[21] We first address Kevin's and Tilmon's argument that the trial court should have intervened *ex mero motu*. During the State's closing argument, the prosecutor was recounting the testimony of the various witnesses to the crimes. One witness observed Tilmon resisting Deputy Hathcock and trying to get back toward the stolen vehicle. In explaining why Tilmon might want to get back to the vehicle, the prosecutor held up the SKS rifle Tilmon allegedly used in the killings. Then, in explaining what one might do with a rifle, the prosecutor displayed the rifle in the direction of one of the district attorneys and then in the direction of a juror, and then put the rifle down. Later, the prosecutor described that another witness observed Deputy Hathcock backing away from Tilmon. In explaining why the deputy might have been backing away, the prosecutor again displayed the rifle in the direction of the same juror.

Defendants argue the trial court's failure to intervene when the prosecutor displayed the rifle in the direction of a juror was prejudicial and entitles them to new trials. Defendants, however, failed to object to the allegedly improper closing argument. Therefore, "the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *Roseboro*, 351 N.C. at 546, 528 S.E.2d at 8; *see also State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80 (1999). A " 'trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' " *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (2000) (quoting *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999)). Prosecutors, in capital cases, have wide latitude during jury arguments and must vigorously present arguments for the sentence of death using every legitimate method. *See*

Roseboro, 351 N.C. at 546, 528 S.E.2d at 8; *Warren*, 348 N.C. at 124, 499 S.E.2d at 456; *Daniels*, 337 N.C. at 277, 446 S.E.2d at 319. Whether a prosecutor " '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.' " *Smith*, 351 N.C. at 270, 524 S.E.2d at 41 (quoting *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976)).

In *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183, the prosecutor waved a gun which had been offered into evidence during closing argument. *Id.* at 42, 274 S.E.2d at 193. Later, the prosecutor made reference to the gun while displaying it to the jury. *Id.* The defendants objected, but the trial court overruled their objections. *Id.* This Court held the record revealed no improper use of the weapon in the prosecutor's closing argument because the gun was in evidence and because it "was not improper for the prosecutor to utilize it in his summation so long as he did not attempt to draw inferences from the weapon which were not supported by the evidence or to frighten or intimidate the jury with it." *Id.* This Court then emphasized that prosecutors may argue " 'the facts in evidence and all reasonable inferences to be drawn therefrom.' " *Id.* (quoting *Covington*, 290 N.C. at 327-28, 226 S.E.2d at 640).

In the instant case, the trial court did not err by failing to intervene *ex mero motu*. We note that we are unable to determine from the transcript exactly how the prosecutor used the rifle during closing arguments. While the court reporter made references during transcription, it is mere speculation as to the exact nature of the use of the rifle. The court reporter did not provide details and did not note any reaction from the juror or any courtroom personnel. Four seasoned defense attorneys and an able trial judge were present, and no objection was made to the prosecutor's actions. That being said, the record does not reveal that the prosecutor used the rifle to attempt to draw inferences from the weapon which were not supported by the evidence. *See id.* In addition, the record does not reveal that the juror was frightened or intimidated by the prosecutor's actions. *See id.* Based on the testimony of numerous witnesses, the prosecutor was simply explaining Tilmon's actions according to what witnesses observed.

While we do not condone pointing weapons at jurors, if that in fact occurred, the prosecutor's actions were not "so grossly improper

that the trial court erred in failing to intervene *ex mero motu*." *Roseboro*, 351 N.C. at 546, 528 S.E.2d at 8. Defendants have failed to show the trial court abused its discretion. In light of the overwhelming evidence in this case, defendants were not prejudiced, and the prosecutor's actions during closing arguments did not prevent defendants from receiving a fair trial. This assignment of error is overruled.

[22] We next address Tilmon's argument that the trial court erred in overruling his objection to the portion of the State's closing argument in which the prosecutor referred to parts of his statement as lies. During the State's closing argument, the prosecutor was describing Tilmon's different versions of the events of 23 September 1997. The prosecutor then referred to "[l]ie number one," to which Tilmon's counsel objected, with the qualification, "unless he's contending it's a lie." The prosecutor stated that he was contending it was a lie. The trial court then overruled the objection. Thereafter, the prosecutor described eighteen items from Tilmon's statement about which the State contended Tilmon had lied, including that Tilmon originally did not mention anything about pepper spray; that Tilmon originally stated he had not shot a gun that day, and then that he *probably* had shot a gun that day; and that Tilmon omitted shooting at Waters or at Waters' vehicle.

Tilmon acknowledges the State can "contend" that a defendant lied, *see State v. Davis*, 291 N.C. 1, 12, 229 S.E.2d 285, 293 (1976), but argues the State offered his statement into evidence, and it should not be able to argue the statement contains lies because *he* did not put his own credibility at issue.

This Court addressed a similar issue in *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985). In *Williams*, the defendant offered no evidence on his own behalf, but the State introduced his confession. *See id.* In holding the trial court did not err, this Court stated:

> The introduction of an exculpatory statement by the State does not preclude it from showing facts concerning the crime to be different. The State is entitled to comment during closing argument on any contradictory evidence as the basis for the jury's disbelief of the defendant's story. The record here plainly exhibits plenary evidence introduced by the State to contradict defendant's written statement. During her closing argument, the District

> Attorney indeed commented on the untruthfulness of that statement. This the law allowed her to do.

Id. at 357, 333 S.E.2d at 721-22 (citations omitted).

In the instant case, as in *Williams*, the State introduced Tilmon's statement into evidence, and Tilmon did not testify. The State repeated to the jury some instances where Tilmon made exculpatory statements during questioning and later gave different versions of the events. The law permits the State to show the jury how those exculpatory statements differed from the version of events depicted by other evidence that was presented. *See id.*

Tilmon relies on *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978), where we said: "It is improper for a lawyer to assert his opinion that a witness is lying. 'He can argue to the jury that they should not believe a witness, but he should not call him a liar.' " *Id.* at 217, 241 S.E.2d at 70 (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967)). In addition, Tilmon cites *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972), where we said: " 'When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements.' " *Id.* at 424, 189 S.E.2d at 241 (quoting *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961)).

Locklear is distinguishable. Tilmon was not a witness in the case, and the prosecutor was merely showing the jury instances where Tilmon had not been truthful while giving his statement to law enforcement officers. *See Locklear*, 294 N.C. at 217, 241 S.E.2d at 70. As for Tilmon's reliance on *Bolin*, it is misplaced. Tilmon incorrectly stated that we referred to nonexculpatory statements in *Bolin*, when in fact we referred to instances when the State introduced exculpatory statements. *See Bolin*, 281 N.C. at 424, 189 S.E.2d at 241. Nevertheless, in addition to the statement Tilmon attributes to *Bolin*, we also stated: "The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him, does not prevent the State from showing that the facts concerning the homicide were different from what the defendant said about them." *Id.* at 425, 189 S.E.2d at 241-42. In the instant case, the prosecutor merely pointed out exculpatory statements or omissions to show how the facts differed from Tilmon's statement.

Tilmon was not prejudiced by the prosecutor's contention that portions of Tilmon's statement were lies. Therefore, this assignment of error is overruled.

[23] By numerous assignments of error, both Kevin and Tilmon argue the trial court erred by giving an acting in concert instruction for the first-degree murder and robbery with a dangerous weapon charges. Defendants contend the instruction permitted the jury to find them guilty of first-degree murder and robbery with a dangerous weapon without finding the required intent to commit the crimes, in violation of their constitutional rights. In addition, Kevin argues the evidence was not sufficient to convict him of the first-degree murder or the robbery with a dangerous weapon of Deputy Hathcock. We disagree.

This Court, in *Barnes*, 345 N.C. at 233, 481 S.E.2d at 71, restated the doctrine of acting in concert as enumerated in *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991), and *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972):

> "[I]f 'two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.' "

Erlewine, 328 N.C. at 637, 403 S.E.2d at 286 (quoting *Westbrook*, 279 N.C. at 41-42, 181 S.E.2d at 586) (alteration in original); *see also Gaines*, 345 N.C. at 677 n.1, 483 S.E.2d at 414 n.1 ("In *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), a majority of this Court held that a finding that the accomplice individually possessed the *mens rea* to commit the crime is not necessary to convict a defendant of premeditated and deliberate murder under a theory of acting in concert.").

Thus, "if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan." *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *quoted in State v. McCullers*, 341 N.C. 19, 29-30, 460 S.E.2d 163, 169 (1995). While a person may be either actually or constructively present at the scene, *see State v. Oliver*, 309

N.C. 326, 362, 307 S.E.2d 304, 327 (1983), "[a] person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413; *see also State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992).

In the instant case, in instructing the jury on the first-degree murder charges, the trial court included an acting in concert instruction consistent with the pattern instruction, and stated:

> For a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of that crime of, in this case, possession of a stolen vehicle, if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit the crime of possession of a stolen vehicle.

See N.C.P.I.—Crim. 202.10 (1998). A similar instruction was included in the jury instruction for robbery with a dangerous weapon, pursuant to N.C.P.I.—Crim. 202.10.

In its mandate on each charge of first-degree murder, the trial court instructed as follows:

> I charge that if you find from the evidence beyond a reasonable doubt that on or about the twenty-third day of September, 1997, the defendant [defendant's name], acting either by himself or acting together with [other defendant's name], intentionally killed the victim [victim's name] with a deadly weapon, thereby proximately causing the victim [victim's name] death, and that the defendant [defendant's name] acted with malice, with premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder.

Similarly, in its mandates on robbery with a dangerous weapon, the trial court gave instructions substantially similar to the following:

> as to the charge of robbery with a firearm in which [defendant's name] is the defendant and in which [victim's name] is the alleged victim, I charge that if you find from the evidence beyond a reasonable doubt that on or about the twenty-third day of September, 1997, the defendant [defendant's name] had in his possession a firearm and took and carried away property from

> the person or presence of [victim's name], without [victim's name]'s voluntary consent, by endangering or threatening [victim's name]'s life with the use or threatened use of a firearm, the defendant [defendant's name] knowing that he was not entitled to take the property and intending to deprive [victim's name] of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm in the case in which [victim's name] is the alleged victim.

We note the trial court's acting in concert instructions comported in all respects with our previous case law. Therefore, defendants' arguments in this regard are without merit.

[24] We next address whether there was sufficient evidence to submit the charges of first-degree murder and robbery with a dangerous weapon of Deputy Hathcock against Kevin. Kevin made a motion to dismiss to preserve this issue for appellate review. The trial court denied that motion. "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." *Nobles*, 350 N.C. at 504, 515 S.E.2d at 898; *see also Call*, 349 N.C. at 417, 508 S.E.2d at 518; *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). To withstand a defendant's motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *Call*, 349 N.C. at 417, 508 S.E.2d at 518. "[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).

Circumstantial evidence may be utilized to overcome a motion to dismiss " 'even when the evidence does not rule out every hypothesis of innocence.' " *Thomas*, 350 N.C. at 343, 514 S.E.2d at 503 (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, "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). If, however, 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).

Regarding the sufficiency of the evidence of the charges of first-degree murder and robbery with a dangerous weapon of Deputy Hathcock against Kevin, the trial court instructed the jury with an acting in concert instruction based on the possession of a stolen vehicle. As we previously held, this instruction was proper. Therefore, our inquiry is limited to whether there was sufficient evidence of first-degree murder by Kevin, Tilmon, or both, and robbery with a dangerous weapon by Kevin, Tilmon, or both, based on the common purpose of possessing the stolen vehicle.

We find there was sufficient evidence that Kevin and Tilmon acted with a common purpose in possessing the stolen vehicle. The evidence showed Kevin and Tilmon were riding together from Kingstree to Richmond when they were stopped by Trooper Lowry near Fayetteville. Although Kevin was driving the stolen vehicle, in his statement to Agent Tilley, he admitted giving Tilmon's driver's license to Trooper Lowry. After shooting both Trooper Lowry and Deputy Hathcock, Kevin and Tilmon retrieved the officers' weapons and left the scene in the stolen vehicle. There is also evidence they exited the highway to remove the license plate from the stolen vehicle to avoid detection.

Moreover, without utilizing the acting in concert theory, there was sufficient evidence Kevin committed first-degree murder. Contrary to Kevin's argument that Tilmon shot Deputy Hathcock with Trooper Lowry's weapon prior to retrieving the rifle, Kevin, in his statement to Agent Tilley, stated he took Trooper Lowry's gun from the trooper's holster. Kevin also stated Tilmon did not fire the trooper's gun, and he did not think Tilmon ever had the trooper's gun in his possession. After initially denying that he had shot a gun on the day in question, Kevin eventually admitted shooting the trooper's gun. A gunshot residue test on Kevin's hands revealed that he had shot a weapon recently. Additionally, a .40-caliber bullet from Trooper Lowry's gun was recovered from Deputy Hathcock's body during the autopsy, and that .40-caliber wound was a fatal wound.

In addition, a rational trier of fact could find Kevin and Tilmon committed robbery with a dangerous weapon of Deputy Hathcock. The evidence shows Tilmon shot Deputy Hathcock with an assault rifle. Thereafter, Tilmon retrieved Deputy Hathcock's weapon. There is also evidence that Kevin inflicted a fatal wound to Deputy Hathcock. Subsequently, when Kevin and Tilmon fled the scene, Tilmon was carrying Deputy Hathcock's weapon.

Kevin points to other possible scenarios based on the evidence presented. However, we do not require the evidence to rule out every possible hypothesis of innocence. *See Thomas*, 350 N.C. at 343, 514 S.E.2d at 503. Considering the evidence in the light most favorable to the State, *see Nobles*, 350 N.C. at 504, 515 S.E.2d at 898, there is substantial evidence from which the jury could find that the first-degree murder and robbery with a dangerous weapon of Deputy Hathcock were committed pursuant to Kevin's common purpose with Tilmon of possessing a stolen vehicle.

CAPITAL SENTENCING PROCEEDING

[25] By assignment of error, Tilmon argues the trial court erred by denying his motion to sever his and Kevin's sentencing proceedings. Tilmon contends the trial court's actions constituted prejudicial error. By a similar assignment of error, Kevin argues the trial court committed reversible constitutional error by joining his and Tilmon's cases for sentencing. We disagree.

Initially, we note Kevin concedes he did not object to joinder for sentencing or renew a previous motion to sever; therefore, he did not preserve appellate review of this issue pursuant to N.C. R. App. P. 10(b)(1). Kevin argues, however, the trial court's error amounts to plain error pursuant to N.C. R. App. P. 10(c)(4). However, plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence. *See State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). This Court has previously declined to extend plain error review to other issues, and we decline to do so now. *See State v. Fleming*, 350 N.C. 109, 133, 512 S.E.2d 720, 737 (declined to extend plain error review to the situation where the trial court allowed and instructed the prosecutor to prompt his witness after the witness had taken the stand), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 274 (1999); *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109-10 (declined to extend plain error review to situations in which the trial court failed to give an instruction during jury *voir dire* which was not requested). Therefore, we will not review Kevin's assignment of error.

Tilmon, on the other hand, relied on a letter from his mother, Sylvia Williams, to show why the cases should be severed for sentencing. The letter stated that Williams would not testify for Tilmon because of possible damage to Kevin's case. However, Tilmon never actually renewed his prior motion to sever, nor did he object to joinder of the cases for sentencing. Therefore, the trial court never ruled

on this issue. Tilmon's purported efforts, during the sentencing phase, to revive his previous motion to sever were insufficient to satisfy N.C. R. App. P. 10 to preserve appellate review of this issue. Pursuant to N.C. R. App. P. 2, however, we waive the appellate rules and review Tilmon's assignment of error. Any error found by this Court will also apply to Kevin, as his case was joined with Tilmon's. *See Oliver*, 309 N.C. at 361, 307 S.E.2d at 327.

Joint defendants convicted of capital crimes at a joint trial can be joined for sentencing if each defendant receives individualized sentencing consideration. *See id.* at 366, 307 S.E.2d at 328-29. In *Oliver*, this Court stated that the United States Supreme Court impliedly approved joint sentencing proceedings as long as there is "individualized consideration given to each defendant's culpability." *Id.* at 366, 307 S.E.2d at 330 (citing *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982)). In considering joinder for sentencing, this Court has relied on the general rules governing joinder for trial. *See Barnes*, 345 N.C. at 224, 481 S.E.2d at 66 (where this Court relied on *Pickens*, 335 N.C. 717, 440 S.E.2d 552, which addresses joinder for trial, and held two of the three defendants were not denied a fair capital sentencing proceeding because testimony of a third defendant did not result in antagonistic defenses, as each defendant could show why he should not receive the death penalty).

"[T]he propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge." *Pickens*, 335 N.C. at 724, 440 S.E.2d at 556. When a decision is within the trial court's discretion, the court's determination will not be disturbed absent an abuse of discretion. *See id.* As we previously stated, the North Carolina General Statutes provide for joinder of defendants in situations where each defendant is charged with accountability for each offense. *See* N.C.G.S. § 15A-926(b). Joinder of defendants is also appropriate if the several offenses charged were part of a common plan or scheme; were part of the same act or transaction; or were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others. *See id.*

Tilmon argues severance was appropriate because Williams would not testify for him otherwise. Tilmon's argument, however, makes the unsubstantiated assumption that Williams would have testified favorably on his behalf and unfavorably on behalf of Kevin. Such an assertion can be substantiated only by an offer of proof.

> "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) (citing *State v. Cheek*, 307 N.C. 552, 299 S.E.2d 633 (1983)). "[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 (citing *Currence v. Hardin*, 296 N.C. 95, 249 S.E.2d 387 (1978)).

State v. Johnson, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995). However, Tilmon made no offer of proof in the instant case as to the actual substance of Williams' testimony, and the significance of the testimony is not apparent from the record. Thus, we are unable to rely on this reasoning in support of Tilmon's argument. Furthermore, we note that Tilmon could have subpoenaed Williams to testify. *See Coffey*, 326 N.C. at 292, 389 S.E.2d at 62. There was no indication that she would not testify truthfully if she had been subpoenaed.

In addition, Tilmon contends that information Williams would have provided regarding his difficult childhood could have supported mitigating circumstances that would have led the jury to impose life imprisonment rather than death. This information, however, had already been provided by other witnesses, and Tilmon has offered no proof that Williams' testimony would have expanded on what had already been made known to the jury.

Further, Tilmon cannot show he was denied individualized consideration during the joint sentencing proceeding. The trial court's instructions to the jury at the conclusion of the sentencing proceeding included the following: "[Y]ou must consider the evidence *separately* as to each defendant and as to each victim. You must evaluate and make a *separate* recommendation based upon a *separate* and distinct evaluation as to each defendant and as to each victim." (Emphasis added.) On more than one occasion, the trial court instructed the jury to consider each defendant separately. We presume juries follow the instructions of the trial court. *See Trull*, 349 N.C. at 455, 509 S.E.2d at 196. As such, the transcript reveals Tilmon received individualized consideration during the sentencing proceeding. It is also apparent from the "Issues and Recommendation as to Punishment" forms that Kevin and Tilmon were given separate consideration by the jury. The jury found as a mitigating circumstance

that Kevin lacked parental involvement. In contrast, in Tilmon's case, the jury did not find any of the mitigating circumstances related to parental involvement. Therefore, Kevin and Tilmon were given individualized sentencing consideration. *See Oliver*, 309 N.C. at 366, 307 S.E.2d at 330. Tilmon has not shown that the trial court abused its discretion. Therefore, Tilmon's assignment of error is overruled.

[26] By assignment of error, Tilmon contends the trial court committed reversible error by denying his motion to suppress two letters seized by prison officials allegedly in violation of his constitutional rights to freedom of speech and freedom from unreasonable searches and seizures. Tilmon's pretrial motion to suppress the content of the letters was denied by the trial court after conducting a hearing. The State did not use the letters during the guilt/innocence phase of the trial, but introduced them during the sentencing proceeding. When the State introduced the letters and read them to the jury, Tilmon failed to object. To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. *See Hayes*, 350 N.C. at 80, 511 S.E.2d at 303. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. *See id.* His objection must be renewed at trial. *See id.* Tilmon's failure to object at trial waived his right to have this issue reviewed on appeal. This assignment of error is overruled.

[27] By two assignments of error, Kevin contends the trial court erred by admitting into evidence during the sentencing proceeding a note he wrote. This note contained Rastafarian language, and Kevin argues the note was seized in violation of his federal and state constitutional rights, has no relevance to the issues presented in his case, and was unfairly prejudicial. We disagree.

During the jury selection phase of the trial, Kevin drafted a note while sitting in the courtroom. Correctional Sergeant Scott Brown, who led the security detail during transport of defendants, instructed Kevin not to bring anything into or take anything out of the courtroom. Another officer informed Sgt. Brown that Kevin was leaving the courtroom with a piece of paper in his hand. Sgt. Brown took no immediate action, but waited to see if Kevin would pass the note to his attorneys on the way out of the courtroom. He did not. Thereafter, when Kevin was in the prisoner holding area, Sgt. Brown confiscated the note. Sgt. Brown testified that he confiscated the note because of concerns about possible escape plans.

At the outset, we note that Kevin failed to raise an objection regarding his argument that the note was seized in violation of his federal and state constitutional rights. Prior to sentencing, Kevin raised relevancy as the only basis for his objection to the introduction of the letter. " 'This Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court.' " *Nobles*, 350 N.C. at 495, 515 S.E.2d at 893 (quoting *Creason*, 313 N.C. at 127, 326 S.E.2d at 27). Therefore, we need not address Kevin's allegation that the note was seized in violation of his federal and state constitutional rights.

We now turn to Kevin's claims that the note was irrelevant and highly prejudicial. It is well settled that "[t]he North Carolina Rules of Evidence do not apply to sentencing hearings." *State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). "Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f)." N.C.G.S. § 15A-2000(a)(3) (1999); *see also 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). Because the State can present any evidence that is competent and relevant to the submitted aggravating circumstances, "trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding." *State v. Flippen*, 349 N.C. 264, 273, 506 S.E.2d 702, 708 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

In the instant case, the State offered five statutory aggravating circumstances in Kevin's sentencing proceeding for the murder of Trooper Lowry, including N.C.G.S. § 15A-2000(e)(9)—that the murder of Trooper Lowry was especially heinous, atrocious, or cruel. This Court has previously held " '[i]t is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing.' " *State v. Stanley*, 310 N.C. 332, 338-39, 312 S.E.2d 393, 397 (1984) (quoting *Magill v. State*, 428 So. 2d 649, 651 (Fla.), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983)); *see also State v. Gibbs*, 335 N.C. 1, 63, 436 S.E.2d 321, 357 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Evidence that a murder was racially motivated can be used to show the "depravity of defendant's character." *State v. Moose*, 310 N.C. 482, 500, 313 S.E.2d 507, 519 (1984). The evidence of racial motivation then becomes a key factor

because the (e)(9) aggravating circumstance is appropriate "when the killing demonstrates an unusual depravity of mind on the part of the defendant." *Kandies*, 342 N.C. at 450, 467 S.E.2d at 84.

Kevin's note contained references to "the beast" and "Babylon," which were interpreted at trial to mean "the police" and "Caucasian-run America," respectively. The references in Kevin's note are evidence that the murders were racially motivated; therefore, the jury could properly consider the note when determining if the murder was especially heinous, atrocious or cruel. *See* N.C.G.S. § 15A-2000(e)(9). This assignment of error is overruled.

[28] In two assignments of error, Tilmon contends the trial court erred by allowing the State to cross-examine Dr. John Warren, an expert in the field of forensic psychology, regarding Dr. Warren's potential bias. Tilmon argues certain questions asked by the prosecutor were improper and resulted in a denial of his federal and state constitutional rights to a fair sentencing hearing. Tilmon claims the questions concerning the fees charged by Dr. Warren for testimony in indigent cases, his ownership of a plane, places where he would not testify, and a highly publicized case in which he was involved were improper. However, Tilmon failed to object to any questions asked or answers given during the portion of the cross-examination when these topics were discussed.

To preserve an issue for appeal, a party must make a timely objection. *See* N.C. R. App. P. 10(b)(1). As Tilmon did not object, he has failed to preserve these assignments of error for appellate review. In addition, this Court will not review Tilmon's constitutional arguments because he did not provide the trial court with an opportunity to rule on any constitutional issue related to this cross-examination. *See Nobles*, 350 N.C. at 495, 515 S.E.2d at 893. Moreover, although Tilmon assigns plain error in the alternative, he did not "specifically and distinctly" argue plain error. *See* N.C. R. App. P. 10(c)(4). Therefore, these assignments of error are overruled.

In two assignments of error, Kevin argues the trial court erred by allowing the State to cross-examine one of Tilmon's expert witnesses with a report prepared by another expert witness and by allowing the report into evidence. Specifically, Kevin contends his constitutional right to confront the witnesses against him was violated by the introduction of this report, and the report contains incriminating hearsay statements that are highly prejudicial to his case. We disagree.

Dr. James Johnson, an expert on African-American males and the sociological impact of societal forces, testified on behalf of Tilmon and was cross-examined by the State. Kevin was given an opportunity to cross-examine Dr. Johnson but chose not to do so. Later, following Dr. Johnson's testimony, the trial court ruled that a preliminary draft of a report completed by Dr. Johnson was discoverable by the State. Kevin received a copy of the report after the trial court's ruling. Subsequently, the State then cross-examined Dr. Warren about the report and introduced it into evidence following Dr. Warren's testimony.

[29] Kevin first argues the report itself was hearsay and was improperly introduced after Dr. Warren's testimony. Therefore, it should not have been allowed into evidence. The Rules of Evidence do not apply in sentencing hearings. *See Daughtry*, 340 N.C. at 517, 459 S.E.2d at 762. "Any evidence the court 'deems relevant to sentence' may be introduced at [the sentencing proceeding]." *Id.* (quoting N.C.G.S. § 15A-2000(a)(3)). Hearsay evidence can be admitted if the trial court concludes it is relevant to the defendant's sentencing, and it does not violate a defendant's constitutional right to confront witnesses against him. *See State v. McLaughlin*, 341 N.C. 426, 458-59, 462 S.E.2d 1, 19 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996).

[30] Kevin contends he was denied his right to confront Dr. Johnson because he was not given an opportunity to cross-examine Dr. Johnson regarding the substance of the report. While it is true that Kevin did not obtain a copy of the report until *after* Dr. Johnson had been excused as a witness, Kevin was aware of the report's existence *prior* to the conclusion of Dr. Johnson's testimony. The State cross-examined Dr. Johnson regarding the existence of the report. Only one question was asked regarding its substance, but a plain and unambiguous reference was made which clearly revealed its existence. After cross-examination by the State and redirect examination by Tilmon's counsel, the court gave Kevin a second opportunity to question Dr. Johnson, *following* the line of questioning by the State which revealed the report's existence. Kevin responded to the court that he had no questions for Dr. Johnson. Kevin cannot now claim his decision not to cross-examine Dr. Johnson was influenced by a lack of time for adequate preparation because he could have requested a continuance. *See State v. Branch*, 306 N.C. 101, 104-05, 291 S.E.2d 653, 656 (1982) (holding a motion to continue which raises constitutional issues, including the right to confront witnesses, has no fixed

time limits, and there is a case-by-case determination as to what constitutes a reasonable time to prepare a defense). Thus, introduction of the report did not violate Kevin's right to confront the witnesses against him. The trial court did not err in admitting Dr. Johnson's report into evidence.

Kevin also argues the report itself contained inadmissible hearsay statements which also violated his right to confront the witnesses against him. Rule 703 provides guidance on the admissibility of expert opinions based on out-of-court communications when presented during the sentencing proceeding:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C.G.S. § 8C-1, Rule 703 (1999).

Allowing disclosure of the bases of an expert's opinion "is essential to the factfinder's assessment of the credibility and weight to be given to it." *State v. Jones*, 322 N.C. 406, 412, 368 S.E.2d 844, 847 (1988).

> Testimony as to matters offered to show the basis for a physician's opinion and not for the truth of the matters testified to is not hearsay. "We emphasize again that such testimony is not substantive evidence." *State v. Wade*, 296 N.C. 454, 464, 251 S.E.2d 407, 412 (1979). Its admissibility does not depend on an exception to the hearsay rule, but on the limited purpose for which it is offered.

State v. Wood, 306 N.C. 510, 516-17, 294 S.E.2d 310, 313 (1982); *see also Jones*, 322 N.C. at 412, 368 S.E.2d at 847; *State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988).

Dr. Johnson's report included comments from unidentified informants on various aspects of Tilmon's character and upbringing, including the relationship Tilmon had with his parents, Tilmon's prior experience with police, Tilmon's demeanor, and the influence Kevin had over Tilmon. Experts in Dr. Johnson's field often rely upon statements such as these to form an opinion. These statements were introduced, not for the truth of the matter asserted, but as non-

hearsay evidence to support Dr. Johnson's conclusions. Therefore, the report was admissible.

[31] Kevin further argues the State improperly cross-examined Dr. Warren about Dr. Johnson's report. Pursuant to N.C.G.S. § 8C-1, Rule 705, an expert witness may be cross-examined with regard to " 'the underlying facts and data used by [the] expert in reaching his expert opinion,' " including other experts' reports. *State v. White*, 343 N.C. 378, 393, 471 S.E.2d 593, 602 (quoting *State v. Simpson*, 341 N.C. 316, 355, 462 S.E.2d 191, 213 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996)), *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996).

Assuming *arguendo* that the report was improperly admitted, any error that may have resulted was harmless beyond a reasonable doubt. Kevin argues that certain statements in the report were "incriminating." However, references to Kevin in the report as "the sly manipulator" and the "bad" brother were not nearly as incriminating as the evidence that Kevin resisted arrest; shot Trooper Lowry several times after he had been rendered helpless; shot Deputy Hathcock after he had been rendered helpless; and according to Kevin's own statement, drove the stolen car past Waters' Jeep so Tilmon could shoot at him. Furthermore, Dr. Johnson's report supported Kevin's mitigating circumstances that he grew up in an unstable environment and that he had previous negative experiences with the police. Kevin was not prejudiced by the State's cross-examination of Dr. Warren.

Accordingly, the trial court did not err in admitting Dr. Johnson's report into evidence, and the cross-examination of Dr. Warren about Dr. Johnson's report did not prejudice Kevin. Therefore, these assignments of error are overruled.

[32] In assignments of error, Tilmon and Kevin argue the trial court erred by failing to instruct the jury that unless the aggravating circumstances outweighed the mitigating circumstances, a life sentence should be imposed. Defendants claim the trial court's use of the pattern jury instructions resulted in confusion and may have led to imposition of a death sentence on less than complete jury unanimity. Defendants also argue the trial court's instructions called for imposition of the death penalty if the jury found the mitigating circumstances and aggravating circumstances to be in "equipoise," which means a state of equilibrium.

The trial court instructed the jury, pursuant to the pattern instruction, as follows: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" This instruction is entirely consistent with N.C.G.S. § 15A-2000(c)(3), which provides that the jury may recommend a death sentence if it finds "[t]hat the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." This Court has previously denied the same argument. *See State v. Keel*, 337 N.C. 469, 493-94, 447 S.E.2d 748, 761-62 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995); *State v. Hunt*, 323 N.C. 407, 433, 373 S.E.2d 400, 416-17 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990); *State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 326, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Defendants request that we reconsider these holdings. We decline to do so and reaffirm our prior decisions with respect to this issue. These assignments of error are overruled.

By assignments of error, Tilmon and Kevin contend the trial court erred by failing to intervene *ex mero motu* during the State's sentencing proceeding arguments. Neither defendant objected to the State's argument. Specifically, both defendants claim the State improperly argued general deterrence. In addition, Tilmon contends the State improperly argued community sentiment, and Kevin claims Tilmon's Rastafarian beliefs were wrongly attributed to him. Defendants insist these arguments were improper and warranted the trial court's intervention *ex mero motu*. We disagree.

Prosecutors are given wide latitude during jury arguments and may argue "the facts in evidence and all reasonable inferences that may be drawn therefrom." *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). When a defendant does not object to an allegedly improper argument, the trial court should intervene *ex mero motu* if the argument rises to the level of gross impropriety. *See Trull*, 349 N.C. at 451, 509 S.E.2d at 193. "It is well established that '[c]ontrol of closing arguments is in the discretion of the trial court.' " *State v. Barrett*, 343 N.C. 164, 181, 469 S.E.2d 888, 898 (quoting *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996). As previously stated, " '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.' " *Smith*, 351 N.C. at 270, 524 S.E.2d at 41 (quoting *Covington*, 290 N.C. at 328, 226 S.E.2d at 640).

[33] We first address defendants' arguments that the State made impermissible statements regarding the general deterrent effect of the death penalty. Although Tilmon objected to one reference regarding sending a message to anyone contemplating lawlessness and the trial court sustained the objection, both defendants argue the trial court should have intervened with regard to other such references.

In spite of the wide latitude granted to the State, *Anderson*, 322 N.C. at 37, 366 S.E.2d at 468, the State is prohibited from arguing general deterrence "because it is not relevant to defendant, his character, his record, or the circumstances of the charged offense." *State v. Bishop*, 343 N.C. 518, 555, 472 S.E.2d 842, 862 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). The State, however, in its arguments, can "urg[e] the jury to sentence a particular defendant to death to specifically deter that defendant from engaging in future murders." *McNeil*, 350 N.C. at 687, 518 S.E.2d at 504.

In the instant case, the State's argument included such statements as the following:

> These two defendants deserve the death penalty for what they did, for their motives, for their actions. Someone has got to tell people like these two defendants, "We absolutely will not tolerate this any longer." If you don't tell that to these two defendants, nobody else will. We can't rely on the next bad case. We can't rely on the next jury to send that message to people who have no regard for your way of life, for your state, for your law enforcement officers.

After reviewing the argument in context, we conclude the State's arguments did not constitute a general deterrence argument. *See State v. Guevara*, 349 N.C. 243, 258, 506 S.E.2d 711, 721 (1998) (holding the State's argument "merely focused the jury's attention on the seriousness of the crime and the importance of the jury's duty" and did not constitute a general deterrence argument), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999); *Barrett*, 343 N.C. at 181, 469 S.E.2d at 898 (holding the State can argue the seriousness of the crime). Nevertheless, assuming the State's arguments were improper, they were not so grossly improper as to warrant intervention by the trial court. *See, e.g., McNeil*, 350 N.C. at 687, 518 S.E.2d at 504 (holding the State's argument that the death penalty is proper in our soci-

ety and "we're going to enforce the laws and if you kill three people, that's enough" was not so "grossly improper" as to warrant intervention by the trial court *ex mero motu*); *State v. Hill*, 311 N.C. 465, 475, 319 S.E.2d 163, 170 (1984) (holding the State's argument referring to the "deterrent effect" of the death penalty did not warrant *ex mero motu* intervention by the trial court). Therefore, intervention by the trial court was not warranted.

[34] We next address Tilmon's argument that the State's reference to the community's sentiment regarding the death penalty was improper. A prosecutor is prohibited from "intimat[ing] to the jury community preferences regarding capital punishment." *State v. Artis*, 325 N.C. 278, 329, 384 S.E.2d 470, 499 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The State cannot encourage the jury to lend an ear to the community. *See State v. Jones*, 339 N.C. 114, 161, 451 S.E.2d 826, 852 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). However, "it is not improper to remind the jury . . . that its voice is the conscience of the community," nor is it "objectionable to tell the jury that its verdict will 'send a message to the community' about what may befall a person convicted of murder in a court of justice." *Artis*, 325 N.C. at 329-30, 384 S.E.2d at 499-500.

The State's arguments in the instant case included the following:

> Someone has got to stand up and tell defendants like this, "We are not gonna tolerate this. We cannot tolerate this." What does a life sentence to these two defendants *send* as a message to the citizens of this state? . . .
>
> I submit that it would *send* a message to them that we do not hold our law enforcement officers in very high esteem . . . .

(Emphasis added.)

A review of the prosecutor's statements reveals that he never told the jury what was expected of them by the community, but instead reiterated what the jury's message should be to the community. *See State v. Quesinberry*, 325 N.C. 125, 141, 381 S.E.2d 681, 691 (1989) (holding the trial court properly did not intervene *ex mero motu* to the State's argument that the jury should send a message to the community), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Thus, we conclude the State did not improperly argue community sentiment to the jury.

[35] We finally address Kevin's argument that the trial court should have intervened *ex mero motu* because the State's attribution of hatred based on Rastafarian beliefs on him was not supported by the evidence and was grossly improper. He contends that any discussion of Rastafarianism, and its related beliefs, should have been limited to Tilmon's sentencing but was improperly submitted to the jury as a factor in considering his own sentence.

A review of the record and transcript, however, shows there was evidence that Kevin was involved with Rastafarianism. The note written by Kevin during jury selection revealed that he, too, was immersed in the Rastafarian culture, as the note contained references to "the beast" and "Babylon." There was evidence which showed that these two words were used in Rastafarian jargon to mean "the police" and "Caucasian-run America." In addition, there was evidence from Kevin's expert witness, Dr. Thomas Harbin, who referred to Kevin's religious belief in terms of the Rastafarian religion. Dr. Harbin stated that Kevin got his beliefs from his brother. The State's argument was comprised of reasonable inferences from the facts in evidence. *See Anderson*, 322 N.C. at 37, 366 S.E.2d at 468. Thus, Kevin cannot show a consideration of Rastafarian beliefs by the jury regarding his sentencing was grossly improper. Therefore, the State's closing argument during sentencing did not require *ex mero motu* intervention by the trial court. These assignments of error are overruled.

[36] In another assignment of error, Kevin contends the trial court committed plain error by not instructing the jury consistently with *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140, and *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987), in the Hathcock murder case, when there was evidence that defendant himself did not participate in that killing. Kevin concedes that he did not request such an instruction at trial and therefore relies on the plain error rule for this assignment of error.

Because Kevin did not request the *Enmund/Tison* instruction, he is limited to plain error review. N.C. R. App. P. 10(c)(4). As we have stated, under plain error review, the defendant must be able to show that there was error and that the jury probably would have reached a different result absent the error. *See Roseboro*, 351 N.C. at 553, 528 S.E.2d at 12.

In *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994), this Court explained the holdings in *Enmund* and *Tison*:

> In *Enmund*, the [United States Supreme] Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets 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. *Enmund*, 458 U.S. at 801, 73 L. Ed. 2d at 1154. In a later case, however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the death penalty. *Tison v. Arizona*, 481 U.S. 137, 158, 95 L. Ed. 2d 127, 145 (1987).

McCollum, 334 N.C. at 223, 433 S.E.2d at 151-52.

Pursuant to our pattern jury instructions, if there is evidence which suggests that a defendant was not personally involved in the killing, then an instruction must be given which requires the jury to first determine the defendant's culpability before considering the death penalty. *See* N.C.P.I.—Crim. 150.10 (1998); *Lemons*, 348 N.C. at 364-65, 501 S.E.2d at 327.

This issue, however, "only arises when the State proceeds on a felony murder theory." *State v. Robinson*, 342 N.C. 74, 87, 463 S.E.2d 218, 226 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996). In *State v. Gaines*, this Court held:

> The *Enmund* rule does not apply to a defendant who has been found guilty of first-degree murder based on premeditation and deliberation. Because defendant was convicted of first-degree murder based on premeditation and deliberation, and not based on the felony-murder rule, Issue One-A [of the pattern jury instructions] is inapplicable.

345 N.C. at 682, 483 S.E.2d at 417 (where the jury found the defendant guilty of premeditated and deliberate murder either under the theory of acting in concert or by aiding and abetting); *see also Lemons*, 348 N.C. at 365, 501 S.E.2d at 327.

In the instant case, the jury found Kevin guilty of first-degree murder on the basis of premeditation and deliberation under the theory that Kevin committed all the elements or that he acted in concert with Tilmon. As we stated in *Gaines*, the *Enmund/Tison* instruction is not required in such a case. *Gaines*, 345 N.C. at 682, 483 S.E.2d at

417. Therefore, the trial court did not err by failing to give the requested instruction, and Kevin has failed to establish the existence of error for the purpose of plain error review. Moreover, even if the *Enmund/Tison* instruction did apply to premeditated and deliberate murder, there was more than sufficient evidence that Kevin's actions alone possessed the requisite intent to overcome the need for the *Enmund/Tison* instruction. Accordingly, this assignment of error is overruled.

[37] By assignment of error, Kevin contends the trial court committed constitutional error by failing to give a peremptory instruction for the (f)(7) mitigating circumstance, which relates to "[t]he age of the defendant at the time of the crime." N.C.G.S. § 15A-2000(f)(7) (1999). We disagree.

"Upon request, a trial court should give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted evidence." *Wallace*, 351 N.C. at 525-26, 528 S.E.2d at 354; *see also White*, 349 N.C. at 568, 508 S.E.2d at 274. Conversely, the trial court is not required to give a peremptory instruction when the evidence supporting a mitigating circumstance is controverted. *See State v. Womble*, 343 N.C. 667, 683, 473 S.E.2d 291, 300 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). The existence of the (f)(7) mitigating circumstance is not wholly determined by the defendant's chronological age. *See State v. Skipper*, 337 N.C. 1, 47, 446 S.E.2d 252, 277 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). Other varying circumstances and conditions must also be considered. *See State v. Gregory*, 340 N.C. 365, 422, 459 S.E.2d 638, 671 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

In the instant case, Kevin clearly requested a peremptory instruction on the (f)(7) mitigating circumstance. The State did not object to Kevin's request. The trial court then decided to give a partial peremptory instruction that all the evidence showed that Kevin was seventeen years old at the time of the crimes. Kevin did not object. Thereafter, the trial court instructed the jury on the (f)(7) circumstance, stating:

> The evidence tends to show that the defendant Kevin Golphin was seventeen years of age at the time of each of these murders. The mitigating effect of the age of the defendant is for you to determine from all the facts and circumstances which you find from the evidence. "Age" is a flexible and relative concept.

The chronological age of the defendant is not always the determinative factor.

Following the court's instructions, Kevin did not object to the instruction, nor did Kevin request any clarification for the jury. Therefore, Kevin waived appellate review of this assignment of error. *See* N.C. R. App. P. 10(b)(2); *see also State v. Gregory*, 348 N.C. 203, 211-12, 499 S.E.2d 753, 759 (holding the defendant waived appellate review where he requested a peremptory instruction, the trial court gave the peremptory instruction, and the defendant did not object to the instruction or request clarification), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). Moreover, Kevin cannot show prejudice because one or more jurors found the (f)(7) circumstance. While Kevin assigns plain error as an alternative, he does not specifically and distinctly argue plain error. *See* N.C. R. App. P. 10(c)(4). This assignment of error is overruled.

By assignment of error, Tilmon contends the trial court erred by refusing to give a peremptory instruction on several mitigating circumstances which he contends are supported by uncontroverted, credible evidence. Specifically, Tilmon contends his request for peremptory instructions on the mitigating circumstances regarding his age, N.C.G.S. § 15A-2000(f)(7), and inability to appreciate the criminality of his actions, N.C.G.S. § 15A-2000(f)(6), and nonstatutory mitigating circumstances regarding Tilmon's being forced to lie about parental abuse, being subjected to parental neglect, and his not receiving necessary counseling were improperly denied. We disagree.

As we previously stated, the trial court should give a peremptory instruction for mitigating circumstances when the evidence is *uncontroverted*. *See Wallace*, 351 N.C. at 525-26, 528 S.E.2d at 354. However, peremptory instructions are not required when the evidence supporting a mitigating circumstance is controverted. *See Womble*, 343 N.C. at 683, 473 S.E.2d at 300.

[38] We first address the failure of the trial court to give a peremptory instruction for the statutory mitigating circumstance of Tilmon's age at the time of the crimes. *See* N.C.G.S. § 15A-2000(f)(7).

Our review of the transcript reveals that Tilmon did not request a peremptory instruction on the (f)(7) statutory mitigating circumstance. In addition, following the trial court's instructions, when the parties were given an opportunity to request corrections and clarifications, Tilmon did not object to the trial court's failure to give any

peremptory instruction on Tilmon's age at the time of the crime. Therefore, pursuant to N.C. R. App. P. 10(b)(2), Tilmon cannot now assign as error this alleged omission from the instruction. Accordingly, this argument is without merit.

[39] Tilmon also contends he should have received a peremptory instruction stating that the evidence tended to show "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." N.C.G.S. § 15A-2000(f)(6).

While there was evidence which supported Tilmon's contention that he could not "appreciate the criminality of his conduct," there was also evidence that Tilmon attempted to eliminate Waters as a witness and that he initially denied shooting Trooper Lowry or Deputy Hathcock. In addition, there was evidence from family members that Tilmon cared for his grandmother. *See State v. Lynch*, 340 N.C. 435, 477, 459 S.E.2d 679, 701 (1995) (holding evidence by friends and family that a defendant volunteered to help and took care of others could conflict with evidence that a defendant's capacity to appreciate the criminality of his conduct was impaired), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996). Therefore, as there was contradictory evidence, the trial court did not err in refusing to give a peremptory instruction on the (f)(6) statutory mitigating circumstance.

[40] Tilmon further contends the trial court should have given peremptory instructions which he requested for several nonstatutory mitigating circumstances: (1) he was subjected to parental neglect, (2) his mother forced him to lie about being abused, (3) he did not receive appropriate counseling, and (4) he was abandoned by his father. Our review of the transcript reveals Tilmon was given a peremptory instruction on the nonstatutory mitigating circumstance that he was abandoned by his father. Therefore, we address only Tilmon's argument as to the other three circumstances.

Tilmon's claim that he was subjected to parental neglect was supported by evidence at trial. However, the State presented contradictory evidence. Neighbors of the Golphin family testified they never witnessed neglect by Tilmon's parents. In addition, there was evidence Tilmon lived in two nice neighborhoods while growing up. Therefore, as there was contradictory evidence, the trial court did not err in refusing to give a peremptory instruction on the nonstatutory mitigator that Tilmon was neglected by his parents.

Tilmon also argues the trial court should have granted his request for a peremptory instruction about his mother previously forcing him to lie about parental abuse to protective services. The trial court originally indicated it would peremptorily instruct the jury with regard to this circumstance, but then decided the word "forced" in the circumstance was "sufficiently subjective" and not appropriate for a peremptory instruction. While there may have been evidence that Tilmon lied to protective services about abuse, it is not clear from the evidence that he was "forced" to lie. Therefore, the trial court properly refused to give a peremptory instruction for this nonstatutory mitigating circumstance.

Finally, Tilmon argues the trial court should have given a peremptory instruction on the nonstatutory mitigating circumstance that he did not receive *any* counseling for his problems. Again, the trial court initially agreed to give the instruction, but then decided it was "just too universal to be subject to a peremptory instruction." While Dr. Johnson testified there was "nothing in the record that says Tilmon got any counseling," this is not definitive evidence that he did not have *any* counseling. Therefore, the trial court did not err in refusing to give the peremptory instruction. Accordingly, this assignment of error is overruled.

[41] In another assignment of error, Kevin contends the trial court committed reversible constitutional error by giving disjunctive instructions on the statutory aggravating circumstance of murder committed in the course of a felony. *See* N.C.G.S. § 15A-2000(e)(5). Kevin argues the instruction given by the trial court allowed the jury to find the (e)(5) aggravating circumstance to exist if the jury found him guilty of either armed robbery of Ava Rogers' car in South Carolina, *or* guilty of robbery of Trooper Lowry's weapon. Kevin contends this violated the jury unanimity requirement. We disagree.

In *State v. DeCastro*, 342 N.C. 667, 467 S.E.2d 653, this Court approved the use of a disjunctive instruction on the (e)(3) aggravating circumstance—that defendant had been previously convicted of a crime involving the use or threat of violence to another person. *Id.* at 696, 467 S.E.2d at 668-69. We noted that the defendant's reliance on cases requiring a unanimous verdict to convict a defendant of a charged offense was misplaced. *Id.* We then stated, "So long as the crimes for which defendant had been previously convicted were felonies and involved the use or threatened use of violence against another person, the specific crime which supports this aggravating circumstance is immaterial." *Id.* at 696-97, 467 S.E.2d at 669.

In the instant case, the State requested two (e)(5) aggravating circumstances, one for each felony, to insure unanimity. Kevin objected to using two (e)(5) circumstances, and requested one (e)(5) circumstance based on one felony because the jury may perceive the number of aggravating circumstances as significant, and the legislature did not intend subdivision of the eleven aggravating circumstances. The trial court recognized Kevin's concerns and refused to allow the separate (e)(5) circumstances to be submitted based on each felony. Instead, the trial court submitted two theories of (e)(5) to the jury as subissues of one (e)(5) aggravating circumstance. On this issue, it instructed as follows:

> As to the defendant Kevin Golphin as to the case in which the victim is Lloyd Lowry, the potential aggravating circumstance is stated as follows: "Was the capital felony committed by the defendant while the defendant was engaged in a flight after committing armed robbery or while in the commission of an armed robbery?"
>
> . . . .
>
> As to the defendant Kevin Golphin in the case in which Lloyd Lowry is the victim, if you find from the evidence beyond a reasonable doubt that when Kevin Golphin killed Lloyd Lowry, the defendant was engaged in a flight after taking and carrying away a motor vehicle from the person and presence of Ava Rogers without her voluntary consent by endangering or threatening her life with a firearm, the defendant Kevin Golphin knowing that he was not entitled to take the property and intending at that time to deprive Ava Rogers of its use permanently or if you find from the evidence beyond a reasonable doubt that when Kevin Golphin killed Lloyd Lowry, the defendant was in the commission of taking and carrying away a pistol from the person and presence of Lloyd Lowry, without his voluntary consent by endangering or threatening his life with a firearm, the defendant Kevin Golphin knowing he was not entitled to take the pistol and intending at that time to deprive him of its use permanently, then you would find this aggravating circumstance and would so indicate by having your foreperson write, "Yes," in the space provided.

The instant case is analogous to *DeCastro*. There was evidence to support both theories of the (e)(5) circumstance, and both of the theories involved felonies. Therefore, both theories satisfy the requirements of the (e)(5) circumstance. *See id.* at 696, 467 S.E.2d at

668-69. As such, it is immaterial which crime the jurors use to support the circumstance. *See id.* at 697, 467 S.E.2d at 669. Moreover, the case relied on by Kevin to support the unanimity requirement, *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985 (1999), actually requires unanimity for elements of an offense, rather than for aggravating circumstances. Therefore, we conclude the trial court did not err by using a disjunctive instruction for the two theories under one (e)(5) aggravating circumstance. This assignment of error is overruled.

[42] In an assignment of error, Kevin argues the trial court committed reversible constitutional error by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that the murder was especially heinous, atrocious, or cruel in the Trooper Lowry case. The jury found this circumstance to exist, and Kevin contends resentencing is required. Kevin bases his argument on three separate grounds: (1) the (e)(9) circumstance is unconstitutionally vague, (2) submission of the (e)(9) circumstance was not supported by the evidence, and (3) it was arbitrary and capricious to submit the (e)(9) circumstance as to him and not as to his brother. We disagree.

We first address Kevin's argument that the (e)(9) aggravating circumstance is unconstitutionally vague. Although defendant requested that the trial court not submit the (e)(9) circumstance because it was not justified in the instant case, he never made any constitutional claims at trial and never objected after the trial court's instruction. He will "not be heard on any constitutional grounds now." *State v. Anderson*, 350 N.C. 152, 186, 513 S.E.2d 296, 317, *cert. denied*, — U.S. —, 145 L. Ed. 2d 326 (1999). Moreover, this Court has consistently rejected this argument. *See id.* at 187, 513 S.E.2d at 317; *Simpson*, 341 N.C. at 357, 462 S.E.2d at 214.

Kevin further contends the evidence does not support submission of the (e)(9) aggravating circumstance. "In determining whether 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.' " *Flippen*, 349 N.C. at 270, 506 S.E.2d at 706 (quoting *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988)). Determination of whether submission of the (e)(9) circumstance is appropriate depends on the facts of the case. *See Anderson*, 350 N.C. at 185, 513 S.E.2d at 316.

This Court has previously held the following types of murders to warrant submission of the (e)(9) aggravating circumstance:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328 (1988). A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985) [, *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)], including those which leave the victim in her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where the "killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

Gibbs, 335 N.C. at 61-62, 436 S.E.2d at 356. In addition, this Court held the submission of the (e)(9) aggravating circumstance is warranted when there is evidence that the killing was committed in a fashion beyond what was necessary to effectuate the victim's death. *See State v. Reese*, 319 N.C. 110, 146, 353 S.E.2d 352, 373 (1987), *overruled on other grounds by Barnes*, 345 N.C. 184, 481 S.E.2d 44.

In two previous cases with fact patterns similar to the instant case, this Court found no error in the submission of the (e)(9) aggravating circumstance. In *State v. Pinch*, the defendant shot the victim once, and then walked over to where the victim lay moaning and shot him again at close range. *State v. Pinch*, 306 N.C. 1, 35, 292 S.E.2d 203, 228, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), *by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). In *State v. Bonney*, this Court held the (e)(9) aggravating circumstance was properly submitted to the jury when the victim died within two or three minutes after being shot, but was nevertheless aware of his impending death. *See State v. Bonney*, 329 N.C. 61, 80, 405 S.E.2d 145, 156 (1991). In the instant case, Tilmon shot Trooper Lowry, causing him to become incapacitated. Kevin was therefore able to shake himself free of Trooper Lowry's grasp and retrieve the trooper's pistol. He then shot the trooper multiple times

as he lay on the ground moaning. Because Trooper Lowry had the presence of mind to attempt to grab Kevin after he had been shot, this, taken in the light most favorable to the State, was evidence he was aware of his fate and unable to prevent impending death. *See Hamlet*, 312 N.C. at 175, 321 S.E.2d at 846. These facts are sufficiently similar to the facts of *Pinch* and *Bonney* to warrant the same holding. Therefore, sufficient evidence did exist to support the submission of the (e)(9) aggravating circumstance to the jury.

In his third argument, Kevin contends the (e)(9) aggravating circumstance should not have been submitted against him because it was arbitrary and capricious to submit the circumstance against only him, and not against Tilmon. However, he failed to object at trial and has cited no authority to support his contentions. We have previously recognized that the (e)(9) aggravating circumstance can be utilized when the evidence shows the murder "was committed in such a way as to amount to a conscienceless or pitiless crime which is *unnecessarily* torturous to the victim." *State v. Martin*, 303 N.C. 246, 255, 278 S.E.2d 214, 220, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240 (1981) (emphasis added). The State has borne this burden with respect to Kevin. Kevin has not shown the (e)(9) circumstance was improperly submitted. The trial court did not err in submitting the (e)(9) aggravating circumstance against Kevin. This assignment of error is accordingly overruled.

[43] By assignments of error, Tilmon and Kevin contend the trial court erred by allowing the jury to consider and find aggravating circumstances pursuant to both N.C.G.S. § 15A-2000(e)(4), that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, and (e)(8), that the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties. We disagree.

Kevin concedes this argument has been decided adversely to his position in *Hutchins*, 303 N.C. 321, 279 S.E.2d 788. Tilmon, however, argues the circumstances were based on the same evidence and inherently duplicitous. "Aggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them." *Moseley*, 338 N.C. at 54, 449 S.E.2d at 444. The same evidence cannot be used to support submission of more than one aggravating circumstance. *See Hutchins*, 303 N.C. at 354, 279 S.E.2d at 808.

In *Hutchins*, this Court addressed the submission of both the (e)(4) and (e)(8) aggravating circumstances:

> Of the two aggravating circumstances challenged by defendant here as purportedly being based upon the same evidence, one of the aggravating circumstances looks to the underlying factual basis of defendant's crime, the other to defendant's subjective motivation for his act. The aggravating circumstance that the murder was committed against an officer engaged in the performance of his lawful duties involved the consideration of the factual circumstances of defendant's crime. The aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest forced the jury to weigh in the balance defendant's motivation in pursuing his course of conduct. There was no error in submitting both of these aggravating circumstances to the jury.

Id. at 355, 279 S.E.2d at 809.

As in *Hutchins*, in the instant case, the trial court submitted both the (e)(4) and (e)(8) aggravating circumstances to the jury. The (e)(4) aggravating circumstance required the jury to determine the subjective motivation for the murders. There is evidence that defendants were motivated by the desire to avoid arrest for stealing Rogers' vehicle. In support of the (e)(8) aggravating circumstance, the jury must consider the factual circumstances of the crime. There was evidence Trooper Lowry was performing an official duty when he stopped Kevin on I-95 for not wearing a seat belt and then learned of defendants' theft. There is also evidence that Deputy Hathcock was performing an official duty when he arrived on the scene to provide assistance to a fellow officer. Therefore, although the same underlying sequence of events was the subject of the (e)(4) and (e)(8) aggravating circumstances, the two circumstances were directed at distinct aspects of the crimes charged. The trial court did not err by submitting both the (e)(4) and (e)(8) aggravating circumstances. These assignments of error are overruled.

[44] By assignments of error, Kevin and Tilmon contend the trial court erred by submitting the (e)(5) aggravating circumstance, that the capital felony was committed while defendant was engaged in or in flight after committing a robbery, and the (e)(11) aggravating circumstance, that the murder committed was part of a course of conduct involving other violent crimes, without instructing the jury not to consider the same evidence for each. We disagree.

It is axiomatic that a sentencing jury may not consider the same evidence in support of more than one aggravating circumstance. *See*

Hutchins, 303 N.C. at 354, 279 S.E.2d at 808. In the instant case, both defendants concede there was sufficient evidence to provide adequate and separate bases for the two statutory aggravating circumstances in that both an armed robbery and a double murder took place. However, both argue that there was a likelihood that without a proper instruction, the jury might have utilized the same evidence in support of more than one aggravating circumstance. Neither defendant objected to the submission of the (e)(5) and (e)(11) circumstances on this basis, nor did they request a limiting instruction to that effect. Therefore, our review is limited to a search for plain error, "which requires [a] defendant to show that the error was so fundamental that another result would probably have obtained absent the error." *Rouse*, 339 N.C. at 99, 451 S.E.2d at 565. After a careful review of the record, we agree with defendants' concessions that there exists more than sufficient evidence to provide independent bases for the two aggravating circumstances. Because such a quantum of evidence exists, defendants cannot show that a different result was probable had a limiting instruction been given. *See Kandies*, 342 N.C. at 452, 467 S.E.2d at 85. Accordingly, we decline to find plain error, and these assignments of error are overruled.

[45] By several assignments of error, Kevin and Tilmon contend the trial court's instructions involving the jury's consideration of mitigating circumstances were erroneous. Specifically, they argue the instruction that allows the jury to reject a mitigating circumstance if it finds the circumstance to be without mitigating value is unconstitutional. We disagree.

Kevin and Tilmon both concede that this Court has previously upheld the instructions they challenge and ruled contrary to their positions on this issue in *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). However, Tilmon makes an additional argument, without reference to any prior holding of this Court, relating to the jury's rejection of several nonstatutory mitigating circumstances. Tilmon claims that uncontroverted evidence supported, *inter alia*, the following nonstatutory mitigating circumstances: that he had an unstable home environment, that he was physically abused as a child, that he was reared by an abusive father, that he was remorseful, that he cared for his ailing grandmother, that he loved his grandparents, and that he suffered from parental neglect and low intellectual functioning. Tilmon claims that because these circumstances possess inherent mitigating value, the jury was not free to reject them and was required to

give them mitigating value pursuant to *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982).

Although Tilmon attempts to frame this argument anew, citing "inherent mitigating content," we have previously rejected these claims. *See Hill*, 331 N.C. at 418, 417 S.E.2d at 780; *State v. Huff*, 325 N.C. 1, 58-61, 381 S.E.2d 635, 668-70 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990); *State v. Fullwood*, 323 N.C. 371, 395-97, 373 S.E.2d 518, 533-34 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). Defendant has not cited, nor do we perceive, any reason to revisit our prior decisions. These assignments of error are overruled.

[46] By another assignment of error, Kevin contends his sentences of death were imposed in an arbitrary and capricious manner because no juror found that the (f)(2) mitigating circumstance existed even though a peremptory instruction was given and substantial and uncontradicted evidence was presented in support of it. Kevin argues the jury was required to find that the (f)(2) circumstance existed because at least one juror found the existence of the nonstatutory mitigating circumstance that "Kevin Golphin lacked parental involvement or support in treatment for psychological problems." He contends the same evidence was sufficient to support the (f)(2) statutory mitigating circumstance that "the capital felony was committed while the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). We disagree.

Although a peremptory instruction for a mitigating circumstance may be given because the evidence in support of it is uncontroverted, a jury remains free to reject the circumstance in the event it does not find the evidence in support of the circumstance credible or convincing. *See, e.g.*, *Rouse*, 339 N.C. at 107, 451 S.E.2d at 571; *Gay*, 334 N.C. at 492, 434 S.E.2d at 854; *Huff*, 325 N.C. at 59, 381 S.E.2d at 669. The evidence presented by Kevin's mental health expert was not so manifestly credible that we are able to conclude that the jury was required to find it convincing. Furthermore, the fact that a juror accepted the expert's testimony to support the nonstatutory mitigating circumstance that "Kevin Golphin lacked parental involvement or support in treatment for psychological problems," is not determinative of the sufficiency of the evidence in support of the (f)(2) statutory mitigating circumstance. The two mitigating circumstances emphasize different times and different events. The nonstatutory cir-

cumstance relates to *parental support* at the time Kevin sought psychological treatment, before these crimes were committed. The statutory circumstance involves Kevin's mental or emotional state at the time the crimes were committed. Thus, it cannot be said that the same evidence necessarily supports both mitigating circumstances. Accordingly, this assignment of error is overruled.

PRESERVATION ISSUES

Defendants have raised seven additional issues which they concede have been decided previously by this Court contrary to their respective positions: (1) the trial court's instruction regarding the burden of proof applicable to mitigating circumstances was unconstitutionally vague and imposed too high a burden of proof by utilizing the term "satisfy"; (2) the jury instructions for Issues Three and Four on the sentencing recommendations forms which provided that jurors "may" rather than "must" consider mitigating circumstances were erroneous; (3) the jury instructions for Issues Three and Four which provided that each juror could consider only mitigating circumstances that juror had found in Issue Two were erroneous; (4) the jury instructions for Issues One, Three, and Four were unconstitutionally vague and ambiguous, resulting in an arbitrary verdict and requiring the jury to unanimously reject a death sentence to impose a life sentence; (5) the jury instruction defining mitigation was unconstitutionally narrow; (6) the trial court erred by "death qualifying" the jury, which resulted in an unconstitutionally biased jury in favor of the death penalty, and by failing to require separate juries for determinations of guilt and sentence; and (7) the North Carolina death penalty statute and the death sentences imposed are unconstitutional.

Defendants make these arguments for the purposes of permitting this Court to reexamine its prior holdings and to preserve these arguments for any possible further judicial review in these cases. We have thoroughly considered defendants' arguments on these issues and find no compelling reason to depart from our prior holdings. Accordingly, these assignments of error are overruled.

PROPORTIONALITY REVIEW

Having concluded that defendants' trial and capital sentencing proceeding were free from prejudicial error, it is our duty, pursuant to N.C.G.S. § 15A-2000(d)(2), to make the following determinations with regard to each sentence of death: (1) whether the evidence sup-

ports the jury's findings of the aggravating 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. *See* N.C.G.S. § 15A-2000(d)(2).

In relation to Kevin's conviction for the murder of Trooper Lowry, the jury found the following five aggravating circumstances to exist: (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (2) the capital felony was committed while the defendant was engaged in flight after committing robbery or while the defendant was engaged in the commission of armed robbery (Lowry's gun), N.C.G.S. § 15A-2000(e)(5); (3) the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties, N.C.G.S. § 15A-2000(e)(8); (4) the murder for which defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11); and (5) the capital felony was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). In relation to Kevin's conviction for the murder of Deputy Hathcock as well as Tilmon's convictions for the murders of both officers, the jury found the following four aggravating circumstances to exist in each instance: (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (2) the capital felony was committed while the defendant was engaged in flight after committing robbery, N.C.G.S. § 15A-2000(e)(5); (3) the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties, N.C.G.S. § 15A-2000(e)(8); and (4) the murder for which defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

The trial court submitted four statutory mitigating circumstances as to each murder on Kevin's behalf. The jury found that one, defendant's age at the time of the crimes, N.C.G.S. § 15A-2000(f)(7), existed. The jury also found that one of the fifteen nonstatutory mitigating circumstances, that Kevin "lacked parental involvement or support in treatment for psychological problems," submitted by the trial court on Kevin's behalf existed. The trial court submitted five statutory mit-

igating circumstances as to each murder on Tilmon's behalf. Again, the jury found that one, defendant's age at the time of the crimes, N.C.G.S. § 15A-2000(f)(7), existed. Of the thirty-six nonstatutory mitigating circumstances submitted on Tilmon's behalf, the jury found none to exist.

After a thorough review of the record, including the transcripts, briefs, and oral arguments, we conclude the evidence fully supports all of 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." *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *Barfield*, 298 N.C. at 354, 259 S.E.2d at 544. In conducting proportionality review, we compare the instant cases with other cases in which this Court has concluded the death penalty was disproportionate. *See McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. This Court has determined the death penalty to be disproportionate on seven occasions: *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 Gaines*, 345 N.C. 647, 483 S.E.2d 396, *and by Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *Young*, 312 N.C. 669, 325 S.E.2d 181; *Hill*, 311 N.C. 465, 319 S.E.2d 163; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

[47] Several factors lead us to the conclusion that the instant cases are not similar to the cases in which we have found a death sentence to be disproportionate. First and foremost, the evidence in this case reveals that defendants deliberately murdered two law enforcement officers for the purpose of evading lawful arrest. This Court has noted that the N.C.G.S. § 15A-2000(e)(4) and (e)(8) aggravating circumstances reflect the General Assembly's recognition that "the collective conscience requires the most severe penalty for those who flout our system of law enforcement." *State v. Brown*, 320 N.C. 179, 230, 358 S.E.2d 1, 33, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in

> degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

Hill, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell, J. (later C.J.) concurring in part and dissenting in part), *quoted with approval in McKoy*, 323 N.C. at 46-47, 372 S.E.2d at 37. Second, defendants were each 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. *See State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). Third, defendants' convictions for the murders were based on the theory of premeditation and deliberation. This Court has stated, "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506. Fourth and finally, as to each murder conviction, the jury found these two aggravating circumstances: (1) "[t]he capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb," N.C.G.S. § 15A-2000(e)(5); and (2) "[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). In addition, in relation to Kevin's conviction for Trooper Lowry's murder, the jury also found that "[t]he capital felony was especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9). There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death. *See Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. The N.C.G.S. § 15A-2000(e)(5), (e)(9), and (e)(11) statutory aggravating circumstances are among those four. *See id.* For these stated reasons, we conclude this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

We also compare the instant cases 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 proportionality review, we reemphasize that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *See 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). Considering the brutal circumstances of these murders along with the fact that the victims were law enforcement officers engaged in the performance of their official duties, it suffices to say the instant cases are 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 that defendants received a fair trial and capital sentencing proceeding, free from prejudicial error, and that the sentences of death are not disproportionate. Therefore, the judgments of the trial court must be and are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. ROBERT FRANKLIN BREWINGTON

No. 252A99

(Filed 25 August 2000)

1. Confessions and Other Incriminating Statements— not custodial

The trial court did not err by admitting statements by a capital first-degree murder defendant where defendant voluntarily drove himself to the Sheriff's Department in a private automobile after a detective requested an interview; defendant was not confined, handcuffed, restrained, threatened, or subjected to any show of force; he consented to a polygraph examination, returning to a waiting room while the test was prepared and voluntarily going to the examination room; when the examiner told defendant that she did not think he was telling the entire truth, he replied that he had been present when the fire was set and blamed it on one of the victims; and when the examiner returned after speaking with the detectives, defendant stated

before she could speak that his fiancee had set the fire. Under the totality of the circumstances, defendant was not in custody during his interview.

2. Confessions and Other Incriminating Statements— statements after request for counsel

The trial court did not err in a prosecution for capital first-degree murder and other crimes by admitting statements made by defendant after he indicated that he wished to talk with counsel where defendant was then subjected to interrogation only after continuing to ask questions about the case, telling detectives that he wished to talk without the presence of counsel, and formally waiving his Miranda rights.

3. Search and Seizure— consent to search—voluntary waiver of rights

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence seized during a search of defendant's automobile. Although defendant argued that his consent to the search was given without a knowing and voluntary waiver of his Miranda rights, the trial court had already properly determined that none of defendant's constitutional rights were violated during his arrest and interrogation and that defendant had voluntarily waived his Miranda rights. From the totality of evidence regarding defendant's arrest, waiver of rights, interrogation and statements made, defendant knowingly and voluntarily consented to the search of his vehicle.

4. Discovery— polygraph—results not discoverable

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to discover polygrams (produced by a polygraph test) under N.C.G.S. § 15A-903(e) where defendant asserted that he wanted to submit the polygrams to his own expert to determine whether the examiner had misrepresented the results to defendant. Polygraphs do not fall within the category of examinations contemplated by the statute; furthermore, the issue of whether the examiner correctly interpreted or commented upon the test results is merely one factor bearing upon the total circumstances

5. Confessions and Other Incriminating Statements— redacted confession of codefendant—other overwhelming evidence

There was no prejudicial error in a capital prosecution for first-degree murder, conspiracy, and arson in the admission of the redacted and retyped confession of an accomplice where the confession was carefully redacted by taking out complete sentences and groups of sentences that mentioned, connected, or referenced the existence of defendant; the confession as redacted retained a natural narrative flow and did not contain any contextual clues indicating that it had been altered; and, the alterations were subtle, neither attracted the jury's attention nor invited speculation, and did not directly implicate defendant by language which invited the jury to infer that the unnamed third party referred to in the confession was defendant. Furthermore, any Bruton error which may have occurred was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt, including defendant's own confession.

6. Criminal Law— joinder—confession of codefendant

The trial court did not err by joining the capital trials of two defendants for first-degree murder, arson, and conspiracy where defendant Brewington argued that joinder was improper and severance necessary due to prejudice from the introduction of his codefendant's confession, but, as stated elsewhere in the opinion, the admission of the confession did not prejudice defendant.

7. Homicide— first-degree murder—short-form indictment

A short-form murder indictment was constitutionally sufficient.

8. Sentencing— capital—mitigating circumstances—age of defendant

The trial court did not err during a capital sentencing proceeding by not submitting the statutory mitigating circumstance of defendant's age at the time of the offense, N.C.G.S. § 15A-2000(f)(7), where defendant argues that he presented substantial evidence that his psychological maturity was that of a child even though his chronological age at the time of the murders was 33, there was evidence that defendant appeared to be fairly well adjusted in society, and he had sufficient intelligence to attend community college and establish a good work history. The North Carolina Supreme Court will not conclude that a trial

court erred by failing to submit this mitigator where evidence of emotional immaturity is counterbalanced by other factors.

9. Sentencing— capital—nonstatutory mitigating circumstances—relatively minor participation—subsumed by statutory circumstances

The trial court did not err in a capital sentencing proceeding by not submitting defendant's requested nonstatutory mitigating circumstances concerning the fact that he was not present when the killing was done where the court submitted the statutory mitigating circumstance that defendant was an accomplice or accessory and his participation was relatively minor. The court's instruction regarding that mitigator specifically referred to defendant's indirect participation three times and it fully encompassed and more accurately stated the concepts defendant wanted the jury to consider; moreover, any juror who found it to exist was required to give it mitigating value because it was a statutory circumstance. Finally, although defendant argues that the statutory circumstance was insufficient because jurors could have found defendant's absence from the scene to have mitigating value even if his participation was not minor, the court's instruction on the statutory catchall mitigating circumstance gave the jury the authority and opportunity to consider any and all facts in evidence which any member of the jury found to have mitigating value. N.C.G.S. § 15A-2000(f)(4); N.C.G.S. § 15A-2000(f)(9).

10. Sentencing— capital—mitigating circumstances—instructions—substantially similar to Pattern Jury Instructions

A defendant in a capital sentencing proceeding could not show that the trial court's instruction prejudiced him where defendant requested the pattern jury instruction on the mitigating circumstance of no significant history of prior criminal activity, the court gave an instruction which was not precisely identical to the pattern jury instruction but was substantially so, and the jury found the circumstance. N.C.G.S. § 15A-2000(f)(1).

11. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel—accomplice not at scene

The trial court did not err during a capital sentencing proceeding by submitting the especially heinous, atrocious, or cruel aggravating circumstance where defendant was not present when the murders were committed. Even though he was not present,

he was personally involved in planning the details of the murders, took deliberate steps to enable the murders to proceed according to his instructions, and does not dispute that the manner in which the victims were murdered is sufficient to support the circumstance. N.C.G.S. § 15A-2000(e)(9).

12. Sentencing— capital—proportionality

A death sentence for a first-degree murder was not imposed under the influence of passion, prejudice, or any other factor, the evidence supported the aggravating circumstances found by the jury, and the sentence was not disproportionate. Defendant was convicted of two counts of murder, the jury found three aggravating circumstances, and the jury found the especially heinous, atrocious, or cruel aggravating circumstance.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Bowen, J., on 28 August 1998 in Superior Court, Harnett County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 26 October 1999, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 15 May 2000.

Michael F. Easley, Attorney General, by John G. Barnwell and Joan M. Cunningham, Assistant Attorneys General, for the State.

Ann B. Petersen for defendant-appellant.

LAKE, Justice.

On 30 June 1997, defendant was indicted for two counts of first-degree murder, two counts of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree burglary, one count of conspiracy to commit first-degree arson, and one count of first-degree arson. Defendant was tried capitally at the 4 August 1998 Special Criminal Session of Superior Court, Harnett County. During the course of the trial, the charges of conspiracy to commit first-degree burglary and conspiracy to commit first-degree arson were dismissed. The jury subsequently found defendant guilty of first-degree arson, both counts of conspiracy to commit first-degree murder, and 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 28 August 1998, the trial court sentenced defendant to two separate sentences of death, one for each of the two convictions for first-degree murder. The trial court also sentenced defendant to a sentence of 157 to 198 months' imprisonment for the two conspiracy to commit murder convictions and to a sentence of 64 to 86 months' imprisonment for the arson conviction.

At trial, the State's evidence tended to show that defendant and Vera Sue Lee were engaged to be married. Defendant lived in Dunn, North Carolina, with his grandmother, Frances Brewington, who had adopted him as a child, and also with his eight-year-old nephew, Brian Brewington. On 21 April 1997, defendant took out two life insurance policies from Home Beneficial Life Insurance Company. One policy was on defendant's brother, Patrick Brewington, for $75,000. The other policy was on Patrick's son, Brian, for $58,552. Defendant forged Patrick's signature on both policies and named himself as the beneficiary on both. On 29 May 1997, Lee and defendant made a deposit on a lot and mobile home, but the mortgage company refused to approve their loan.

After defendant took out the life insurance policies on Brian and Patrick, Lee met with her friend, Chris Wilson, and discussed the idea of killing Patrick Brewington to get money for a house. Lee offered to share $10,000 from the insurance proceeds with Wilson if they killed Patrick. A week later, Lee, Wilson, and defendant met to discuss killing Patrick, but Wilson refused to help. Lee, however, continued to talk about killing either Patrick or Brian Brewington during the weeks that followed. During this time, Lee also recruited Henry Michael McKeithan to help with the killing, promising him "$200 or $300 Wednesday and about a $1,000 in three to four months."

On 1 June 1997, Lee and defendant discussed defendant's plan for her to kill Frances and Brian Brewington. Defendant told Lee to make the crime look like a robbery, remove a few items such as the TV, stab Frances and Brian, and set the house on fire. On 11 June 1997, defendant and Lee went to an open-air market and bought a knife to use for the killings. During a telephone conversation that evening, defendant told Lee that he was ready for the plan to be carried out.

Around 4:49 a.m. on 12 June 1997, Lee and McKeithan, who had just driven by the Brewington residence and honked the horn to wake defendant, purchased two one-gallon jugs of distilled water at Winn-

Dixie. They emptied the water from the jugs and refilled them with gasoline from the T-Mart on Cumberland Street. During this time, defendant dressed for work; collected the insurance policies and his best clothes for Frances' and Brian's funerals; and left the Brewington home, leaving the back door unlocked. Defendant drove to Hardee World where he met Lee, and defendant put his clothes in the trunk of Lee's car. Defendant then drove to work while Lee and McKeithan drove to the Brewington residence.

When Lee and McKeithan arrived at the Brewington house, they parked the car in the driveway, put on rubber gloves, and entered the house through the back door, carrying the jugs of gasoline. Lee gave McKeithan the knife from the open-air market and told him to kill Brian while she killed Frances. Unable to stab Brian, McKeithan instead poured gasoline around the bedroom where the victims were sleeping. As McKeithan and Lee stood over them with knives, Frances and Brian Brewington woke up and started screaming. McKeithan stabbed Frances Brewington repeatedly and then ran to the car to get his lighter. While McKeithan was outside, Lee, who had stabbed Brian, lit a dishrag at the heater and ignited the gasoline in the bedroom. Although severely wounded, the Brewingtons continued to scream while Lee and McKeithan ran to the car and drove away. Lee and McKeithan buried the knife and burned their clothing and gloves at McKeithan's house.

At approximately 6:15 a.m. that morning, Harnett County Sheriff's Deputy Jerry Edwards saw smoke rising from the Brewington house. He called the fire department, then went to the house and tried to look into the windows, but the smoke was too thick for him to see inside. After the firefighters extinguished the fire, they notified Deputy Edwards that they had found two bodies in the bedroom. Deputy Edwards secured the scene after viewing the bodies and a jug of gasoline and lighter in the living room. Defendant had been summoned from work before the fire was extinguished. When he arrived at the house, defendant spoke with Deputy Edwards. Defendant told Deputy Edwards that he had left for work around 5:30 a.m., and that when he left, the only appliance running was the air conditioner. Defendant was also interviewed twice that day by Deputy Fire Marshal Jimmy Riddle. During the first interview around 8:05 a.m., defendant told Riddle that the microwave would sometimes "kick out" the circuit breakers and that there were several extension cords in the bedroom. Riddle terminated the interview because defendant seemed "very upset." Around 12:20 that afternoon, Riddle again inter-

viewed defendant, who stated that he had left the house by 5:30 a.m. and that he had run several errands before arriving at work. Defendant also stated that his grandmother had been having problems with the air conditioner lately and that he had not seen the jug of gasoline that had been found in the living room.

The preliminary investigation of the crime scene showed that the fire had been deliberately set with an accelerant which was poured on the floor of the bedroom. This conclusion was based on factors such as the "pour pattern" of the gasoline, the color of the smoke and flames, and the elimination of the electrical system and all appliances as possible sources of the fire. The investigation also revealed the knife wounds to Frances Brewington's body. A knife handle and partial knife blade were also found under her body.

Following the investigation, defendant, McKeithan and Lee were arrested and charged. Pursuant to N.C.G.S. § 15A-926, the State elected to try defendant and McKeithan in a joint trial, and Lee was tried separately.

In his first assignment of error, defendant contends that the trial court erred by denying his motion to suppress statements made to State Bureau of Investigation (SBI) Special Agent Gail Beasley at the Harnett County Sheriff's Department on 12 and 13 June 1997. An evidentiary hearing on defendant's motion to suppress began on 24 July 1998, but was not completed that day. The trial court resumed the evidentiary hearing on this issue on 12 August 1998, after the completion of jury selection. On 13 August 1998, in open court, the trial court denied defendant's motion to suppress. On appeal, defendant argues the statements should have been excluded from evidence because they were made at a time when defendant was subjected to custodial interrogation and was not advised of his *Miranda* rights.

Following the evidentiary hearing, the trial court made extensive and detailed findings of fact with regard to defendant's interviews with members of the Harnett County Fire and Sheriff's Departments, which we summarize: At approximately 8:00 a.m. on 12 June 1997, the morning of the fire and before the cause of the fire was known, Deputy Fire Marshal Jimmy Riddle interviewed defendant. Defendant stated that when he left home around 5:30 a.m., the bedroom window air conditioner had been on and that there had been problems with the microwave "kick[ing] out" the house's circuit breakers. At approximately 12:20 p.m. that afternoon, Riddle again interviewed defendant, this time at the Dunn Fire Department and in the pres-

ence of Sheriff's Detective Greg Taylor. Defendant stated that he had left the house for work after waking at 5:00 a.m. that morning, and repeated that the air conditioner had been on when he left and that the microwave oven would often trip the circuit breakers. Defendant also stated that there had been no gasoline in the house when he left.

The trial court's extensive findings of fact further included the following: At approximately 5:30 p.m. that same day, defendant drove himself to the Harnett County Sheriff's Department at Detective Billy Wade's request. Detective Wade asked defendant to take a polygraph test, and defendant agreed. Agent Beasley conducted the polygraph test. Defendant denied any involvement in the deaths, but Agent Beasley told him that she did not think he was telling the entire truth. Defendant then told her that Brian had started the fire, and that defendant had left the house after Brian told him to leave. Agent Beasley left the examination room to tell Detective Wade and SBI Special Agent John Hawthorne what defendant had said. As Agent Beasley returned to the room, defendant spontaneously told her that his fiancée, Vera Lee, had started the fire. Agent Beasley reported this statement to Detective Wade and Agent Hawthorne, who subsequently entered the room and advised defendant of his *Miranda* rights. This occurred at approximately 8:20 p.m. that evening. After defendant received his *Miranda* warnings, defendant stated that he thought he needed to speak with a lawyer. The officers stopped questioning defendant. However, defendant then asked, "What if I know who did it?" Detective Wade told defendant that the officers could not talk to him unless he initiated the conversation. Defendant then stated that he did want to talk to them. Detective Wade again advised defendant of his *Miranda* rights. Defendant signed a written waiver of his *Miranda* rights at 8:33 p.m. that evening.

Additionally, the trial court found that defendant told Detective Wade and Agent Hawthorne that defendant planned the murders with Lee and McKeithan, that the murders were defendant's idea, and that they planned to kill Brian for the proceeds of a $58,000 life insurance policy that defendant had taken out on Brian. Defendant detailed his role in the murders, giving an account of his movements on the morning of 12 June 1997. The trial court found that defendant was rational, coherent, and logical when he waived his *Miranda* rights, and defendant did not appear to be under the influence of alcohol or any drugs other than a prescription medication for his "nerves," which he had taken earlier in the day. Defendant did not at any time request a

lawyer or request that the interview stop. After the interview, defendant freely and voluntarily consented to the search of his automobile, in which several items of evidence were seized, including the life insurance policies that defendant had taken out on Brian Brewington and on Brian's father, Patrick.

Based on these findings of fact, the trial court concluded that defendant's statements to Deputy Fire Marshal Riddle and Agent Beasley were noncustodial and were made freely and voluntarily; that defendant himself reinitiated conversation with law enforcement officers following his being advised of his *Miranda* rights; and that defendant's subsequent statement to Detective Wade and Agent Hawthorne was made freely, voluntarily, and with full comprehension of his *Miranda* rights. The trial court also concluded that none of defendant's constitutional rights were violated during his interrogation and arrest; that defendant was not induced to make a statement or consent to the search of his vehicle by any promises, inducements, or offers of reward, or by any threat or show of force; and that defendant freely, knowingly, and voluntarily consented to the search of his car. The trial court therefore denied defendant's motion to suppress.

At the outset, we note that the standard of review in evaluating a trial court's ruling on a motion to suppress is as follows:

> The trial court makes the initial determination as to whether an accused has waived his right to counsel. Its findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). "Conclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996).

State v. Peterson, 347 N.C. 253, 255, 491 S.E.2d 223, 224 (1997). Furthermore, this Court has recently reaffirmed that

> a trial court's resolution of a conflict in the evidence will not be disturbed on appeal, *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996), and its findings of fact are conclusive if they are supported by the evidence, *State v. Robinson*, 346 N.C. 586, 596, 488 S.E.2d 174, 181 (1997). Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task "is to determine whether the

> trial court's conclusion[s] of law [are] supported by the findings." *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000).

State v. Steen, 352 N.C. 227, 237, —— S.E.2d ——, —— (2000).

[1] In this assignment of error, defendant first addresses the admission of the two statements made by defendant to Agent Beasley at the Harnett County Sheriff's Department after 6:00 p.m. on 12 June 1997. Defendant argues that these statements should have been excluded from evidence because they were made at a time when defendant was subjected to custodial interrogation and had not been advised of his *Miranda* rights. We disagree.

In determining whether a statement is voluntary, this Court reviews the totality of the surrounding circumstances in which the statement was made. *Hyde*, 352 N.C. at 45, 530 S.E.2d at 288. This Court reaffirmed that pertinent factors include

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

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). Additionally, with regard to the question of whether a person is in custody, this Court has stated:

> The United States Supreme Court has held that in determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994) (*per curiam*).

State v. Gaines, 345 N.C. 647, 662, 483 S.E.2d 396, 404-05, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

Our review of the record, in its entirety, reflects that after Detective Wade requested an interview with defendant, defendant voluntarily drove himself to the Sheriff's Department in a private automobile. Defendant was not accompanied by a police officer. Once defendant arrived at the Sheriff's Department, he was not con-

fined, handcuffed, restrained in any manner, threatened or subjected to any show of force. Defendant consented when Detective Wade asked him if he would agree to take a polygraph examination. After defendant met Agent Beasley, she told defendant that "this test was voluntary and he could leave at any time." Defendant replied that he "had no problem with taking a polygraph." Defendant agreed to sign, and did sign, a polygraph examination consent form, which reaffirmed that defendant was not in custody and was taking the polygraph examination voluntarily. After Agent Beasley explained the polygraphic process to defendant, defendant returned to the waiting room for about ten to fifteen minutes while Agent Beasley prepared for the test. Once Agent Beasley prepared the polygraph, defendant voluntarily returned to the examination room with her. Defendant was not handcuffed or restrained during his interview with Agent Beasley. He was not threatened, and Agent Beasley did not make any promises to defendant. Defendant was not crying and did not appear to be agitated.

At the conclusion of the polygraph test, when Agent Beasley told defendant that she did not believe he was telling the entire truth, defendant stated that he had been present when the fire started, but blamed the arson on his nephew, Brian. No one else was in the room with defendant and Agent Beasley at this time. Agent Beasley left the room and reported defendant's statement to Detective Wade and Agent Hawthorne, and defendant remained in the examining room alone. Defendant was not handcuffed or under any restraint at this time. Agent Beasley returned to the examining room alone. Upon her return, before she could "get a chance to speak," defendant stated, "I know who set the fire and she is sitting out there. . . . She's here. My fiancée, Vera Lee." Defendant never requested a lawyer during the time he spent with Agent Beasley, and she had no further communication with him.

Based on the foregoing, we conclude that the record contains ample evidence which supports the trial court's findings of fact. We also conclude that the trial court correctly determined that, under the "totality of the circumstances," defendant was not in custody during his entire interview with Agent Beasley. Therefore, the trial court properly admitted defendant's statements to Agent Beasley into evidence at trial.

[2] By this same assignment of error, defendant next challenges the admissibility of the statement he made to Detective Wade and Agent

Hawthorne. Defendant concedes that he was then in custody and that he had properly been informed of his *Miranda* rights at this time. However, defendant contends that the trial court erred in admitting his statement into evidence because after defendant invoked his right to counsel, Detective Wade and Agent Hawthorne did not scrupulously honor defendant's right to end the questioning.

Our review of the record reveals that when Detective Wade and Agent Hawthorne entered the examination room at approximately 8:20 p.m. and read the *Miranda* warnings to defendant, defendant responded that he understood each item. Wade subsequently read the *Miranda* waiver to defendant, who did not sign the waiver form. Defendant stated, "I believe I need to talk to a lawyer." Wade responded, "I believe you do too." Defendant concedes that this response indicates that Detective Wade and Agent Hawthorne understood defendant's invocation of his rights to counsel.

After defendant invoked his right to counsel, Agent Hawthorne asked defendant questions that were not "case-specific." Agent Hawthorne testified during *voir dire* that the purpose of these questions "was to document our activity and who we were talking to" and to complete defendant's "Personal History Arrest Form." Specifically, the information Agent Hawthorne sought to obtain was defendant's date of birth, social security number, address, height and weight. The record reveals that while Agent Hawthorne was in the process of obtaining this information, defendant began questioning Detective Wade and Agent Hawthorne about the crimes, and asked, "What if I know who did it?" During *voir dire*, Detective Wade testified that at this point he responded to defendant as follows:

> I informed him that I could not talk to him since he had not waived his rights. There was nothing that I could say to him and he should say nothing to me. And that if he wanted to talk to me, he had to initiate it. I had to re-advise him of his required Miranda rights and he would need to sign the waiver stating that he did not wish to have an attorney.

This testimony indicates that Detective Wade understood that defendant was trying to initiate communication about the case, and Detective Wade correctly reminded defendant that he had invoked his right to counsel. Detective Wade also reminded defendant that he could not discuss the case with defendant unless and until defendant formally waived his *Miranda* privileges in writing.

Agent Hawthorne also testified that as defendant continued to ask case-specific questions,

> we explained to him that he had invoked his right to counsel and we couldn't discuss the case with him, and also explained to him that, you know, it couldn't be a one-way conversation; that he'd invoked the right to counsel and I couldn't discuss the facts of the case with him.

Defendant then indicated to both Detective Wade and Agent Hawthorne that he had changed his mind and wanted to participate in the interview, after which both Detective Wade and Agent Hawthorne took steps to "make sure [defendant], in fact, was changing his mind." Agent Hawthorne testified that it was necessary

> [a]lso to make sure that [defendant] understood that he had revoked his right to counsel, that any decision on his part had to be his decision. And he had—in other words, I had to be convinced that he was changing his mind on his own and wanted to, in fact, make a statement.

Once defendant convinced Agent Hawthorne and Detective Wade that he wanted to speak to them, Agent Hawthorne and Detective Wade informed defendant of his *Miranda* rights a second time. Not until defendant formally waived his *Miranda* rights and signed the waiver form did Agent Hawthorne and Detective Wade question defendant about the arson and murders.

During the period between the first and second *Miranda* warnings, Detective Wade and Agent Hawthorne were the only people present in the room with defendant. Defendant was not handcuffed, and while Agent Hawthorne obtained historical and personal data from defendant, defendant appeared to speak in a rational and understanding manner. Defendant did not appear to be impaired, fatigued, or under the influence of a controlled substance.

In *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), the United States Supreme Court held that:

> an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85, 68 L. Ed. 2d at 386. Defendant asserts that this rule is premised upon the assumption that the first interrogation was immediately terminated for a substantial period of time. *Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313 (1975). Defendant contends that in the case *sub judice*, the initial reading of the *Miranda* warnings constituted the "first interrogation," and that Agent Hawthorne's questions, which were asked in order to complete defendant's "Personal History Arrest Form," constituted a reinitiation of that custodial interrogation in violation of his Fifth Amendment rights. We disagree.

The Supreme Court has defined the term "interrogation" as follows:

> [A]ny words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980). Additionally, this Court has held that "interrogation does not encompass routine informational questions posited to a defendant during the booking process." *State v. Ladd*, 308 N.C. 272, 286, 302 S.E.2d 164, 173 (1983). We therefore conclude, based on the aforementioned evidence contained in the record, that defendant was subjected to custodial interrogation only after he continued to ask Detective Wade and Agent Hawthorne questions about the case, told them that he wanted to talk without the presence of counsel, and formally waived his *Miranda* rights. We further conclude that this evidence supports the trial court's findings of fact in this regard, and that these findings of fact support the trial court's conclusions of law. The trial court did not err in denying defendant's motion to suppress his statements and any evidence obtained as a result of those statements.

[3] Finally, under this assignment of error, defendant addresses the search of his automobile on 12 June 1997. After defendant waived his *Miranda* rights and at the conclusion of defendant's interrogation and statements regarding the murders and arson, defendant agreed to allow law enforcement officers to search his vehicle for evidence pertaining to these crimes. After defendant gave his consent, Detective Taylor and Agent Beasley searched defendant's vehicle and seized a number of items of evidence, including the life insurance policies insuring the lives of Brian and Patrick Brewington that named defendant as beneficiary. On appeal, defendant argues that this evi-

dence should have been excluded because defendant's statement giving consent to the search was made without a voluntary and knowing waiver of his *Miranda* rights. This contention is without merit. We have already concluded that the trial court properly determined that none of defendant's constitutional rights were violated during his arrest and interrogation and that he voluntarily waived his *Miranda* rights. From the totality of the evidence of record regarding defendant's arrest, waiver of *Miranda* rights, interrogation and statements made, we conclude defendant knowingly and voluntarily consented to the search of his vehicle. This assignment of error is overruled.

[4] In his next assignment of error, defendant contends that the trial court erred in denying his motion for discovery and production of the documents relating to the polygraph examination taken on 12 June 1997. Defendant filed a motion for supplemental discovery on 5 November 1997. In that motion, defendant made a specific request that the State provide the printout of defendant's 12 June 1997 polygraph test as well as any consent form or other documents that may have been created in connection with the polygraph testing. A hearing on defendant's motion was held on 15 December 1997. On that day, the trial court allowed defendant's motion, but noted, "[W]e may have to go back and look at that one again later."

On 20 February 1998, defendant filed a further motion to compel discovery of the polygram. At the hearing on that motion, the trial court allowed the prosecutor's request to defer a hearing and ruling on that motion until the State could be represented by John Watters, counsel for the SBI. On 19 March 1998, after hearing argument from Mr. Watters and counsel for the defense, the trial court denied defendant's motion to compel and allowed the State's motion to modify the trial court's order on discovery so as to exclude the polygram from discoverable material. The trial court allowed defendant's motion to seal the polygram, which the SBI transmitted to the Harnett County Clerk of Court.

Defendant contends that the polygram falls within the purview of N.C.G.S. § 15A-903(e), which provides for the discovery of "results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case." N.C.G.S. § 15A-903(e) (1999). Defendant therefore argues that this case should be remanded to the trial court with instructions to provide defendant with the polygram. For the reasons stated below, we conclude that polygrams do not fall within the scope of N.C.G.S. § 15A-903.

In *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983), this Court reviewed the law in North Carolina and in other jurisdictions as to the admissibility of polygraph results. This Court ultimately determined that "in North Carolina, polygraph evidence is no longer admissible in any trial. This is so even though the parties stipulate to its admissibility." *Id.* at 645, 300 S.E.2d at 361. Defendant contends that *Grier* does not apply because he did not intend to introduce into evidence the polygrams themselves. Rather, defendant asserts that he intended to submit the polygrams to his own expert to determine whether Beasley misrepresented to defendant what the polygraph test revealed. However, as this Court clearly stated in *Grier*, the meaning of a polygram depends entirely upon interpretation. *Id.* at 636, 300 S.E.2d at 355-56. Chief Justice Branch, speaking for the Court, explained:

> Even if the accuracy of the machine as a measuring device and the operative theory of the polygraph is accepted, this is not the end of the inquiry regarding the validity of the polygraphic process. All courts and commentators concede that the most important factor to be considered when evaluating the reliability and utility of the polygraph is the role of the examiner. . . .
>
> . . . The recordings of the machine do not, in and of themselves, indicate whether the examinee has been truthful or deceptive. Rather, the ultimate conclusion is totally dependent upon the examiner's *interpretation* and *analysis* of the physiological changes measured by the polygraph. The entire process, then, is a combination of scientific measurement and human evaluation. Because human judgment in the role of the examiner is intrinsic to the method, human error is, perhaps, equally intrinsic. . . .
>
> . . . .
>
> Recognizing that a litigant could legitimately challenge the proffered results of a test on the basis of the motivation of the subject, the subject's physical and mental condition, the competence and attitude of the examiner, the wording of the relevant questions, and the interpretation of the test results, we are acutely aware of the possibility that the criminal proceeding may degenerate into a trial of the polygraph machine. The introduction and rebuttal of polygraph evidence, if all the possibilities for error in the polygraphic process were deeply explored, could divert the jury's attention from the question of the defendant's

guilt or innocence to a judgment of the validity and limitations of the polygraph.

Id. at 636, 643, 300 S.E.2d at 355-56, 359-60 (citations omitted).

In *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991), this Court reiterated its position regarding the admissibility of polygrams that it adopted in *Grier*. The defendant in *Payne* sought the physiological measurements contained in a polygram "as part of his challenge to the admissibility of the statements he made to law enforcement officers after the polygraph examination, as well as to challenge the credibility of those officers' testimony." *Id.* at 201, 394 S.E.2d at 161-62. However, the defendant in *Payne* waited until four days prior to trial to specially request the polygram. *Id.* at 201, 394 S.E.2d at 162. This Court overruled defendant Payne's assignment of error. *Id.*

Defendant in the case *sub judice* construes this Court's decision in *Payne* to mean that polygram readouts are discoverable so long as defendant makes a timely motion to do so. We do not agree. Defendant's argument that polygrams are discoverable under N.C.G.S. § 15A-903(e) ignores this Court's analysis in *Grier* relating the nature of the polygraph. As stated in the above-quoted passage, a polygraph's results are not merely scientific evaluations, but also the product of human judgment. This Court's refusal to admit the results of a polygraph into evidence is grounded in the fear that, given the subjective nature of the results of a polygraph, a "criminal proceeding may degenerate into . . . a judgment of the validity and limitations of the polygraph." *Grier*, 307 N.C. at 643, 300 S.E.2d at 359-60. This concern is not only a threat during the actual trial, but it is present at all aspects of a criminal proceeding. Accordingly, we conclude that a polygraph does not fall within the category of "physical or mental examinations" contemplated under N.C.G.S. § 15A-903(e).

Further, the determination of whether a defendant's inculpatory statement was voluntary depends upon the totality of the circumstances. *Hyde*, 352 N.C. at ——, 530 S.E.2d at 288. The issue of whether the person administering the polygraph correctly interpreted or commented upon the test results is merely one factor bearing upon the total circumstances surrounding defendant's statement made following the agent's comment that she did not think he was telling the entire truth. The significance of this factor is greatly diminished by the unreliable nature of the polygraph due to the subjective nature of an interpretation of its results. Furthermore, and more fundamen-

tally, the question of whether the polygraph results themselves were in fact accurate or not has no real bearing on whether defendant's statement was voluntary. For these reasons, we conclude that the trial court did not err in allowing the State's motion to exclude the polygram or polygraph results from discoverable material. This assignment of error is overruled.

[5] Defendant next assigns error to the trial court's admission of codefendant McKeithan's confession into evidence. Both defendant and McKeithan had made statements to law enforcement officers detailing their involvement in the murders. Each defendant's confession implicated himself, his codefendant in this joint trial as well as Vera Sue Lee, who was tried and convicted in a separate trial. The State redacted the confessions to the extent that each defendant's confession contained no references to the other defendant. Defendant argues that the admission of McKeithan's redacted confession into evidence without a limiting instruction violated defendant's right to confront and cross-examine a witness against him. We do not agree.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.' " *Richardson v. Marsh*, 481 U.S. 200, 206, 95 L. Ed. 2d 176, 185 (1987). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678 (1990). In *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), the Supreme Court held that a defendant's rights under the Confrontation Clause are violated when his nontestifying codefendant's confession is introduced at their joint trial, and the confession names the defendant as a participant in the crime. The Court's rationale was that a trial court's limiting instruction for the jury not to consider the confession as evidence against defendant was an ineffective protection of defendant's right of cross-examination. *Id.* at 135-36, 20 L. Ed. 2d at 484-85.

The Supreme Court later limited the *Bruton* rule by holding that there is no Confrontation Clause violation by the admission of a nontestifying codefendant's confession along with a limiting instruction where the confession has been redacted to eliminate defendant's name as well as all references to defendant's existence. *Richardson*,

481 U.S. at 211, 95 L. Ed. 2d at 188. In determining not to extend the *Bruton* rule to fully redacted confessions, the Supreme Court in *Richardson* distinguished the confession in *Bruton* as a "powerfully incriminating" confession that " 'expressly implicat[ed]' the defendant as [the] accomplice." *Id.* at 208, 95 L. Ed. 2d at 186 (quoting *Bruton*, 391 U.S. at 124 n.1, 20 L. Ed. 2d at 476 n.1). In contrast, the Court in *Richardson* described the redacted confession as one that "was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." *Id.* Accordingly, the confession in *Richardson* was evidence requiring "linkage" in order for it to become incriminating. *Id.*

The Supreme Court clarified the significance of a fully redacted confession in determining a *Bruton* issue in *Gray v. Maryland*, 523 U.S. 185, 140 L. Ed. 2d 294 (1998). In *Gray*, the Supreme Court ruled that a confession redacted so as to merely replace defendant's name with a blank and the word "delete" falls within the "class of statements to which *Bruton's* protections apply." *Id.* at 197, 140 L. Ed. 2d at 304. Even though the trial court had given the jury a limiting instruction in *Gray*, the Supreme Court focused its analysis on the adequacy of the redaction. The Supreme Court distinguished the confession in *Gray* from the fully redacted confession in *Richardson* because the State of Maryland in *Gray* "ha[d] simply replaced the nonconfessing defendant's name with a kind of symbol, namely the word 'deleted' or a blank space set off by commas." *Id.* at 192, 140 L. Ed. 2d at 300. Therefore, the Supreme Court ruled that the *Gray* confession was inadequate because, unlike the confession in *Richardson*, it "refer[red] directly to the 'existence' of the nonconfessing defendant." *Id.*

The Supreme Court of North Carolina has held that *Bruton* and its progeny would affect criminal trials in this state as follows:

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant . . . , and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation."

State v. Tucker, 331 N.C. 12, 23-24, 414 S.E.2d 548, 554 (1992) (quoting *State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968)). The North Carolina General Assembly codified these principles in N.C.G.S. § 15A-927(c)(1), which provides:

> When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:
>
> a. A joint trial at which the statement is not admitted into evidence; or
>
> b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
>
> c. A separate trial of the objecting defendant.

N.C.G.S. § 15A-927(c)(1) (1999). This Court has held that *Bruton* and its progeny apply only when a confession by a nontestifying defendant is " 'inadmissible as to the codefendant.' " *Tucker*, 331 N.C. at 24, 414 S.E.2d at 554 (quoting *Fox*, 274 N.C. at 291, 163 S.E.2d at 502). "A statement is inadmissible as to a codefendant only if it is made outside his presence and incriminates him." *Id.* at 24, 414 S.E.2d at 554-55. In the case *sub judice*, although McKeithan's statement was made outside of defendant's presence, after it was redacted it did not incriminate defendant. We conclude that because McKeithan's confession was fully redacted and did not incriminate defendant, its admission into evidence did not violate defendant's rights under the Confrontation Clause.

At trial, defendant made a general objection to the admission of McKeithan's redacted confession into evidence, and the trial court overruled this objection. Detective Wade read to the jury McKeithan's redacted confession, which stated in essence: Lee asked McKeithan to meet her at the Main Street Grill, where she offered him "$200 or $300 Wednesday and about a $1000 in three to four months by killing this dude named Pat." After about three failed attempts to kill "Pat," Lee suggested they kill his son instead. McKeithan proposed that they kidnap Brian and hold him for ransom, but Lee said that they would get more money if they killed the boy. On the night of the crime, Lee

and McKeithan bought two water jugs from Winn-Dixie, emptied them out, and filled them with gasoline. After a stop at Hardee World, they drove to the Brewington house. On the way there, Lee said that they should make the crime look like a burglary. They entered the back door of the house, carrying the jugs of gasoline and a hunting knife. Lee told McKeithan to kill Brian and leave "Grandma" to her. McKeithan was unable to stab Brian, but poured gasoline around the bedroom and on the end of both beds. Lee brought a knife from the kitchen, and she and McKeithan switched knives. Lee put her knife to Brian's throat, and Brian and Frances woke up and started screaming. McKeithan stabbed Frances while Lee stabbed Brian. He then ran to the car to get his lighter, but while he was outside, Lee lit a dishrag at the heater, which she threw into the bedroom. Lee and McKeithan then ran to the car and drove away.

Prior to trial, defendant objected to the adequacy of the proposed redaction of McKeithan's confession and requested that it be modified further. Specifically, defendant directed his complaints to the "blackouts on sections of the confessions." Defendant also complained that the reference in McKeithan's confession that " 'they' bought a knife at a flea market" was a direct reference to him and Lee. Finally, defendant objected to the use of the words "Grandma" and "grandmother" in McKeithan's confession because they referred to Frances Brewington. In response to defendant's objections, the State then deleted the entire sentence which contained the reference to anyone buying a knife. The State also retyped the confession to eliminate the "blackouts" and any suggestion that the confession had been altered. Further, after these additional modifications, the appearance of the words "Grandma" and "grandmother" was reduced to five instances where they were contextually appropriate.

At trial, following the conclusion of Detective Wade's testimony with regard to McKeithan's confession, the trial court noted that it was five o'clock and excused the jury until the following morning. After the jury left the courtroom, the trial court asked the attorneys whether there was anything that needed to be discussed. Counsel for McKeithan then objected as follows:

> Your Honor, the defendant McKeithan would object to the redacted statement being what comes into evidence. We insist and believe it's only fair that the entire statement come into evidence, and we would make that motion that the entire statement come in.

Counsel for defendant Brewington then stated, "We have also made that same objection numerous times, Your Honor, and we would renew it at this time." The trial court denied the defense attorneys' objections and motions that the entire statement come in. At no point did counsel for defendant Brewington request a limiting instruction, and he did not further challenge the sufficiency of the modified statement or last redaction, or question the content of McKeithan's statement.

Now, on appeal, defendant contends that the admission of McKeithan's confession into evidence without a limiting instruction violated defendant's right to confront and cross-examine a witness against him as set forth in *Bruton*. However, the concerns that the Supreme Court addressed in *Bruton* and its progeny, as well as the concerns addressed by this Court in *Fox* and its progeny, arise only if a defendant is incriminated by his codefendant's statement. As this Court has long held, "[t]he *sine qua non* for application of *Bruton* is that the party claiming incrimination without confrontation at least be incriminated." *State v. Jones*, 280 N.C. 322, 340, 185 S.E.2d 858, 869 (1972). Accordingly, this Court will not determine whether the introduction of McKeithan's statements violated defendant's rights under the Confrontation Clause unless this Court first concludes that McKeithan's statement implicated defendant.

Defendant contends that allowing the words "Grandma" and "grandmother" to remain in the confession prejudiced him. Defendant asserts that because he was the victim's grandson, any reference to "Grandma" or "grandmother" was a reference to his existence and thereby violated *Bruton*. As a result of the State's redaction, there were no references to defendant by name, and the five remaining references to "Grandma" or "grandmother" in McKeithan's confession are as follows:

> We went to the back screen door and Vera handed me the knife and told me to go kill Brian and leave *Grandma* up to her. I walked through the bathroom, down a little hallway into *Grandmother* and Brian's room.
>
> She put the knife to his throat. Brian started screaming and crying and then his *grandmother* woke up and said to me, "Who are you?"
>
> . . . while I was stabbing *Grandma*, Vera was stabbing Brian.

> Vera threw the dishrag in the bedroom and you could hear *Grandma* screaming, "Oh, help me. Help me. Oh."

(Emphasis added.) Defendant contends that the case *sub judice* is analogous to *Gray*, and defendant compares the inclusion of the words "Grandma" and "grandmother" in the instant confession to the artless redactions contained in the *Gray* confession. However, we conclude that the instant case is distinguishable from *Gray*. There was no attempt to disguise the redactions in the *Gray* confession because that confession contained blanks and the word "delete" in place of defendant's name. *Gray*, 523 U.S. at 193, 140 L. Ed. 2d at 300. The redactions in the *Gray* confession obviously encouraged the jury to speculate about those omitted references and overemphasized their importance. *Id.* at 193, 140 L. Ed. 2d at 301. The Supreme Court also noted that in *Gray*, the prosecutor blatantly linked defendant to the deleted names by asking a detective whether the defendant was arrested on the basis of information contained in the codefendant's confession. *Id.* at 188, 140 L. Ed. 2d at 298.

In contrast, the confession in the case at bar was carefully redacted by taking out complete sentences and groups of sentences that mentioned, connected, or referenced the existence of defendant. Additionally, McKeithan's confession as redacted retains a natural narrative flow. It does not contain any contextual clues which indicate that the confession was altered in any manner. Unlike the explicit deletions which the Supreme Court disapproved in *Gray*, the alterations in McKeithan's confession are subtle and neither attract the jury's attention nor invite speculation.

Upon careful review of the record and the evidence introduced at trial, including McKeithan's confession, we conclude that defendant in the case *sub judice* was not incriminated by the inclusion of the words "Grandma" and "grandmother" in McKeithan's confession. Unlike the instant case, the cases where this Court has held that the redacted confession violates *Bruton* are those where, notwithstanding the redaction of defendant's name, the defendant is *directly* implicated by language which invites the jury to infer that the unnamed third party referred to in the confession was the defendant.

This Court reviewed this issue in *State v. Littlejohn*, 340 N.C. 750, 459 S.E.2d 629 (1995). In that case, the State introduced a redacted confession made by Littlejohn which implicated his codefendant Dayson. *Id.* at 755, 459 S.E.2d at 632. That statement did not include defendant Dayson's name or any specific reference to him. *Id.*

However, it did refer to the "three remaining," who divided the money. *Id.* at 756, 459 S.E.2d at 632. This Court recognized that the jury could determine through the process of elimination that defendant Dayson had to be one of the "three remaining" mentioned in the confession. *Id.* However, because there was other overwhelming evidence against the defendant, this Court ruled that the admission of the confession was "harmless beyond a reasonable doubt." *Id.*

The references to "Grandma" and "grandmother" in McKeithan's redacted confession, unlike the confession in *Littlejohn*, do not refer to the existence of someone else who was involved in the crime. The reference to one of the victims by familial relationship does not directly or indirectly identify or implicate defendant. Frances Brewington adopted both defendant and his brother, Patrick, as her children. Therefore, she was both their mother and their grandmother. Furthermore, because Brian was Patrick's son, Frances was both Brian's grandmother and his great-grandmother. Therefore, the references in McKeithan's confession to the familial connection when referring to Frances Brewington do not point to defendant. There is one particular instance in McKeithan's confession where Frances is identified as Brian's grandmother: "Brian started screaming and crying and then *his grandmother* woke up and said to me, 'Who are you?' " (Emphasis added.) This statement clearly refers to Frances as Brian's grandmother. The evidence before the jury showed that McKeithan did not know defendant, Frances, or Brian prior to 12 June 1997. Therefore, it is consistent with what the jury knew and understood about McKeithan for the jury to infer that McKeithan merely adopted Vera Lee's designation of the eighty-two-year-old lady in the bed as "Grandma" and assumed her to be Brian's grandmother. All of McKeithan's references to "Grandma" or "grandmother" in his redacted confession can be appropriately understood as referring to Brian's grandmother.

Even if this Court were to conclude that the inclusion of the five references to either "Grandma" or "grandmother" constituted error, we conclude that such error is harmless beyond a reasonable doubt. This Court has held that a "*Bruton* violation does not automatically require reversal of an otherwise valid conviction." *State v. Hayes*, 314 N.C. 460, 469, 334 S.E.2d 741, 747 (1985). In recognizing this rule, this Court reasoned as follows:

> On at least three occasions, the United States Supreme Court has applied a harmless error analysis to claimed *Bruton* violations.

> *Brown v. United States*, 411 U.S. 223, 36 L. Ed. 2d 208 (1973); *Schneble v. Florida*, 405 U.S. 427, 31 L. Ed. 2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284 (1969). . . . [I]t is well established that where two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty of the particular crime and any other crime committed by the other or others in furtherance of or as a natural consequence of the common purpose. . . . The question of which of the defendants actually committed the assaults was irrelevant to the jury verdicts finding each of the defendants guilty of all of the crimes charged. The interlocking confessions combined with the fact that certain items taken from [the victims] were found in the possession of some of the defendants provided overwhelming evidence of each defendant's guilt as to each charge[,] and any *Bruton* error which *may* have occurred was harmless beyond a reasonable doubt.

Hayes, 314 N.C. at 469-70, 334 S.E.2d at 747.

In another decision, *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563, *cert. denied*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977), this Court reached the same result as it did in *Hayes*. In *Squire*, this Court concluded that if there was a *Bruton* error in admitting a codefendant's statement which incriminated defendant *Squire*, then that error was harmless beyond a reasonable doubt. *Id.* at 510, 234 S.E.2d at 573. In reaching this conclusion, this Court determined that the evidence of the defendant's guilt, including the defendant's own confession, was so overwhelming as to render any possible *Bruton* violation harmless. *Id.* at 510, 234 S.E.2d at 572-73.

In the case *sub judice*, on the first day of trial and prior to the admission of McKeithan's confession, defendant's own confession was read to the jury. In that confession, defendant admitted his full participation in the planning, initiation, and attempted coverup of the murders of Frances and Brian. Defendant's confession was internally consistent, and our review of the record reveals that defendant's confession was corroborated by other objective evidence introduced at trial. Defendant's confession was consistent with the testimony of Greg Maitland, a neighbor of the Brewingtons, with regard to being "startled awake" when Lee drove by the Brewington house and honked her vehicle's horn in order to wake defendant. Defendant's confession was also corroborated by physical evidence regarding the stab wounds to the victims, the knife blade found in Frances' hip

bone, and the knife handle found under her body. During his confession, defendant gave a detailed description of that knife and also took credit for developing the plan of stabbing the victims and setting the house on fire. Deputy Fire Marshal Riddle's testimony at trial corroborated the portion of defendant's confession where he admitted to taking clothes for Frances' and Brian's funerals when he left the house the morning of the murders, before they were committed. Riddle testified that clothes were missing from defendant's closet in the bedroom. Kevin Harrington testified that he sold defendant the insurance policies on Patrick and Brian. Poshia Bell and Reverend J. Brewington corroborated the importance to defendant of those polices in their testimony regarding defendant's act of bringing the policies to church for members to anoint and pray over. Wilson's testimony corroborated defendant's admission that the original plan was to kill defendant's brother, Patrick; recover the insurance proceeds; and purchase the double-wide mobile home he and Lee wanted. Finally, the law enforcement officers found the insurance policies in Lee's vehicle, corroborating defendant's admission that he removed the policies from the house and put them in Lee's car the morning of the murders.

Based on the foregoing, we conclude that McKeithan's redacted confession did not identify, much less incriminate, defendant. Even assuming *arguendo* that McKeithan's confession did incriminate defendant through inference, we conclude that due to the overwhelming evidence of defendant's guilt, particularly in light of defendant's own confession, any *Bruton* error which *may* have occurred was harmless beyond a reasonable doubt. Defendant also alternatively argues that his confession was not reliable because (1) it did not reflect what he actually said; or (2) it did accurately reflect what he said, but he merely told the officers what they wanted to hear. Defendant argues that the jurors were instructed they were required to determine whether defendant made the statements attributed to him and, if he did, whether those statements were truthful and what weight to give them. Defendant made no objection to this instruction. Further, defendant now asserts that the prosecutor was allowed to argue in closing arguments to the jury, without objection, that the details in McKeithan's statement which overlapped those in defendant's statement could have convinced the jury to find defendant's statements truthful. In light of the foregoing, and particularly in view of our consideration of defendant's first and third assignments of error, we conclude that these arguments are without merit. This assignment of error is overruled.

[6] In his next assignment of error, defendant contends that the trial court erred in granting the State's motion for joinder of defendants Brewington and McKeithan for trial, and in refusing to grant defendant's motions for severance.

In a written pretrial motion, the State moved for joinder of defendants Brewington and McKeithan for trial. As basis for this motion, the State argued that public policy strongly favored joinder in a case such as this. Defendant and McKeithan were each charged with two counts of first-degree murder, two counts of conspiracy to commit first-degree murder, and the underlying offense of first-degree arson. Although the State was proceeding on a theory of accessory before the fact against defendant, joinder is still permissible pursuant to N.C.G.S. § 15A-926(b). That section provides in part:

> (2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C.G.S. § 15A-926(b)(2) (1999). Defendant and McKeithan were charged with the same offenses, but on different theories. The several offenses for which defendant and McKeithan were charged were clearly part of a common scheme or plan to murder Frances and Brian Brewington and to disguise their murders by burning the Brewington house.

On appeal, defendant argues that joinder was improper and that severance was necessary to ensure that he received a fair trial because the introduction of McKeithan's confession without a limiting instruction prejudiced defendant. Defendant does not present any new arguments from those addressed in the previous assignment of error regarding this issue. Accordingly, for the reasons previously

stated, we conclude that the admission of McKeithan's confession did not prejudice defendant and that joinder of defendant and McKeithan for trial was proper. This assignment of error is overruled.

[7] In his next assignment of error, defendant contends that the short-form murder indictment was constitutionally insufficient to charge him with first-degree murder. This Court has recently reaffirmed that indictments for murder based on the short-form indictment statute, N.C.G.S. § 15-144 (1999), are in compliance with both the North Carolina and the United States Constitutions. *State v. Braxton*, 352 N.C. 158, 174, —— S.E.2d ——, —— (2000). This assignment of error is overruled.

[8] Defendant contends by his next assignment of error that he is entitled to a new sentencing proceeding because the trial court failed to submit the (f)(7) statutory mitigating circumstance, defendant's age at the time of the offense. N.C.G.S. § 15A-2000(f)(7) (1999). Defendant's attorneys submitted to the trial court a written list of six statutory (including the catchall) and forty-four nonstatutory mitigating circumstances for the jury to consider. The (f)(7) statutory circumstance, defendant's age at the time of the offense, was not included on that list. The trial court ruled that all of the listed circumstances, except for a few of the nonstatutory circumstances, would be submitted as to both murders. Defendant now contends that the trial court's consideration of the mitigating circumstances formally requested by defendant's attorneys was insufficient to fulfill the trial court's obligations concerning the submission of statutory mitigating circumstances to the jury. We disagree.

This Court has recently addressed this issue and held that "this Court will not conclude that the trial court erred in failing to submit the age mitigator where evidence of defendant's emotional immaturity is counterbalanced by other factors such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience." *State v. Steen*, 352 N.C. at 257, —— S.E.2d at ——. The evidence in *Steen* revealed that defendant was twenty-six at the time of the murder, but that defendant suffered a head injury at twenty-one which caused organic brain damage and resulted in a personality change. *Id.* The evidence also showed that defendant's injury caused him to suffer borderline mental retardation and that his memory was impaired. *Id.* However, there was also evidence that defendant was competent to manage simple financial transactions and had a fair ability to understand, retain and

follow instructions. *Id.* Defendant was gainfully employed and was able to perform his job duties proficiently. *Id.* at 258, —— S.E.2d at ——. Because there was evidence which showed that defendant functioned adequately in society, this Court concluded that the evidence of defendant's immaturity was not so substantial as to require the trial court to submit the age mitigator. *Id.* at 258, —— S.E.2d at ——.

In the case *sub judice*, defendant contends that he presented substantial evidence of his limited intellectual and emotional capacity at trial, primarily through the testimony of Dr. Jerry Noble, a clinical psychologist. Dr. Noble testified that defendant's limited mental capacity, which had declined from the level of low-average when defendant was in public school ten years earlier, was the result of dementia, probably the product of his "AIDS infection." Defendant's full scale IQ was 76, a level just above that of mental retardation. Defendant's evidence tended to show that his social adjustment, as well as his ability to understand situations and alternatives and choose between them in an appropriate way, was even more impaired and in the lowest percentile of the adult population. Dr. Noble testified that defendant's reduced intellectual capacity, in combination with his dependent personality disorder, made defendant very susceptible to being persuaded and dominated. Therefore, defendant now argues on appeal that even though his chronological age at the time of the murders was thirty-three years, he presented substantial evidence that his psychological maturity was that of a child.

However, the record at the sentencing proceeding reflects evidence which counterbalances the foregoing evidence of defendant's mental condition. During cross-examination, Dr. Noble conceded that he is not a medical doctor; that he has had no medical training; and that the AIDS-related dementia was his own diagnosis, not that of a treating physician. Further, Dr. Delia Chiuton, the physician who actually treated defendant at Dorothea Dix, observed no symptoms of AIDS-related dementia and did not believe defendant had AIDS-related dementia. Unlike Dr. Noble, Dr. Chiuton is a medical doctor who has had "extensive training and experience in the diagnosis and treatment of AIDS." Additionally, other evidence showed that defendant was never placed in special-education classes, never repeated a grade, graduated from his school, passed the high school competency test, and attended technical college. In the ninth grade, defendant's reading vocabulary was in the top half of students taking the California Achievement Test. Finally, prior to the murders, defendant had no criminal record, and there was no evidence that defendant

ever abused his girlfriend and codefendant, Vera Sue Lee. Defendant was extremely active in his church and participated in gospel singing groups. Even defendant's own expert witness, Dr. Noble, conceded that defendant had a good work history and that he had the intellectual capacity to understand that murder was illegal and wrong.

Therefore, in light of the foregoing evidence that defendant was thirty-three years of age at the time of the murders, appeared to be fairly well adjusted in society, and had sufficient intelligence to attend community college and establish a good work history, we cannot conclude that the evidence of defendant's immaturity was so substantial as to require the trial court to submit the age mitigator. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends that he is entitled to a new sentencing proceeding because the trial court erred in refusing to submit three nonstatutory mitigating circumstances which were supported by the evidence and which a reasonable juror could have found to have some mitigating value. In a written request, defendant asked the trial court to submit six statutory and thirty-seven nonstatutory mitigating circumstances to the jury. Defendant later revised this request and asked the trial court to submit the same six statutory mitigating circumstances and forty-four nonstatutory mitigating circumstances. During the sentencing charge conference, the trial court stated its intention to submit all of the statutory mitigating circumstances defendant requested; the statutory catchall circumstance, N.C.G.S. § 15A-2000(f)(9); and forty of the nonstatutory mitigating circumstances that defendant requested. Defendant then objected to the trial court's decision to exclude the following four nonstatutory mitigating circumstances defendant requested:

> 35. The defendant, Robbie Brewington, did not stab or burn anyone.
>
> 36. The defendant, Robbie Brewington, was not an active participant in the murders.
>
> 37. The defendant, Robbie Brewington, was not present when the crime took place.
>
> 38. The codefendant, Vera Lee, received life in prison for her participation in the crime.

Defendant concedes that the trial court properly refused to submit number 38 because the jury did not hear evidence regarding Vera

Lee's life sentence. However, defendant contends that the trial court's refusal to submit numbers 35, 36, and 37 prejudiced him because the jury was erroneously precluded from considering them as a basis for a sentence less than death. We disagree.

Generally, the trial court must submit nonstatutory mitigating circumstances that are supported by the evidence and which the jury could deem to have mitigating value when a defendant makes a timely written request for the trial court to do so. *See State v. Skipper*, 337 N.C. 1, 55, 446 S.E.2d 252, 282 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). However, "[a] trial court's error in failing to submit a nonstatutory mitigating circumstance is harmless 'where it is clear that the jury was not prevented from considering any potential mitigating evidence.' " *Id.* at 56, 446 S.E.2d at 283 (quoting *State v. Green*, 336 N.C. 142, 183, 443 S.E.2d 14, 38, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)).

In the case *sub judice*, the trial court did not preclude the jury from considering as evidence in mitigation that defendant was not present when the murders occurred, that he did not physically stab or burn anyone, or that he was not an active participant in the murders or arson. Upon defendant's request, the trial court submitted in regard to each murder the (f)(4) statutory mitigating circumstance, that "defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor." N.C.G.S. § 15A-2000(f)(4). Additionally, the trial court instructed the jury on the (f)(4) mitigator as follows:

> Next, consider whether the murder was actually committed by another person, and the defendant was only an accomplice in the murder and his participation in the murder was relatively minor. The distinguishing feature of an accomplice or accessory is that he is not the person who actually committed the murder.
>
> You would find this mitigating circumstance if you find that the victim was killed by another person and that the defendant was only an accessory to the killing and that the defendant's conduct constitutes relatively minor participation in the murder. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would write yes. If none of you find the circumstance exists, you would write no in the space.

The trial court also instructed the jury on the "catchall" mitigating circumstance:

> Finally, members of the jury, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If one or more of you so find by a preponderance of the evidence, you should 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 find any such circumstance to exist, you would so indicate by having your foreperson write no in that space.

This instruction invited the jurors to consider any and all mitigating circumstances they deemed to exist from the evidence.

A trial court's failure or refusal to submit a defendant's proposed nonstatutory mitigating circumstances separately or independently is not error where requested mitigating circumstances are subsumed in submitted mitigating circumstances. *Skipper*, 337 N.C. at 55-56, 446 S.E.2d at 282-83. In the instant case, the trial court's instruction regarding the (f)(4) mitigator specifically refers to defendant's indirect participation three times: "the murder was actually committed by another person"; "the distinguishing feature of an accomplice or accessory is that he is not the person who actually committed the murder"; and "the victim was killed by another person." This instruction fully encompassed and more accurately stated the concepts that defendant wanted the jury to consider. Also, because this was a statutory mitigating circumstance, any juror who found it to exist was required to give it some mitigating value. We conclude that defendant's proposed nonstatutory mitigating circumstances were subsumed in the (f)(4) mitigating circumstance submitted to the jury by the trial court.

Defendant also argues, however, that the submission of the (f)(4) statutory mitigating circumstance did not satisfy his request for these three nonstatutory mitigating circumstances because the jurors could reasonably have found mitigating value in his absence from the crime scene, even though finding that defendant's participation was not minor. However, this argument overlooks the purpose of the (f)(9) statutory catchall mitigating circumstance. The trial court's instruction on the (f)(9) mitigator gave the jury the authority and full opportunity to consider any and all facts, "any other circumstance," in evidence which any member of the jury found to have mitigating value. The jury could have given the evidence that defendant was not present during the murders mitigating value under this catchall circumstance. *See State v. McLaughlin*, 341 N.C. 426, 448, 462 S.E.2d 1, 12-13 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). No

juror was precluded from considering, finding and attaching mitigating value to defendant's absence from the scene of the murders and arson. We therefore conclude the trial court committed no error in refusing to submit these three nonstatutory mitigating circumstances. This assignment of error is overruled.

[10] Defendant contends in his next assignment of error that the trial court committed prejudicial error when it failed to peremptorily instruct the jury in accordance with the North Carolina pattern jury instructions on the (f)(1) mitigating circumstance, that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). For the reasons stated below, we conclude this assignment of error is without merit.

At the close of the evidence in the penalty phase, defendant gave the trial court a written list of the mitigating circumstances he wished to be submitted to the jury. Defendant requested the trial court to peremptorily instruct the jury, in accordance with the North Carolina pattern jury instructions, on the (f)(1) statutory mitigating circumstance, that defendant had no significant history of prior criminal activity. During the charge conference, the prosecutor conceded that defendant was entitled to a peremptory instruction on the (f)(1) mitigator. In its charge to the jury, the trial court gave the following instruction:

> "The defendant has no significant history of prior criminal activity before the date of the murder." The defendant has the burden of establishing this mitigating circumstance by a preponderance of the evidence as explained to you. There is no evidence that the defendant has been convicted of any criminal activity. Accordingly, if one or more of you find the facts to be as all the evidence tends to show, then you will answer this mitigating circumstance yes.

At no point did defendant's attorneys object to this instruction during trial. However, defendant now argues that he is entitled to a new sentencing proceeding because the trial court's instruction was not in accordance with the pattern jury instruction, which states:

> The defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence, as I have explained to you.
>
> Accordingly, as to this mitigating circumstance, I charge you that if one or more of you find the facts to be as all the evidence

tends to show, you will answer "Yes" as to Mitigating Circumstance Number (*read number*) on the "Issues and Recommendation" form.

N.C.P.I.—Crim. 150.11 (1994).

The jury found the (f)(1) statutory mitigating circumstance to exist as to each murder. Even though the trial court's instructions were not precisely identical to the pattern jury instructions, they were substantially so, and defendant cannot show how the trial court's instruction prejudiced him. This assignment of error is overruled.

[11] In his final assignment of error, defendant contends that the submission of the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), violated defendant's rights under the North Carolina and United States Constitutions because it impermissibly allowed the jury to find the existence of an aggravating circumstance based solely upon his codefendants' actions. At trial, defendant objected to the submission of the (e)(9) aggravating circumstance. As basis for this objection, defendant argued that he was not present at the time of the homicides and that there was no evidence that he intended the killings to be carried out in a manner that was especially heinous, atrocious, or cruel. The trial court overruled defendant's objection and submitted the (e)(9) aggravating circumstance on the issues and recommendation as to punishment forms with respect to both murders. On appeal, defendant asserts that the (e)(9) aggravator was properly submitted only as to McKeithan. Defendant concedes that the evidence shows that the murders were committed in a manner that was especially heinous, atrocious, or cruel, and that the evidence also shows that McKeithan was personally culpable for the specific details of the killings. However, defendant contends that because there was no evidence showing that he was personally culpable for the specific details of the killings, the trial court committed reversible error in submitting the (e)(9) aggravating factor as to him. We disagree.

Defendant was tried and convicted of two counts of first-degree murder, two counts of conspiracy to commit murder, and one count of arson. Defendant admitted to planning the murders and enlisting his codefendants to perform the murders. Because defendant was not present when the murders were actually committed, defendant was convicted under the theory that he was an "accessory before the fact." Pursuant to N.C.G.S. § 14-5.2, North Carolina law does not rec-

ognize any guilt or sentencing distinctions between an accessory before the fact and a principal to a felony. This statutory section provides in part:

> All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.

N.C.G.S. § 14-5.2 (1999). This Court has held that "accessories before the fact, who do not actually commit the crime, and indeed may not have been present, can be convicted of first-degree murder under a theory of aiding and abetting." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 174-75 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). "A showing of defendant's presence or lack thereof is no longer required." *Id.*

The United States Supreme Court has held that capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt. *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982). In construing *Enmund*, this Court stated:

> In *Enmund*, the Court 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. *Id.* at 797, 73 L. Ed. 2d at 1151. Thus, an *Enmund* issue only arises when the State proceeds on a felony murder theory.

State v. Robinson, 342 N.C. 74, 87, 463 S.E.2d 218, 226 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996). Accordingly, the constitutional concerns that the United States Supreme Court addressed in *Enmund* do not apply in a case where a defendant "intend[s] that a killing take place or that lethal force will be employed." *Id.*

Defendant argues that the submission of the (e)(9) aggravating circumstance as to him was erroneous under our recent decision in *State v. McNeil*, 350 N.C. 657, 518 S.E.2d 486 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 321 (2000). The defendant in *McNeil* argued that the trial court's instructions to the jury regarding the (e)(9) aggravating circumstance erroneously allowed the jury to consider the behavior of McNeil's accomplice in committing the murder.

However, this Court approved the submission of the (e)(9) aggravator because there was sufficient evidence showing that McNeil's individual acts toward the victim were especially heinous, atrocious, or cruel. *Id.* at 693-95, 518 S.E.2d at 508-09. Defendant therefore argues that the clear implication of *McNeil* is that submission of the (e)(9) aggravator requires evidence sufficient to show that the defendant was personally involved in the infliction of the particular brutality that justifies a conclusion that the murder was especially heinous, atrocious, or cruel.

This Court has held:

> "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 [*State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988)]), *cert. denied*, [526 U.S. 1135, 143 L. Ed. 2d 1015] (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.

McNeil, 350 N.C. at 693, 518 S.E.2d at 508. This Court has also stated that "capital sentencing must focus on the individual defendant, his crimes, personal culpability, and mitigation," *State v. Gibbs*, 335 N.C. 1, 67, 436 S.E.2d 321, 359 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994), and that the particular facts of each case dictate whether the (e)(9) statutory aggravating circumstance was properly submitted, *McNeil*, 350 N.C. at 693-94, 518 S.E.2d at 508. Additionally, evidence regarding the circumstances of the murders is relevant and admissible to support the submission of an aggravating circumstance. The fact that defendant was not present when the murders occurred, and that a codefendant actually committed the murders, is a matter that a jury would properly consider in determining the *weight* to give an aggravating circumstance and in balancing the aggravating and mitigating circumstances. Furthermore, this Court has stated that in determining the sufficiency of the evidence supporting the (e)(9) aggravating circumstance, "the evidence must be considered in the light most favorable to the State and with all reasonable inferences to be drawn from the evidence." *State v. Moseley*,

336 N.C. 710, 722, 445 S.E.2d 906, 913 (1994), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995).

Defendant's confession reveals that defendant and Lee initially developed the idea to murder the victims in order to collect the life insurance proceeds. Defendant told Lee and McKeithan to sneak into the unlocked house after he left for work, stab the victims, and then burn the house to disguise the murders. Defendant directed McKeithan and Lee to use gasoline so the house would burn quickly. Because defendant knew that the house would be burned on the morning of the murders, he removed the insurance policies and his Sunday clothes from the house so they would not be destroyed in the fire. Defendant also confessed that he purchased the knife for McKeithan and Lee to use in the murders.

From this evidence, a reasonable juror could infer that defendant intended for McKeithan and Lee to sneak into the house while the victims were asleep and stab one victim and then the other. Defendant was aware that the victims shared a bedroom, and because he provided only one knife for the two murders, the jury could reasonably infer that defendant knew the stabbings would not be simultaneous. A reasonable juror could also infer that because the victims shared a bedroom and because defendant knew that the killers would necessarily be required to move from one victim in the room to the other, the stabbings could not occur at the same time. Under this scenario, it was likely that death would not be instantaneous for one or both victims or that one or both victims would be left without a fatal wound after the initial attack. Any consideration of these planned circumstances, which logic dictates must have occurred, would clearly call to mind that at least one and possibly both victims would be aware of these ongoing assaults upon them, of the pain they were suffering, and of their probable imminent death, and thus would be placed in terror for some moments.

It is clear from the evidence that defendant and his codefendants carefully considered and planned these killings in considerable detail, including how the house would be burned. Defendant told Lee to use gasoline, intending that the house burn quickly to cover the stabbings. Defendant knew Lee and McKeithan would not stay in the house once the fire began. Therefore, if the stab wounds were not immediately fatal, the fire would ultimately cause the victims' deaths. The evidence shows this is, in fact, the way both victims died. Because of the plan so carefully designed and put in motion

by defendant, his eight-year-old nephew and his grandmother, who gave defendant a home, burned to death. In the context of "especially heinous, atrocious, or cruel," it is difficult to imagine a human mind that could desire such an end for *any* two lives, and for mere money.

Under the particular circumstances of this case, we conclude that there was sufficient evidence from which the jury could infer and conclude that defendant intended and directed McKeithan and Lee to perform the murders in exactly the manner they employed. Even though defendant was not present when McKeithan and Lee committed the murders, defendant was personally involved in planning the details of the murders. Defendant also took deliberate steps to enable the murders to proceed according to his instructions. Defendant does not dispute that the manner in which the victims were murdered is sufficient to support the (e)(9) aggravating circumstance. Because defendant directed that each victim experience the deaths which they suffered, we conclude that the trial court did not err in submitting the (e)(9) aggravating circumstance in this case. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises seven additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the North Carolina death penalty statute is unconstitutional; (2) the trial court erred by failing to prohibit the State from death-qualifying the jury; (3) the trial court erred in denying defendant's motion to examine prospective jurors regarding their opinions on parole eligibility; (4) the trial court erred in excluding evidence of codefendant's Lee's life sentence; (5) the trial court erred in instructing the jury that it was the jury's "duty" to recommend a sentence of death if it found the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances, when considered with the mitigating circumstances, were sufficiently substantial to call for the death penalty; (6) the trial court erred in defining mitigating circumstances as set forth in the pattern jury instructions; and (7) the standards set by the Supreme Court of North Carolina for its proportionality review pursuant to N.C.G.S. § 15A-2000(d)(2) are vague and arbitrary.

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

[12] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now review the record and determine: (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 sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

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 the murder of Brian Brewington: (i) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (ii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) the murder was part of a course of conduct, including defendant's commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury also found three aggravating circumstances submitted as to the murder of Frances Brewington: (i) the murder was committed while engaged, or an aider or abettor, in the commission of arson, N.C.G.S. § 15A-2000(e)(5); (ii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) the murder was part of a course of conduct, including defendant's commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

The trial court submitted and the jury found, as to each murder, two statutory mitigating circumstances: (i) defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and (ii) defendant acted under domination of another person,

N.C.G.S. § 15A-2000(f)(5). 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 forty nonstatutory mitigating circumstances submitted as to each murder, the jury found five 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, *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. First, defendant was convicted of two counts of first-degree murder. This Court has never found the death sentence 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 as to each murder conviction. In none of the cases where this Court has found the death penalty disproportionate has the jury found three aggravating cir-

cumstances. *State v. Trull*, 349 N.C. 428, 458, 509 S.E.2d 178, 198 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80 (1999). Finally, 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. As we have noted, defendant here was convicted of murder on the basis of premeditation and deliberation as well as under the felony murder rule. The defendant in *Stokes*, however, was convicted solely on the basis of the felony murder rule. 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 in the case *sub judice* "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.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *State v. McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although 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. at 198, 443 S.E.2d at 47.

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE v. SMITH

[352 N.C. 531 (2000)]

STATE OF NORTH CAROLINA v. JAMIE LAMONT SMITH

No. 279A99

(Filed 25 August 2000)

1. Homicide— first-degree murder— short-form indictment

The short-form bill of indictment for first-degree murder complies with both the North Carolina and United States Constitutions. N.C.G.S. § 15-144.

2. Jury— selection—criminal record checks of prospective jurors—equal access

There was no error in a capital sentencing proceeding where defendant contended that he did not have equal access to the criminal records of prospective jurors following the prosecutor's challenge to a juror whose questionnaire falsely indicated that she had never been charged with a crime. The court suggested that defendant attempt to get such information through the public defender and the prosecutor suggested that the same information was attainable from the clerk's office. Defendant contends that the public defender does not have access to PIN, which is available to the State, and that other mechanisms for obtaining such information are unreasonably onerous and not universally accessible; however, defendant did not ask for discovery of information in the State's possession and the court's action did not constitute error.

3. Jury— selection—criminal record check—*Batson* challenge

The prosecutor's challenge to an African-American prospective juror for a capital sentencing proceeding does not appear to have been motivated by purposeful discrimination where a prospective juror stated on her questionnaire that she had no criminal history but a criminal history check by the State revealed that she had been charged and convicted of writing a check on a closed account. Defendant's desire to plumb whether this juror had been treated disparately by being singled out for a criminal record check must be addressed through a Batson challenge because defendant did not request disclosure of whether checks were run on other prospective jurors under the statutes governing discovery.

4. Jury— selection—capital trial—bias against death penalty—further inquiry—court's discretion

The trial court did not err during jury selection for a capital sentencing proceeding by excusing for cause jurors who answered affirmatively when asked whether they had beliefs or opinions against the death penalty which would prevent them from imposing a death sentence under any facts or circumstances. When a prospective juror has unequivocally indicated an unyielding bias against capital punishment, the goal of assembling an impartial jury is not jeopardized by voir dire that does not plumb further whether the prospective juror could follow the law, as in this case. When the bias is less patent and the operative question is whether that bias is surmountable, the court's discretion is due deference from the reviewing court.

5. Jury— selection—capital trial—opposition to death penalty—no rehabilitation

The trial court did not err during jury selection for a capital sentencing proceeding by refusing to permit rehabilitation of a juror who had expressed unequivocal opposition to the death penalty.

6. Jury— selection—capital trial—manner in which death penalty executed—irrelevant

The trial court did not err during jury selection for a capital sentencing proceeding by not informing a prospective juror about the manner in which executions are carried out in North Carolina and excusing that juror for cause when he stated that he could not vote for the death penalty without knowing how it was to be carried out. The manner of execution is in no way relevant to the deliberations of the jury or to the ability of a prospective juror to serve.

7. Jury— selection—capital trial—questions and answers in Spanish

The trial court did not err by denying a motion for a mistrial during jury selection for a capital sentencing proceeding where the prosecutor asked a prospective juror two questions in Spanish, the juror responded in Spanish, and subsequent responses in English revealed that the juror's inability to understand English made him unqualified to serve as a juror under N.C.G.S. § 9-3. Any arguable error in not ordering the minimal dialogue in Spanish to be translated for the record was without prejudicial effect, given the wholly proper excusal.

8. Jury— selection—capital trial—excusal of juror with limited English

The dismissal of a prospective juror was not impermissibly based upon national origin where it was clear from the transcript that the court's determination was based on the juror's limited ability to communicate in English rather than on his origin. The legislature's purpose in prescribing the mandatory qualifications for citizens who might serve as jurors was to assure that defendants be judged fairly and impartially; in order to do this a juror must have sufficient proficiency in English to enable full comprehension of the testimony and instructions and to fully and effectively participate in the jury's deliberations. Defendant could have challenged the excusal through the Batson procedure to determine whether the prosecutor acted with discriminatory intent.

9. Jury— selection—capital trial—randomness—use of old noncomputer method

There was no error in the jury selection procedure for a capital sentencing proceeding where the prosecutor informed the court shortly before jury selection began that there was some question as to the statutory compliance of a new computerized system of summoning prospective jurors and the court ordered the clerk to call jurors by the old method, which satisfied the random selection requirement of N.C.G.S. § 15A-1214(a).

10. Criminal Law— guilty pleas--required inquiry

There was no plain error in a capital prosecution for first-degree murder and other crimes in the acceptance of defendant's guilty pleas where the court examined defendant strictly in accordance with statutory requirements; the direct sentencing consequences of defendant's guilty plea to first-degree murder cannot be definitely or immediately gauged by the judge beyond predicting a minimum sentence of life imprisonment without parole and a maximum sentence of death, as this judge did, and the court had no duty to expound on the direct consequences further absent an indication by defendant that he required such instruction or to do more than inquire into whether defendant was satisfied with his attorneys and their explanation of the charges and possible defenses. Finally, contrary to prior practice, provisions governing capital punishment specifically permit any person indicted for a capital offense to plead guilty. N.C.G.S. § 15A-2001.

11. Evidence— victim impact statement—motion in limine

The trial court did not abuse its discretion in a capital sentencing proceeding by denying defendant's motion in limine to prohibit victim impact statements. Deciding the motion pretrial was well within the court's discretion and the only statement introduced did no more than describe the emotional or psychological effect of the victim's death on her brother, which was well within the parameters of N.C.G.S. § 15A-833.

12. Evidence— photographs—prior crime scene and victim—capital sentencing

The trial court did not err in a capital sentencing proceeding by allowing the introduction of photographs of the victims and the scene of a prior murder and arson where the photographs were used to illustrate the testimony of a fire department member who had investigated the prior crimes and whose testimony was offered in support of the previous violent felony aggravating circumstance. The court may admit any evidence it deems relevant to sentencing and these photographs were not so numerous or egregious as to render the hearing fundamentally unfair.

13. Sentencing— capital—mitigating circumstances—remorse

Any error in excluding a psychologist's direct testimony from a capital sentencing hearing was harmless beyond a reasonable doubt where defendant contended that mitigating evidence of remorse was excluded but failed to make an offer of proof, other evidence of defendant's remorse was before the jury, and defendant did not request and the jury thus did not find this circumstance under the catchall mitigating circumstance.

14. Evidence— cross-examination—statements underlying psychological diagnosis

There was no error in a capital sentencing proceeding where the prosecutor asked defendant's psychological expert a number of questions about a prior robbery that occurred a year before the murder to which defendant pled guilty where the questioning was apparently directed at discrediting the diagnosis by showing that statements from defendant which formed a partial basis for the diagnosis were untruthful and unreliable. In addition to the contention being baseless, the trial court has considerable leeway and discretion in governing a sentencing proceeding, and defendant did not assert constitutional error at the sentencing proceeding or raise constitutional error on appeal.

15. Criminal Law— prosecutor's argument—incivility

There was no prejudicial error in a capital sentencing hearing in the prosecutor's treatment of a prospective juror, defense counsel, and defendant's psychological expert where the prosecutor tested the line between zealous advocacy and incivility but her manner and the interjection of arguably irrelevant matters were benign, if overblown. There was ample evidence that would support the jury's judgment as to the nonstatutory mitigating circumstances allegedly affected by the prosecutor's behavior.

16. Criminal Law— prosecutor's argument—personal invective—scatological references

There was no prejudicial error in a capital sentencing proceeding from the prosecutor's argument, which contained unnecessary personal invective but was not so egregious as to compel the court to intervene and did not jeopardize the fairness of defendant's sentencing hearing. Scatological references to a witness's testimony are not to be condoned; however, counsel must be allowed wide latitude in hotly contested cases and the evidence was so overwhelming in this case that the remarks were harmless.

17. Criminal Law— instructions—character of victim

The trial court did not err in a capital sentencing proceeding by refusing a requested instruction regarding the character of the victim where the instruction was requested to foreclose excessive use of a brother's victim-impact statement in the prosecutor's closing argument. The court stated that it would reconsider the request if such excessive argument occurred and defendant did not object nor repeat the request for the instruction.

18. Sentencing— capital—mitigating circumstance—codefendant in another killing receiving life

The trial court did not err in a capital sentencing proceeding by refusing to submit the mitigating circumstance that a codefendant in another killing did not receive a sentence of death or by excluding copies of the codefendant's judgment and commitments. The information was elicited from a witness on cross-examination, and this case is within the rule that an accomplice receiving a lesser sentence is not an extenuating circumstance.

19. Sentencing— capital—aggravating circumstances—not the same evidence

There was no error in a capital sentencing proceeding where defendant advanced arguments concerning aggravating circumstances which allegedly relied upon the same evidence. Although some evidence overlapped by virtue of how and where the crimes occurred, the first three aggravating circumstances involve separate, distinct victims and the fourth is course of conduct, which is a separate circumstance from the crimes that comprise the series.

20. Sentencing— capital—International Covenant on Civil and Political Rights

A defendant's treatment in a capital prosecution did not violate provisions of the International Covenant on Civil and Political Rights concerning cruel or degrading treatment or punishment, or arbitrary deprivation of life.

21. Sentencing— capital—death sentence proportionate

A sentence of death was not disproportionate where defendant raped his victim, stabbed her more than sixty times, and set fire to her apartment. The evidence amply supported the aggravating circumstances found by the jury, and the case was more similar to cases in which the death penalty was found proportionate than to those where it was found disproportionate.

22. Sentencing— capital—death sentence—passion or prejudice

A death sentence was not imposed under the influence of passion or prejudice where defendant contended that the jury's deliberations must have been permeated by emotion from the testimony of the victim's brother, the subtle effect of black on white crime, the parade of victims, photographs of the victim, and the presence at the hearing of maimed victims of another crime for which defendant was convicted. Defendant offered no evidence that the jury was affected by passion or prejudice other than the brother's victim-impact statement, which was singularly restrained under the circumstances.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Downs, J., on 23 April 1998 in Superior Court, Buncombe County, upon defendant's plea of guilty of first-degree murder and a jury's recommendation of a sen-

tence of death. On 26 October 1999, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 17 May 2000.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

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

FREEMAN, Justice.

On 1 May 1995 the Buncombe County grand jury indicted defendant in true bills for murder in the first degree, first-degree burglary, robbery with a dangerous weapon, first-degree forcible rape, and first-degree arson. Defendant pled guilty to all charges. A jury recommended a sentence of death for the murder. The judge imposed sentences within the presumptive range authorized by N.C.G.S. §§ 15A-1340.17(c) for each of the lesser felonies, to run consecutively, and imposed a sentence of death for the murder.

The offenses for which defendant was sentenced in this case were committed on 16 January 1995. The victim, Kelli Froemke, a nineteen-year-old college student, lived with her brother and his girlfriend in their apartment in Asheville. In a statement later given to law enforcement officers, defendant said he gained entry to the apartment by asking Kelli, who was alone at the time, if he could use the telephone. Once in the apartment, defendant demanded money at knifepoint, then forced Kelli into her bedroom and raped her. He then stabbed her more than sixty times. Before leaving, defendant set a fire in the bedroom closet to cover up what he had done. He walked away from the apartment, carrying the cordless phone and Kelli's car keys with him. Kelli's brother and his girlfriend returned to the apartment shortly after 10:00 p.m. and found it full of smoke. After alerting a neighbor to call 911, Kelli's brother made his way through the smoke to Kelli's bedroom where he found her body. He pulled her onto a landing where he administered CPR until the fire department arrived.

Defendant was identified by a neighbor as having been seen around the apartment complex where Kelli lived on the night of the crime. He ultimately gave more than one statement to the police, first implicating a friend, then confessing it was his own intention to rob Kelli, whom he saw getting out of her car, for money for cocaine.

When asked about other recent crimes, defendant told officers he had pled guilty to larceny at the Mountain Trace apartment complex. He also implicated himself in a fire at the Grace Apartments. In subsequent statements defendant elaborated: on 11 December 1994 he and a friend went to the Grace Apartments, knocking on doors to see which apartments were occupied, intending to break in. They eventually stole the mail from the apartment mailboxes. Later that night they broke into a Mountain Trace apartment, stole a computer and other items, and attempted to cover up that theft by starting a fire. About a week later they returned to the Grace Apartments and started a second fire with kerosene to cover up their mail theft. This fire resulted in serious injuries and one death: Phillip Cotton, an eighteen-year-old, died of carbon monoxide poisoning. Another resident of the apartments hung out her window until her hands burned, then fell three stories, breaking her neck. A third resident suffered burns so severe her legs had to be amputated. Defendant was subsequently convicted of the crimes committed in these incidents and sentenced to death for the murder of Phillip Cotton.

Physical evidence corroborated defendant's statements, including a videotape of defendant and his companion buying kerosene the morning of the Grace Apartments fire and DNA evidence matching defendant to the spermatozoa found on Kelli's body.

Defendant offered evidence in mitigation, including the testimony of a clinical and forensic psychologist about defendant's mental illness. Others testified about his close relationship with his mother and other family members and how at sixteen or seventeen he had lost interest in school and turned to alcohol and hard drugs.

[1] Defendant first takes issue with the "short-form" bill of indictment, authorized by N.C.G.S. § 15-144, which states the crime charged as "first degree murder." Defendant argues the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment are violated by the indictment's failure to charge in the indictment the elements of the crime or aggravating circumstances as "fact[s] (other than prior conviction) that increase[] the maximum penalty for [the] crime." *Jones v. United States*, 526 U.S. 227, 243 n.6, 143 L. Ed. 2d 311, 326 n.6 (1999), *quoted in Apprendi v. New Jersey*, — U.S. —, —, 147 L. Ed. 2d 435, — (2000). We have recently decided this issue in *State v. Braxton*, 352 N.C. 158, —, — S.E.2d —, — (2000). There we noted not only that this Court has consistently held murder indictments based upon N.C.G.S. § 15-144

comply with both the North Carolina and United States Constitutions, *id.*, slip op. at 7, but that the short-form indictment is sufficient to charge murder in the first degree based on any theory set forth in N.C.G.S. § 14-17 and referenced on the indictment, *id.* Moreover, we held that because "[t]he crime of first-degree murder and the accompanying maximum penalty of death, as set forth in N.C.G.S. § 14-17 and North Carolina's capital sentencing statute, are encompassed within the language of the short-form indictment. . . . [N]o additional facts need[] . . . be charged in the indictment" where the defendant, like defendant here, was sentenced to the prescribed maximum punishment for that crime. *Id.*, slip op. at 8.

We reiterate here that indictments based on N.C.G.S. § 15-144, like those charging defendant in this case, comply with both the North Carolina and the United States Constitutions. *See State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000); *State v. Williams*, 304 N.C. 394, 422, 284 S.E.2d 437, 454 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982). Defendant's assignments of error as to this issue are thus without merit.

[2] Defendant next cites numerous instances in which he contends the jury selection process was flawed. First, he complains that he did not have equal access to the criminal records of prospective jurors. This was prompted by the prosecutor's challenging a juror whose questionnaire falsely indicated she had never been charged with a crime. When defense counsel asked for access to the same resources, the court suggested defendant attempt to get such information through the office of the public defender. Defendant notes that the public defender does not have access to the Police Information Network (PIN), which is available to the State, and that other mechanisms for obtaining such information through other databases are unreasonably onerous and not universally accessible. Although one authorized to do so may pay to run PIN checks, those who are indigent cannot. Defendant contends denying equal access in this way violates an indigent defendant's due process rights and his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 24, and 35 of the North Carolina Constitution.

Defendant did not ask for discovery of information or documents in the State's possession, but rather requested that the same resources from which such information was derived be accessible to him. Thus, categories of information discoverable under N.C.G.S. §§ 15A-903 and -904 and the trial court's discretion to order the dis-

closure of information not otherwise prohibited, *see, e.g.*, *State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998), are not implicated here. Rather, the trial court simply suggested an alternative means to the same end. The record reveals the prosecutor suggested the same information was attainable from the clerk's office upstairs in the same building, and defense counsel agreed to check those resources. Counsel did not subsequently object to the trial court's action or move for funds with which the defense could run its own criminal record checks. *See* N.C.G.S. § 7A-450(b) (1999) (State must provide indigent defendant with necessary expenses of representation); *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992) (to receive state-funded expert assistance, indigent defendant must make "particularized showing that . . . there is a reasonable likelihood that it would materially assist him in the preparation of his case"). The court's action here constitutes neither error of procedure nor error of law from which defendant might seek relief on appeal. *See* N.C.G.S. § 15A-1442 (1999).

[3] The State's exercise of a peremptory challenge to excuse this same juror, an African-American, also prompted defendant's next several assignments of error. Defendant objected to the challenge, and the court excused the jury and asked the prosecutor her reason, the second step in the procedure outlined in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), for evaluating whether a prosecutor has used peremptory challenges in violation of the Equal Protection Clause. Briefly, the process requires the defendant to make a *prima facie* showing that the prosecutor has exercised a peremptory challenge on the basis of race. The burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question. Finally, the court must determine whether the defendant has carried his burden of showing purposeful discrimination. *Id.* at 96-98, 90 L. Ed. 2d at 87-88. Although in this case defendant never actually stated a *prima facie* case of discrimination, the absence of this step was moot once the prosecutor's stated reason and the court's determination had been made. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

Here, the prosecutor's articulated reason for excusing the juror was that she questioned the juror's veracity: the juror had stated on her questionnaire that she had no criminal history, yet a criminal history check revealed she had been charged and convicted of writing a check on a closed account. The court accepted this reason as race-neutral and overruled defendant's objection.

The court did not err in doing so. The prosecutor's challenge does not appear to have been motivated by purposeful discrimination, but appears both race-neutral and otherwise beyond reproach. Even if, as defendant contends, few people who bounce checks regard doing so as criminal behavior, people who are criminally charged with and convicted of doing so are surely more enlightened. And those who take oaths as jurors must know what an oath means.

Defendant subsequently asked the trial court to inquire whether the State had run criminal record checks on any other prospective jurors. The court, seeing no obligation to do so and not being presented with a motion based in law, refused. (Although the court arguably had the inherent authority in the interest of justice to order disclosure by the State of such criminal record checks, *see generally State v. Warren*, 347 N.C. 309, 492 S.E.2d 609, defendant did not request such disclosure under the auspices of statutes governing discovery in criminal cases, N.C.G.S. §§ 15A-903, -904 (1999).) Defendant's desire to plumb whether this juror had been treated disparately in relation to the rest of the pool by being singled out for a criminal record check must be—and was—addressed through the *Batson* analysis. That is, if the prosecutor can articulate a race-neutral reason for challenging the prospective juror and if this reason does not appear to the court to be mere pretext, then that is the end of the inquiry. It should be remembered that the *Batson* analysis "permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Hernandez*, 500 U.S. at 358, 114 L. Ed. 2d at 405. Further delay to pursue an argument for which a basis in fact has not been established or, as in this case, effectively sought is neither in defendant's interest nor in that of the State. We thus overrule defendant's assignments of error on this point.

[4] Defendant also assigns error to the excusal of eleven prospective jurors who were challenged for cause after their affirmative responses to two questions concerning the death penalty. The prosecutor asked each of these prospective jurors, first, whether he or she had "any religious, moral, or philosophical beliefs or opinions against the death penalty." Each answered "yes." The prosecutor then asked: "If the defendant was found guilty of first-degree murder, would your feelings or beliefs about the death penalty prevent you from voting at the sentencing hearing to impose a death sentence under any facts or circumstances and no matter what evidence or aggravating circumstances were shown?" Again, each prospective juror answered defin-

itively, "yes," and was challenged for cause. Defendant now contends that, despite these responses, the inquiry was inadequate to determine whether the prospective juror met the critical standard for challenge for cause under *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). That standard is characterized as beliefs that impede the juror's ability to follow the law—beliefs that " 'prevent or substantially impair the performance of his duties as a juror in accordance with this instruction and his oath.' " *Id.* at 420, 83 L. Ed. 2d at 849 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)); *see also, e.g., State v. Gregory*, 340 N.C. 365, 394, 459 S.E.2d 638, 654 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

Challenge for cause must rest on more than a prospective juror's " 'general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' " *Gregory*, 340 N.C. at 394, 459 S.E.2d at 654 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 785 (1968)). Beyond this rule, however, is the question of precisely what kinds of responses on *voir dire* justify a prospective juror's excusal for opposition to the death penalty. In *Witherspoon* and in *Wainwright v. Witt*, the United States Supreme Court drew and refined two profiles of venirepersons excusable for cause—one distinctive and readily identifiable, the other so much less so that the sentencing court's own discernment is accorded substantial deference. The first kind of prospective juror is one whose opposition to the death penalty is absolute and invariable, regardless of the character of the defendant or the circumstances of the crime. Such candidates "could be excused for cause if they expressed an unmistakable commitment to automatically vote against the death penalty, regardless of the facts and circumstances which might be presented." *State v. Brogden*, 334 N.C. 39, 42, 430 S.E.2d 905, 907-08 (1993) (citing *Witherspoon*, 391 U.S. at 522 n.21, 20 L. Ed. 2d at 785 n.21); *see also Gregory*, 340 N.C. at 388, 459 S.E.2d at 651 (citing *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992)). This description mirrors the prosecutor's inquiry here. We stress that prospective jurors who fit this profile are not those for which the "standards" described in *Witherspoon* and *Wainwright* were drawn. *See Witherspoon*, 391 U.S. at 513-14, 20 L. Ed. 2d at 780 ("The issue before us is a narrow one. It does not involve . . . the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them.").

The second kind of prospective juror is one whose opposition is not blinding, who can put aside bias and exercise judgment informed by the law. The Court in *Witherspoon* recognized that such people are suitable as jurors: "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519, 20 L. Ed. 2d at 783, *quoted in Brogden*, 334 N.C. at 42, 430 S.E.2d at 907. In *Adams v. Texas* the Court articulated the rule, reaffirmed in *Wainwright*, that such a prospective juror cannot properly be excused for his views on capital punishment unless those views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U.S. at 45, 65 L. Ed. 2d at 589, *quoted in Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52; *see also Brogden*, 334 N.C. at 42, 430 S.E.2d at 907. It is in fact one objective of jury *voir dire* to determine whether those who oppose the death penalty would nonetheless be suitable as jurors by being capable of and willing to "conscientiously apply the law to the facts adduced at trial." *Wainwright*, 469 U.S. at 421, 83 L. Ed. 2d at 850. "[T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of . . . ." *Id.* at 423, 83 L. Ed. 2d at 851, *quoted in Brogden*, 334 N.C. at 42, 430 S.E.2d at 907.

Determining whether a prospective juror is intractably biased or whether such bias is surmountable through "discretionary judgment" may not always be "unmistakably clear" from the printed record. *Wainwright*, 469 U.S. at 424-26, 83 L. Ed. 2d at 852. "[T]here 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 426, 83 L. Ed. 2d at 853, *quoted in Brogden*, 334 N.C. at 43, 430 S.E.2d at 908. "[T]his is why deference must be paid to the trial judge who sees and hears the juror." *Wainwright*, 469 U.S. at 426, 83 L. Ed. 2d at 853. "In such cases, reviewing courts must defer to the trial court's judgment concerning the prospective juror's ability to follow the law impartially." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990), *quoted in Brogden*, 334 N.C. at 43, 430 S.E.2d at 908; *see also State v. Moses*, 350 N.C. 741, 752-53, 517 S.E.2d 853, 861 (1999), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 826 (2000); *State v. Hill*, 347 N.C. 275, 288, 493 S.E.2d 264, 271 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998).

In this case, all eleven prospective jurors answered the prosecutor's two questions in the affirmative. When prospective jurors' bias against capital punishment is unwavering and unequivocally clear to the sentencing court, then the court may properly conclude that they fit the profile of the first type of venireperson, whose "opposition to capital punishment will not allow them to apply the law or view the facts impartially." *Wainwright*, 469 U.S. at 421, 83 L. Ed. 2d at 850. Thus, for such prospective jurors, it does not matter if the question whether he or she would oppose the death penalty "under any facts or circumstances" is answered "yes," or if the question whether, despite that bias, he or she would be able to follow the court's instructions and the oath, is answered, "no." When the response to either question is unequivocal, the juror must be excused for cause.

Nevertheless, for prospective jurors whose answers on *voir dire* indicate a willingness to put aside such bias and "follow the statutory sentencing scheme and truthfully answer the questions put by the trial judge," *id.* at 422, 83 L. Ed. 2d at 850, "the "proper standard" is one that focuses on the juror's ability to be responsible, reflective, and fair-minded—to follow the law and the juror's oath. It is the better practice, once bias against the death penalty has been identified, to test that bias not merely against unspecified "facts and circumstances," but against the gauge of the juror's willingness to follow the court's instructions on the law and to obey his or her oath. We reiterate, however, the observation of the Court in *Wainwright* that, for this second class of veniremen, "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424, 83 L. Ed. 2d at 852.

> 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.

Id. at 424-25, 83 L. Ed. 2d at 852. In such situations the sentencing court's firsthand impression is owed deference. *Id.* at 426, 83 L. Ed. 2d at 852-53.

When a prospective juror has in fact unequivocally indicated an unyielding bias against capital punishment, the goal of assembling an impartial jury is not jeopardized by *voir dire* that does not plumb fur-

ther whether, despite those scruples, the prospective juror could follow the law. But such limited inquiry is appropriate only when the prospective juror's bias *is* "unmistakably clear," as was the case with these eleven members of the venire. When, however, bias is less patent and the operative question is not *whether* the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law, the court's decision, in the exercise of its sound discretion and judgment, that such prospective jurors are excusable for cause is due the reviewing court's deference.

[5] Defendant also assigns error to the court's refusal to permit rehabilitation of one of these eleven jurors. We held in *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990), that, in order to prevent possible harassment of the prospective juror based on his or her personal views, a defendant may not "rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the [sentencing] court." This rule remains as sound as its reasoning; we overrule this assignment of error.

[6] Defendant next contends the court erred in allowing excusal for cause of a prospective juror because the court refused to inform him how executions are carried out in North Carolina, an issue upon which his opposition to the death penalty appeared to hinge. After considerable colloquy, the prospective juror concluded, "Without knowing, in good conscience[,] I could not vote for the death penalty without knowing how it was going to be executed." Defendant contends that, without establishing that the juror would feel the death penalty to be inhumane if he actually knew the manner of its execution, the tenets of *Wainwright* and *Adams* are violated. *E.g.*, *Adams*, 448 U.S. at 50, 65 L. Ed. 2d at 593 ("to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law").

The deliberations and sentencing recommendation of a jury in a capital sentencing proceeding must be based upon the absence or existence and relative weight of aggravating and mitigating circumstances "after hearing the evidence, argument of counsel, and instructions of the court." N.C.G.S. § 15A-2000(b) (1999). The manner of execution is in no way relevant to these deliberations, nor is it in

any way relevant to the ability of a prospective juror to serve. Generally speaking, the court is duty-bound only " 'to explain . . . each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon.' " *E.g.*, *State v. Avery*, 315 N.C. 1, 36, 337 S.E.2d 786, 803 (1985) (*quoting State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965). More specifically, it is the court's positive responsibility to eradicate irrelevant matters from the consideration of the jury. "It is the knowledge that irrelevant considerations of a prejudicial nature have entered into the deliberations of the jury, rather than the source of such considerations, that calls the judge to duty." *State v. Conner*, 241 N.C. 468, 472, 85 S.E.2d 584, 587 (1955). Here the court did its duty and did not err.

[7] Defendant next contends that the court erred in not allowing his motion for a mistrial after a prospective juror was asked by the prosecutor and responded to two questions in Spanish. The court thereafter told the prosecutor that she would have to ask in English and that responses in any other language would have to be interpreted for the reporter. After a few more questions (in English), the prosecutor challenged the prospective juror for cause. Defendant says this exchange (in Spanish) was *ex parte* communication between the State and a venireperson in violation of North Carolina rules of court, statutes, and his rights under the North Carolina and United States Constitutions. Absent a translation of what was said, he contends the State cannot show this error was harmless beyond a reasonable doubt.

Untranslated dialogue in a language other than English could be as inaccessible and one-sided as the resulting blank pages of the court record. But under the facts of this case, it is impossible to see how defendant was prejudiced. This prospective juror's subsequent responses reveal that his own inability to understand English made him unqualified to serve as a juror under N.C.G.S. § 9-3 (those qualified to serve as jurors must be able to "hear and understand the English language"):

> [PROSECUTOR:] Mr. Adams, I asked you before in English, and I'm going to try one more time in English. Do you understand enough English to pay attention and understand all the witnesses that may come before you in this trial?
>
> MR. ADAMS: Say one more time.

[PROSECUTOR:] Do you understand enough English to pay attention and understand all the witnesses that may come before you in this trial?

MR. ADAMS: I don't know.

[PROSECUTOR:] Do you not understand the question?

MR. ADAMS: Understand what?

[PROSECUTOR:] The question I just asked. Do you understand the question I just asked you?

MR. ADAMS: A little bit; a little bit. I understand a little bit, but I don't—I don't know.

[PROSECUTOR:] No?

MR. ADAMS: I don't know how to speak too much and speak a little bit.

. . . .

[PROSECUTOR:] Is that true; you can't understand a lot of English?

MR. ADAMS: I understand a little bit.

The court unquestionably acted well within its discretion in allowing the prosecutor's motion to challenge Mr. Adams for cause, and any arguable error in not ordering the minimal dialogue in Spanish to be translated for the record was, given the wholly proper excusal, without prejudicial effect. *See* N.C.G.S. §§ 15A-1442, -1443(a) (1999).

[8] Defendant also questions the excusal of Mr. Adams as being impermissibly based on Mr. Adams' national origin and argues that the requirement of N.C.G.S. § 9-3 that jurors must be able to "hear and understand the English language" violates Article I, Section 26 of the North Carolina Constitution (none shall be excluded from jury service on account of national origin); Article I, Section 19 of the North Carolina Constitution (law of the land, equal protection); and similar protections under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Defendant's position here is untenable on its face. To assume that people native to countries where English is not the mother tongue cannot understand English is as presumptuous and offensive as it is irrational to propose that an inability to understand English is not an

insuperable impediment for a juror. A similar argument was raised in *Hernandez v. New York*, "that Spanish-language ability bears a close relation to ethnicity, and that, as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish." 500 U.S. at 360, 114 L. Ed. 2d at 406. The Court in *Hernandez* found it unnecessary to address this argument because the prosecutor stated a race-neutral explanation for the excusal of three bilingual Latinos: their responses and demeanor raised doubts as to their ability to defer to the official translation of Spanish-language testimony. As in *Hernandez*, defendant here should have challenged this excusal through the three-step *Batson* procedure to determine whether the prosecutor acted with discriminatory intent. Even though defendant failed to do so, it is utterly plain from our reading of the transcript in this case that the court's determination that Mr. Adams was not suitable as a juror was not based on where he came from, but on his limited ability to communicate in English. The legislature's purpose in prescribing the mandatory qualifications for citizens who might serve as jurors was to assure that defendants be judged fairly and impartially. *See, e.g.*, *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972), *cert. denied*, 410 U.S. 958, 35 L. Ed. 2d 691, *and* 410 U.S. 987, 36 L. Ed. 2d 184 (1973). Clearly, in order to do this, a juror must, at the very least, have sufficient proficiency in the English language as to enable him or her to fully comprehend the testimony and the court's instructions and to fully and effectively participate in the jury's deliberations. It is apparent from the record of *voir dire* that Mr. Adams did not demonstrate this critical level of skill.

[9] Defendant next asserts that a new, computer-generated system of summoning prospective jurors was so questionable that selection of jurors should have been suspended until the system was examined for compliance with the law. N.C.G.S. § 15A-1214(a) requires the clerk to "call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." Shortly before jury selection began, the prosecutor commendably informed the court that the system had previously set up two lists—one random, and one alphabetical—about which there was some question as to compliance with the statute. Because of its concerns with this possibility, the court ordered the clerk to call jurors by the old method of shuffling cards upside down, drawing one at a time and calling each prospective juror at random, thus precluding the clerk's advance knowledge of the identities of those called.

As the old system of calling jurors was utilized here—one which obviously satisfied the random-selection requirement of N.C.G.S. § 15A-1214(a)—we see neither error on the part of the court, although this is what defendant alleges, nor prejudice to defendant. We thus overrule this assignment of error.

[10] Defendant pled guilty to all offenses charged, and he now asserts on appeal that the court committed plain error in accepting those pleas without examining defendant's knowledge of the effect of those pleas on sentencing and on appellate review. Defendant says his responses to the court's inquiry indicated he did not have any idea of the possible consequences of his pleas and that N.C.G.S. § 15A-1022(b), which requires that the judge accept a guilty plea only after determining it to be the product of informed choice, was thus violated. Pertinent parts of their colloquy include the following:

> COURT: The charges that you're facing and indicating that you're pleading "guilty" to, have they been explained to you by your lawyer?
>
> DEFENDANT: Yes, sir, they have.
>
> COURT: Have they—do you understand the nature of the charges?
>
> DEFENDANT: Yes, sir, I do.
>
> COURT: Do you understand the elements of the charges?
>
> DEFENDANT: Yes, sir.
>
> COURT: Have you and your lawyers discussed any possible defenses that you might have had to any or all of these charges?
>
> DEFENDANT: Yes, sir, we have.
>
> COURT: Are you fully satisfied with your lawyers' legal services?
>
> DEFENDANT: Yes, sir, I am.
>
> . . . .
>
> [The trial court here established defendant's understanding of the possible maximum sentences for the other offenses to which he had pled guilty—first degree burglary, first-degree rape, robbery with a deadly weapon, and first-degree arson.]

COURT: And then first-degree murder is a Class A felony and has a possible—has a maximum punishment of either death by execution or life imprisonment without parole. Do you understand that?

DEFENDANT: Yes, sir.

COURT: Now, do you personally plead guilty to all these offenses?

DEFENDANT: Yes, sir, your Honor, I do.

COURT: Are you in fact guilty of them?

DEFENDANT: Yes, sir, your Honor, I am.

. . . .

COURT: Has anybody made any promises to you or threatened you in any way to cause you to enter this plea against your wishes?

DEFENDANT: No, sir.

COURT: Do you enter the pleas of your own free will, fully understanding what you're doing?

DEFENDANT: Yes, sir.

COURT: Do you have any questions of me about anything I've just said to you or about anything else connected with your cases up to this point in time?

DEFENDANT: No, sir.

The court examined defendant strictly in accordance with statutory requirements that a defendant be apprised not only of the constitutional and statutory rights he waives as a consequence of pleading guilty, but also, as the quoted portions of the dialogue shows, of "the nature of the charge," N.C.G.S. § 15A-1022(a)(2) (1999), and of such direct consequences of the plea as "the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and . . . the mandatory minimum sentence, if any, on the charge," N.C.G.S. § 15A-1022(a)(6). This latter part of the statute addresses a defendant's due process right that the plea be " 'entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court.' " *Brady v.*

United States, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (*en banc*), *rev'd on other grounds*, 356 U.S. 26, 2 L. Ed. 2d 579 (1958)).

Defendant contends, however, that the statutory formula for informing a defendant pleading guilty of the maximum and minimum sentences for the offenses of which that defendant is accused, falls short of constitutional requirements for an informed plea to the murder charge. Defendant was not told in particular that, as he was pleading guilty to murder in the first degree based on theories of premeditation and deliberation *and* of felony murder, his pleas to the felonies other than the murder would establish four aggravating circumstances and foreclose the argument of certain issues on appeal.

"Direct consequences" are those that have a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005, 38 L. Ed. 2d 241 (1973), *quoted in Bryant v. Cherry*, 687 F.2d 48, 50 (4th Cir.), *cert. denied*, 459 U.S. 1073, 74 L. Ed. 2d 637 (1982). Nothing is automatic or predictable about how a sentencing jury may weigh these aggravating circumstances or whether countervailing mitigating circumstances will be offered or how they will be weighed. Unlike the sentencing provisions of the Structured Sentencing Act, N.C.G.S. ch. 15A, art. 81B, (1999), the "direct [sentencing] consequences" of defendant's guilty plea to the murder, even on both theories, cannot be definitely or immediately gauged by the judge, beyond predicting a minimum sentence of life imprisonment without parole and a maximum sentence of death, as the court here did.

Defendant relies upon *State v. Barts*, 321 N.C. 170, 176, 362 S.E.2d 235, 238 (1987), in which this Court concluded the defendant adequately understood "the nature of the plea and the possible consequences" after the judge explained to him the theories of (1) premeditation and deliberation and (2) felony murder, upon which the charge of murder in the first degree also rested in that case. In *Barts* further explanation was called for by the defendant's initial response that he did not understand he was pleading guilty based upon both theories. In this case, by contrast, defendant answered positively that he understood the nature of the charges against him and their elements and that he had discussed this and possible defenses he might have with his lawyers. Unlike the defendant's response in *Barts*,

defendant here gave no signal to the court of a need to further explain the nature of the charges against him. Defendant was informed of the punishment for each offense to which he was pleading guilty, including the punishment of death for the murder. His responses indicated he was pleading as he did voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969). The court had no duty to expound on direct consequences further, absent an indication by the defendant that he required such instruction.

Defendant also argues the court failed to ascertain whether defense counsel had in fact instructed defendant as to the particular, direct consequences of his pleas. Again, beyond inquiring whether defendant was satisfied with his attorneys and their explanation of the charges and possible defenses and receiving a positive response; and beyond informing defendant of the mandatory sentences for each charge, as required under the Structured Sentencing provisions, the court was required by neither statute nor Constitution to say more.

On this issue of defendant's plea, defendant also argues that this state should return to the practice before *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800, *cert. denied*, 414 U.S. 1000, 38 L. Ed. 2d 235 (1973), of not accepting a plea of guilty for an offense that could result in capital punishment. At times prior to our decision in *Watkins*, "[t]he idea that a person should be allowed to decree his own death has been unacceptable, not only to the judiciary, but to the citizens at large." *Id.* at 30, 194 S.E.2d at 809-10. Nevertheless, conflicting policy existed then, as now:

> [A] judge cannot compel a defendant against his will to plead not guilty and submit to a trial; for undoubtedly a prisoner of competent understanding, duly enlightened, has the right to plead guilty instead of denying the charge. Yet, in proportion to the gravity of the offense, the court should exercise caution in receiving this plea, and should see that he is properly advised as to the nature of his act and its consequences. This is a matter which is left largely to the good judgment and discretion of the court, which should be exercised so as to protect a defendant from an improvident plea and to prevent injustice.

State v. Branner, 149 N.C. 559, 563, 63 S.E. 169, 171 (1908). Thus, the citizens of this state, through the legislature, have elected a shift in both public policy and the law. Provisions governing capital punishment specifically permit "any person who has been indicted for an

offense punishable by death [to] enter a plea of guilty at any time after his indictment," and the judge is authorized therein to sentence that person to life imprisonment or to death, depending upon the recommendation of a jury convened for that express and limited purpose. N.C.G.S. § 15A-2001 (1999). Unless such provisions are determined to violate the Constitution of this state or of the United States, it is not within this Court's constitutional powers to disregard them and to legislate others. "The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922), *quoted in In re Alamance County Court Facils.*, 329 N.C. 84, 95, 405 S.E.2d 125, 130 (1991).

[11] Defendant next argues the court erred in denying his pretrial motion *in limine* to prohibit the introduction of victim impact statements rather than deferring its ruling on the motion until the issue arose or giving the State a limiting instruction. As a consequence, he says, the jury heard inflammatory and prejudicial material.

The fact that the court decided pretrial to permit such statements rather than defer that decision until the State introduced them was well within the court's discretion, and because that decision was interlocutory, it is not appealable. "A ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." *State v. Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988). "[T]hus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " *T&T Dev. Co. v. Southern Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (quoting *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)), *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997), *quoted in State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (*per curiam*). Nevertheless, because defendant renewed his objection to the victim impact evidence when it was introduced in his sentencing hearing, we proceed to address that specific objection here.

The introduction of victim-impact statements in criminal sentencing hearings in North Carolina is authorized by statute. "A victim has the right to offer admissible evidence of the impact of the crime, which shall be considered by the court or jury in sentencing the defendant. The evidence may include . . . [a] description of the nature

and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant." N.C.G.S. § 15A-833 (1999). So long as victim-impact statements are not so prejudicial as to "render[ ] the hearing fundamentally unfair," no constitutional impediment exists to their use in capital sentencing hearings. *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991).

The only victim-impact statement introduced at defendant's sentencing hearing was the testimony of the victim's brother. The brother, who found his sister's body, stated: "The impact has been, No. 1, that I've lost a confidant[e]. No. 2, that I feel like she was taken from me at a stage in our lives where we needed each other and we were still learning about life, as if a predator had come and taken one of two sibling birds out of the nest." Defendant argues this remark was unduly prejudicial and that the trial court erred in denying his motion to strike.

We disagree. The victim's brother's restrained testimony did no more than describe the emotional or psychological effect of his sister's death on him, well within the parameters of the statute. His statement also followed the guidance by the United States Supreme Court that it address the "specific harm caused by the defendant," *Id.* at 825, 115 L. Ed. 2d at 735, and " 'remind[] the sentencer that . . . the victim is an individual whose death represents a unique loss to society and in particular to his family,' " *id.* (quoting *Booth v. Maryland*, 482 U.S. 496, 517, 96 L. Ed. 2d 440, 457 (1987) (White, J., dissenting), overruled by *Payne*). Nor was this statement so affecting as to sway the sentencing jury to improper considerations in determining defendant's sentence, i.e., to considerations not relevant to the circumstances of the crime or the character of the defendant. *See, e.g.*, *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). In addition, such "[o]ral testimony . . . relating to punishment" was properly heard in defendant's presence. *State v. Pope*, 257 N.C. 326, 334, 126 S.E.2d 126, 133 (1962). He was "given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation." *Id.* We hold that the court's decision to allow this statement was well within the wide latitude allowed trial judges in North Carolina in conducting sentencing hearings. *See, e.g.*, *State v. Smith*, 300 N.C. 71, 81, 265 S.E.2d 164, 171 (1980).

[12] Defendant also argues publication to the jury of photographs taken of the premises after the Grace Apartments fire and of some of its victims before and after the fire were more prejudicial than probative, and that some, akin to a statement of victim impact, were so prejudicial as to render the sentencing hearing fundamentally unfair. *See Payne*, 501 U.S. 808, 115 L. Ed. 2d 720.

These photographs were introduced to illustrate the testimony of a member of the Asheville Fire Department and Arson Task Force who had been involved in the investigation of the Grace Apartments fire and whose testimony was offered in support of the aggravating circumstance that defendant had been previously convicted of a felony involving the use of violence to a person, N.C.G.S. § 15A-2000(e)(3).

We recently addressed this issue regarding postmortem photographs of the victim of an earlier murder in *State v. Warren*, 347 N.C. 309, 492 S.E.2d 609. We noted that the State may present evidence of the circumstances surrounding a defendant's prior felony, notwithstanding the defendant's stipulation to the record of conviction, to support the existence of aggravating circumstances. *Id.* at 316, 492 S.E.2d at 612; *see also Brown*, 315 N.C. at 61, 337 S.E.2d at 824 (the prosecution "must be permitted to present *any competent, relevant evidence relating to the defendant's* character or *record* which will substantially support the imposition of the death penalty so as to avoid an arbitrary or erratic imposition of the death penalty") (emphasis added). Further, "[i]f the felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed." *Warren*, 347 N.C. at 316, 492 S.E.2d at 612 (citing *State v. Heatwole*, 344 N.C. 1, 19, 473 S.E.2d 310, 319 (1996)). The court may admit any evidence it deems relevant to sentencing, including photographs of the victim to illustrate the testimony of a witness regarding the manner of a killing. *See id.*; *State v. Kandies*, 342 N.C. 419, 444, 467 S.E.2d 67, 80, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). "Photographs [depicting] 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. This is true even if the photographs are gory or gruesome." *State v. Williams*, 350 N.C. 1, 34, 510 S.E.2d 626, 648, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 162 (1999); *accord State v. Conaway*, 339 N.C. 487, 525, 453 S.E.2d 824, 848, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995).

We conclude that the photographs published to the sentencing jury here were not so numerous or egregious as to render the hearing fundamentally unfair. *Cf. State v. Hennis*, 323 N.C. 279, 287, 372 S.E.2d 523, 528 (1988) (in guilt phase of trial, repetitive showing of macabre slides projected on a screen above defendant's head more prejudicial than probative). Introduced for illustrative purposes, the photographs were the visible consequences of defendant's prior criminal act, relevant to the aggravating circumstance of defendant's prior violent felony. To whatever extent they were heinous or shocking, the jury, whose duty it was to consider the character of the defendant and the circumstances of the crime, was entitled to be informed.

[13] During the testimony of defendant's psychological expert, the court sustained the prosecutor's hearsay objections to two questions regarding any expression of defendant's remorse. Defendant now asserts that by doing so the court violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution to place all mitigating evidence before the jury. *See Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978).

"[R]elevant mitigating evidence cannot be excluded at a sentencing hearing based on evidentiary rules." *State v. Adams*, 347 N.C. 48, 63, 490 S.E.2d 220, 227 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). As in *Adams*, however, defendant here failed to except to the court's ruling and to make an offer of proof. "An exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified had he been permitted to answer." *State v. Fletcher*, 279 N.C. 85, 99, 181 S.E.2d 405, 414 (1971), *quoted in Adams*, 347 N.C. at 63, 490 S.E.2d at 227. Moreover, any arguable constitutional violation was harmless beyond a reasonable doubt, for other evidence of defendant's remorse was before the jury. This was in the form of the psychologist's actual written report, which defense counsel moved to introduce and the court allowed into evidence immediately after the psychologist testified. In that report the psychologist had noted:

> During discussions when Jamie's mental status was more stable, he admitted significant conflict over his situation despite his grandiose beliefs. He indicated he could not understand his behavior, why or how he did the things that caused his imprisonment. He stated, "I failed my family and the community."

The jury heard this other evidence of defendant's remorse, but the defendant failed to request and the jury thus did not find this cir-

cumstance under the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9) (1999). Under such circumstances, similar to those in *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996), we consider any error in excluding the psychologist's direct testimony to have been harmless beyond a reasonable doubt.

[14] In her cross-examination of defendant's psychological expert, the prosecutor asked a number of questions about a robbery that occurred in the restaurant where defendant was working the year before the murder in this case and to which defendant subsequently pled guilty as an accessory before the fact. Defendant claimed and hospital records show he suffered a mild concussion in a fall during the robbery. The psychologist opined that defendant's mental faculties were impaired by a psychotic disorder and by cognitive deficits resulting from a concussion occurring about the same time as the fall during the robbery. The prosecutor's examination, which included asking the psychologist whether she was aware defendant had filed a worker's compensation claim for this injury and that he had sued a prison nurse for failing to give him medication for AIDS, which disease he did not have, was apparently directed at discrediting the psychologist's diagnosis by showing that those of defendant's statements upon which it had been based in part were untruthful and unreliable.

Defendant contends on appeal that this examination was so incompetent and grossly prejudicial as to have rendered the sentencing proceeding fundamentally unfair in violation of his due process rights. *See Payne*, 501 U.S. 808, 115 L. Ed. 2d 720. We find this contention baseless in fact. Nevertheless, for the guidance of other criminal appeals to this Court, we point out the following additional reasons we overrule defendant's underlying assignments of error: We reiterate that the court has considerable leeway and discretion in governing the conduct of a sentencing proceeding, to which the North Carolina Rules of Evidence do not apply. *See, e.g.*, *Daughtry*, 340 N.C. at 517, 459 S.E.2d at 762 (any evidence the court " 'deems relevant to sentence' " may be introduced) (quoting N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992)). More fundamentally, however, defendant waived his right to appellate review of this issue because he failed to raise it as constitutional error before the court and to allege the same in his assignments of error. To preserve a question for appellate review, a party

> must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party

> desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1). The North Carolina Rules of Appellate Procedure also provide: "Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a); *see also, e.g., State v. Elliott*, 344 N.C. 242, 277, 475 S.E.2d 202, 218 (1996) (defendant failed to preserve issue for appellate review where he failed to object to the court's action, made no motion and thus received no ruling from the court with respect to the constitutionality of the contested issue, and did not assign error to that issue), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997).

Defendant neither asserted constitutional error to the court at the sentencing proceeding nor raised constitutional error as an assignment of error addressing this issue before this Court. Such putative error is thus waived as well as being substantively without merit.

[15] Defendant next quotes copiously from the record, detailing numerous instances of the prosecutor's allegedly rude and curt treatment of a prospective juror, defense counsel, and, most particularly, of defendant's psychological expert.

Defendant failed to object to most of the prosecutor's allegedly improper remarks; but even absent objection, it is incumbent upon the trial court to take corrective action when necessary to prevent unfair prejudice. *See State v. Sanderson*, 336 N.C. 1, 12, 442 S.E.2d 33, 40 (1994). This Court has rarely found prosecutorial misconduct in a sentencing hearing to be so egregious as to require a new hearing. In *Sanderson*, however, the prosecutor "insulted, maligned, continually interrupted and bullied" a defense witness and distorted her testimony "on several occasions without provoking curative instructions." 336 N.C. at 15, 442 S.E.2d at 41. Because "[t]he net result may . . . have been a less than complete, or less than accurate, statement of her opinion[,]" we could not in that case "conclude that the prosecutor's improper conduct toward this witness caused no prejudice to defendant." *Id.*

Our scrutiny of dialogue flagged by defendant where the prosecutor tested the line between zealous advocacy and incivility leads us

to caution the bar that it remain vigilant, even sensitive, to that line. A prosecutor's first responsibility is not to win at any cost, but as the government's defender of the truth, to be a just advocate.

> "The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Id. at 8, 442 S.E.2d at 38 (quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 1321 (1935)) (alteration in original).

Nevertheless, the prosecutor's manner and the interjection of arguably irrelevant matters into her cross-examination in this case were benign, if at times overblown, compared to the gross excesses that characterized the prosecutor's misconduct in *Sanderson*. Defendant argues that the prosecutor's behavior here had the prejudicial effect of the jury's failing to find the nonstatutory mitigating circumstances that defendant was under the influence of a mental disturbance, that he was unable to conform his conduct to the requirements of the law, that he had suffered a closed head injury which likely had an impact on his psychological condition, and that he had been diagnosed with psychosis and had a family history of paranoid schizophrenia. But the record contains ample other countervailing evidence that would support the jury's judgment as to these circumstances, other than that elicited by the prosecutor, including many instances of the defendant's inconsistent statements. Because we conclude the prosecutor's manner and remarks were not so egregious as to "provok[e] curative instructions" from the trial court, *Sanderson*, 336 N.C. at 15, 442 S.E.2d at 41, defendant's argument as to their deleterious effect on the jury is meritless.

We find other examples raised in this appeal of the prosecutor's exhibited comments toward a juror, defense counsel, and even the judge, to which defendant failed to object, to be so testy as to

approach disrespect, but likewise harmless. Further, as for those instances when the court sustained defendant's objection, "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." *Williams*, 350 N.C. at 24, 510 S.E.2d at 642.

[16] Defendant also claims similar uncivil excesses mar the prosecutor's closing argument. In the sentencing hearing for a capital trial, counsel is permitted wide latitude in arguments to the jury. *See, e.g., State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). Counsel may argue the facts in evidence and all reasonable inferences therefrom as well as the relevant law. *See Sanderson*, 336 N.C. at 15, 442 S.E.2d at 42. But they "may not become abusive, inject . . . personal experiences, [or] express . . . personal belief as to the truth or falsity of the evidence." N.C.G.S. § 15A-1230(a) (1999). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*." *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975). Argument calling for such intervention is that which "strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999).

Our review of the prosecutor's argument discloses a number of remarks abusing these rules, remarks to which defendant again did not object. But these were neither so gross nor so excessive that we can say the court erred in failing to intervene *ex mero motu*. In her closing argument the prosecutor again drew a bead on defendant's psychologist, analogizing the field of psychology generally and psychologists that testify as experts in particular to animals and their habits.

> The psychologized language of moral evasion is like gold in a mountain waiting to be mined by these people flocking to what they perceive to be the public trough of the criminal justice system. Claudia Coleman reminds you of a little boy in a barn. "With all this manure in here, there must be a pony someplace." There's no pony; just manure.

Later, the prosecutor disdainfully disparaged the psychologist's personal motives for testifying, as well as her expertise:

> Why did she diagnose him like that? She doesn't want to be out of work. Dr. Sansbury didn't do such a great job, and now a woman. The only person hallucinating in this room was that psychologist.

Offensiveness of the imagery aside, maligning the expert's profession rather than arguing the law, the evidence, and its inferences is not the proper function of closing argument. *See Monk*, 286 N.C. 509, 212 S.E.2d 125 (counsel may argue the facts in evidence and all reasonable inferences therefrom as well as the relevant law). Nor are scatological references to a witness' testimony to be condoned, as "[c]ounsel are at all times to conduct themselves with dignity and propriety". Gen. R. Pract. Super. and Dist. Ct. 12, para. 2, 2000 Ann. R. (N.C.) 10. Nevertheless, we have stated many times that in hotly contested cases counsel must be allowed wide latitude, *see, e.g., id.* at 515, 212 S.E.2d at 131, and we have noted in similar cases that it is not improper to highlight reasons for an expert witness' bias, including his or her fee. *See, e.g., State v. Atkins*, 349 N.C. at 82-83, 505 S.E.2d at 110. Further, in this case the evidence is so overwhelming that such scatological references were harmless.

During cross-examination, the psychologist indicated that she had originally believed defendant had faked the head injury he had allegedly sustained either at his own doing, at the hands of his accomplice in the robbery, or by accident. When she saw the hospital records that noted nurses' observations of unequal pupil reactivity and an actual contusion, the psychologist changed her opinion. The prosecutor challenged her repeatedly about this on cross-examination and in closing characterized the psychologist's testimony as dissembling:

> She said, "Yes, I knew he had done that part, too." Why did she do that? How honest is that? There's a saying: False in one, false in all. You can't believe anything she said in her report because she didn't mention to this jury about knowing that he didn't have a head injury and he pled "guilty" to accessory before the fact to robbing Backyard Burgers, and she didn't put that in her report, either.

When vigor in unearthing bias becomes personal insult, all bounds of civility, if not of propriety, have been exceeded. *See State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967) (counsel "should refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives" directed at opposing counsel). But in evalu-

ating comments alleged to be such, " 'remarks are to be viewed in the context in which they are made and the overall factual circumstances to which they referred.' " *State v. Bowman*, 349 N.C. 459, 473, 509 S.E.2d 428, 437 (1998) (quoting *State v. Robinson*, 346 N.C. 586, 606, 488 S.E.2d 174, 187 (1997)), *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 802 (1999). The record contained evidence supporting both the prosecutor's and the psychologist's understanding of the actuality of defendant's head injury, and the many past instances of defendant's prevarication confounded that evidence further. In this context, and in view of the occasional nature of the prosecutor's excesses, we find their effect to have been innocuous. That the jury failed to find mitigating circumstances that might arguably otherwise have been supported by the psychologist's testimony, if found credible, was likely not because the balance was tipped unfairly by the prosecutor's rhetoric, but because of the unconvincing nature of the evidence supporting those circumstances. We hold that these remarks, while unnecessary personal invective, were not so egregious as to compel the court to intervene and did not jeopardize the fairness of defendant's sentencing hearing.

[17] Defendant argues that the court violated his constitutional rights in refusing to include this instruction in its charge to the jury: "Certain evidence has been introduced in this case regarding the character of Kell[i] Fro[e]mke. You are not to impose or refrain from imposing the death penalty on the basis of any good or bad character of Kell[i] Fro[e]mke that you may find." The proffered instruction was culled from the following language in *State v. Reeves* regarding victim-impact statements:

> While evidence of a victim's character may not by the strictest interpretation be relevant to any given issue, the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far. The State should not be permitted to ask for the death sentence because the victim is a "good person," any more than a defendant should be entitled to seek life imprisonment because the victim was someone of "bad character."

337 N.C. 700, 723, 448 S.E.2d 802, 812 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995). " '[W]hen a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial

conformity therewith.' " *State v. Wilkinson*, 344 N.C. 198, 231, 474 S.E.2d 375, 393 (1996) (quoting *State v. Holder*, 331 N.C. 462, 474, 418 S.E.2d 197, 203 (1992)).

The record reveals that at the time it was requested, the instruction, while amply supported by evidence of the victim's good character, was offered in order to foreclose excessive use of the victim's brother's victim-impact statement in the prosecutor's closing argument. The court specifically stated that if any such excessive argument did occur, it might reconsider defendant's request. Defendant excepted to this decision. During the prosecutor's closing argument, defense counsel neither objected again on this basis nor repeated its request that the court give the instruction. No evidence of the victim's bad character appears in the record, and from the standpoint of its absence, the court did not err in refusing to give the instruction.

[18] Defendant next assigns error to the trial court's refusal to submit the following proposed mitigating circumstance: "Jamie Smith's co-defendant in the Grace Apartment case did not receive a sentence of death." Defendant notes in another assignment of error that this information was elicited by defense counsel in examining a witness. The trial court had overruled the State's objection, and defendant argues the court erred in not permitting certified copies of the co-defendant's judgment and commitments to be admitted into evidence. Defendant acknowledges the rule that the fact an accomplice received a lesser sentence in the case for which defendant is on trial is not an extenuating circumstance.

> It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. It bears no relevance to these factors . . . .

State v. Williams, 305 N.C. 656, 687, 292 S.E.2d 243, 261-62 (citations omitted), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *see also State v. Ward*, 338 N.C. 64, 114, 449 S.E.2d 709, 737 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). Defendant argues this situation is different because the evidence was already before the jury and codefendant was not a participant in the crime for which defendant was not being sentenced. These points are indeed differences, but differences that make the relevance of such information even more remote, as we have said earlier. That the court, in its discretion, allowed this evidence to come before the jury was arguably

to defendant's benefit; that the court disallowed introduction of documents supporting that evidence was both within its discretion and well within the rationale of the rule stated in *Williams*. Barring the jury's consideration of the admitted evidence as mitigating was also wholly proper. Defendant's assignment of error on this point is therefore overruled.

[19] Defendant also advances arguments regarding the nine aggravating circumstances requested by the State, to which he repeatedly objected on grounds that they improperly relied on the same evidence. *See State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979). Defendant did not ask the court to instruct the jury that the same evidence cannot be used as a basis for finding more than one aggravating circumstance. *See* N.C.P.I.—Crim. 150.10 (optional instruction). In *State v. Hutchins*, we elucidated this rule, holding it is permissible to use the same evidence to support aggravating circumstances when "the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished." 303 N.C. 321, 354, 279 S.E.2d 788, 808 (1981). Further, "[a]ggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995).

The aggravating circumstances submitted with which defendant takes issue concerned the Grace Apartments and Mountain Trace arsons. These were stated to the jury as the following, separate circumstances:

> (1) Had the Defendant been previously convicted of another capital felony, to-wit: the First Degree Murder of David Lawrence Phillip Cotton?
>
> . . . .
>
> (2) Had the Defendant been previously convicted of a felony involving the use or threat of violence to the person, to-wit the Attempted First Degree Murder of Erin Conklin?
>
> . . . .
>
> (3) Had the Defendant been previously convicted of a felony involving the use or threat of violence to the person, to-wit the Attempted First Degree Murder of Allison Kafer?
>
> . . . .

> (9) Was this murder part of a course of conduct in which the Defendant engaged, and did that course of conduct include the commission by the Defendant of other crimes of violence against other persons, to-wit: First Degree Arson at Mountain Trace Apartments and First Degree Arson at Grace Apartments?

It is readily apparent that although some evidence necessarily overlaps by virtue of how and where the crimes occurred, the first three aggravating circumstances, which name separate, unique victims, depend on distinct evidence. As for the ninth circumstance submitted, course of conduct is a separate circumstance from the individual crimes that comprise the series because of what it indicates about the character of the perpetrator—not only was he oblivious to the value of every human life affected by each act of arson, but he engaged in a pattern of robbery and arson that showed a particular callousness of character: Knowing the consequences, he did it again.

We addressed a similar argument in *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998)—defendant's appeal from his convictions for the Grace Apartments arson and murder. In that case we noted that although the (e)(5) aggravating circumstance, which addressed the defendant's having committed the murder while engaged in another felony (arson) relied on the same evidence as (e)(10)—that defendant knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person—the latter circumstance

> speaks to a distinct aspect of defendant's character [—] that he not only intended to kill a particular person when he set fire to the apartment building, but that he disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night.

Id. at 468, 496 S.E.2d at 366.

When the court perceives a possible overlap of evidence supporting more than one aggravating circumstance *and* when the court is requested to instruct the jury that the same evidence cannot be used as a basis for finding more than one aggravating circumstance, it should do so. But because the evidence for each circumstance here was distinct as to the crimes or as to an aspect of defendant's character, the court did not err either in submitting the above circumstances or in choosing not to instruct the jury

that it could not rely on the same evidence to find more than one circumstance.

[20] Defendant next argues that his treatment in this case violated provisions of the International Covenant on Civil and Political Rights, which this country ratified on 8 September 1992. Specifically, defendant says the long delay between sentencing and execution and the conditions in which death row inmates are kept constitute "cruel or degrading treatment or punishment" in violation of article VII of the covenant, and, because of errors briefed on appeal, the death penalty imposed constitutes the arbitrary deprivation of life in violation of article VI, section 1.

We do not dispute that "state law must yield when it is inconsistent with or impairs the policy of [such treaties]." *United States v. Pink*, 315 U.S. 203, 231, 86 L. Ed. 2d 796, 818 (1942). But we cannot see how any defendant's right to appeal errors alleged in his capital case, which necessarily delays his execution, or our own mandate to ascertain on appeal that the death penalty rests firmly on the law and is in no way arbitrary or in any other way "cruel or degrading" violates this treaty's provisions. We overrule this assignment of error.

PRESERVATION ISSUES

Defendant also raises six additional issues that he concedes this Court has previously considered and decided contrary to his position: (1) the unconstitutionality of the death penalty as arbitrary and in conflict with the constitutional requirement of individualized sentencing, held constitutional in, *e.g.*, *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); (2) the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), as unconstitutionally broad, held constitutional in, e.g., *State v. Stroud*, 345 N.C. 106, 478 S.E.2d 476 (1996), *cert. denied*, 522 U.S. 826, 139 L. Ed. 2d 43 (1997); (3) the court's refusal to allow defendant's motions for individual *voir dire* of prospective jurors, held to be within the discretion of the court in, e.g., *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); (4) the court's refusal to allow *voir dire* of prospective jurors about the concept of life without parole, held to be in compliance with N.C.G.S. § 15A-2002 in, e.g., *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995), and with the Constitution in, e.g., *State v. Neal*, 346 N.C. 608, 487 S.E.2d 734 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998); (5) the trial court's refusal to

strike the word "recommend" from the jury instructions, held neither improper nor misleading in, e.g., *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808; and, finally, (6) the trial court's refusal to grant defendant's motion for a bill of particulars detailing the aggravating circumstances that would be supported by the evidence, held in *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991), not to be within those entitlements guaranteed a criminal defendant by the United States Constitution.

Defendant urges this Court to reexamine these holdings. We have considered defendant's arguments on these issues, and, finding no compelling reason to depart from our prior holdings, we overrule these assignments of error.

PROPORTIONALITY REVIEW

[21] Defendant asserts the death sentence imposed in this case "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Quoting N.C.G.S. § 15A-2000(d)(2). We disagree.

We note at the outset that this Court determined the death sentence imposed for defendant's conviction of murdering Phillip Cotton at the Grace Apartments was neither excessive nor disproportionate. *Smith*, 347 N.C. 453, 496 S.E.2d 357. In this case, the same defendant committed murder under even more awful circumstances, first raping, then stabbing his victim more than sixty times before setting fire to her apartment. The jury found nine aggravating circumstances. It found that defendant had been previously convicted of a felony involving the threat of violence to a person, with regard to (i) the attempted murder of Erin Conklin and (ii) the attempted murder of Allison Kafer, N.C.G.S. § 15A-2000(e)(3); that the murder was committed while defendant was engaged in (i) first-degree rape, (ii) first-degree burglary, (iii) armed robbery, and (iv) first-degree arson, N.C.G.S. § 15A-2000(e)(5); and that the murder was part of a course of conduct in which defendant committed crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). In addition, and most significantly, the jury found that the defendant had been previously convicted of a capital felony, the murder of David Lawrence Phillip Cotton, N.C.G.S. § 15A-2000(e)(2); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). As the record discloses, the evidence before the jury amply supported its finding these circumstances. One or more jurors found only one of the four statutory mitigating circumstances submitted by the defendant to

exist and have mitigating value, that defendant had aided in the apprehension of another capital felon, N.C.G.S. § 15A-2000(f)(8); one or more jurors found six of sixteen submitted nonstatutory mitigating circumstances to exist and have mitigating value; and the jurors declined to find any other mitigating circumstances under the catchall, N.C.G.S. § 15A-2000(f)(9).

We have compared this case to others in the pool defined for proportionality review in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), and in particular to cases in the pool that "are roughly similar with regard to the crime and the defendant," *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). None, however, is more similar or illuminating for purposes of proportionality review than *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357. In that case we concluded, after comparing it to similar cases in the pool, that it bore no affinity with the seven cases this Court has found to be disproportionate, *id.* at 472, 496 S.E.2d at 368. We concluded as well that it was "more similar to cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate or those in which juries have consistently returned recommendations of life imprisonment." *Id.* at 473, 496 S.E.2d at 369.

Because the murder in this case, committed by the same defendant, is by its facts and by the jury's findings underlying its recommendation of punishment, even more appalling than that for which defendant was convicted and condemned in *Smith*, it necessarily bears even less similarity to the cases we have found disproportionate and even more to those in which we have found the sentence of death to be proportionate. In *Smith* the jury found all five aggravating circumstances submitted:

> (1) that defendant had been previously convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) that defendant committed this murder for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); (3) that defendant committed this murder while engaged in first-degree arson, N.C.G.S. § 15A-2000(e)(5); (4) that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the

lives of more than one person, N.C.G.S. § 15A-2000(e)(10); and (5) that the murder was part of a course of conduct in which defendant committed crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11).

347 N.C. at 472, 496 S.E.2d at 368. In this case the jury found many of the same aggravating circumstances, some more than once, and several in addition, including that this murder was especially heinous, atrocious, or cruel, and defendant's prior conviction of a capital felony.

With all other cases in the proportionality pool in mind, including *State v. Smith*, we hold that the jury recommending punishment for defendant for the crimes committed here was not "aberrant," *see, e.g., 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), nor was its recommendation "capricious, or random," *see, e.g., State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980).

We repeat, as we did in *State v. Smith*, "[s]imilarity 'merely serves as an initial point of inquiry' " in proportionality review, *Smith*, 347 N.C. at 473, 496 S.E.2d at 369 (quoting *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)). Whether the death penalty in a particular case is proportionate ultimately rests " 'on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances.' " *Id.* (quoting *Daniels*, 337 N.C. at 287, 446 S.E.2d at 325). In light of that judgment we conclude as a matter of law that the sentence of death in this case was neither excessive nor disproportionate.

[22] Defendant raises as a separate assignment of error the contention that the sentence of death in this case was imposed under the influence of passion and prejudice and that it is this Court's statutory duty to so find and to overturn that sentence and impose the sentence of life imprisonment. *See* N.C.G.S. § 15A-2000(d)(2). The jury's deliberations, he charges, "must have been permeated" with emotion from the "impassioned" testimony of the victim's brother, as well as from the subtle effect of "black on white" crime and the "parade" of victims, from photographs of Kelli Froemke to the presence at his sentencing hearing of the maimed victims of the Grace Apartments fire.

Apart from the "victim-impact statement" made by the victim's brother, which we find singularly restrained, given the blows this young man felt, first in discovering his murdered sister, then in grieving for her loss, defendant offers no evidence that the jury was affected by passion or prejudice in rendering its sentencing recommendation, or that any aspect of the sentencing hearing itself was so infected. Our review of the record also reveals no such excesses. We thus overrule this assignment of error.

We conclude that defendant received a fair capital sentencing proceeding, free of prejudicial error, and that the judgment of death recommended by the jury and entered by the court for defendant's plea of guilty to murder in the first degree, as well as the sentences imposed for first-degree burglary, robbery with a dangerous weapon, first-degree forcible rape, and first-degree arson, should be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. RAYMOND THOMAS THIBODEAUX

No. 157A99

(Filed 25 August 2000)

1. Evidence— murdered wife's testimony of prior assault by husband—hearsay—admissible

The trial court did not err in a capital first-degree murder prosecution by admitting the victim's testimony from a domestic violence protective order hearing regarding an assault upon her by defendant. Defendant was precluded from raising on appeal an objection based upon N.C.G.S. § 8C-1, Rule 804(b)(1) because it was not raised at trial; the hearsay statements in the testimony were admissible as statements of the declarant's then existing mental, emotional, or physical condition; when a husband is charged with murdering his wife, evidence spanning the entire marriage is allowed to show malice, intent, and ill will; and the court's ruling that the probative value was not outweighed by the prejudice was not manifestly unsupported by reason. N.C.G.S. § 8C-1, Rules 804(b)(5), 803(3), 404(b), and 403.

2. Appeal and Error— preservation of issues—objection when witness called—no objection when evidence introduced

A defendant in a capital first-degree murder prosecution did not preserve for appellate review evidentiary issues where he objected when the witnesses were called; the trial judge removed the jury, considered the forecast of evidence and the legal arguments, and found the evidence admissible; and defendant did not object when the testimony was subsequently introduced before the jury. The arguments preceding the calling of the witnesses were tantamount to motions in limine and defendant must make an objection at the time the evidence is actually introduced to preserve the question of admissibility for appeal.

3. Homicide— second-degree murder—voluntary intoxication—no evidence of intoxication when killing occurred

The trial court in a capital first-degree murder prosecution did not err by not submitting second-degree murder based upon voluntary intoxication where there was testimony that defendant appeared impaired when a detective arrived at his house, but defendant offered no evidence to show that he was voluntarily intoxicated at the time of the killing and the pathologist opined that the victim had been dead for at least twenty-four hours when officers found the body.

4. Sentencing— capital—proportionality

A sentence of death was not disproportionate where the record supports the aggravating circumstance found by the jury, there is nothing to suggest that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case was more similar to cases in which the death penalty was found proportionate than to those where it was found disproportionate. Defendant was convicted based upon premeditation and deliberation, the jury found the especially heinous, atrocious or cruel aggravating circumstance, the crime was brutal and there is evidence that the victim was conscious and suffered as she died, and defendant showed no apologetic or ameliorative conduct.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Albright, J., on 2 March 1999 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 March 2000.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

David B. Freedman and Dudley A. Witt for defendant-appellant.

ORR, Justice.

Defendant was indicted 20 July 1998 for the first-degree murder of his wife, Bertha Annette (Hyatt) Thibodeaux, and was tried capitally in Superior Court, Forsyth County. On 25 Feb. 1999, the jury returned a guilty verdict of first-degree murder on the basis of premeditation and deliberation and, on 2 March 1999, a recommendation of death for defendant. Judgment was entered accordingly, and defendant gave notice of appeal to this Court on 2 March 1999.

After consideration of the questions presented 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 conviction or sentence.

Defendant and the victim, Annette Thibodeaux, resided at 204 Barney Road in High Point, Forsyth County, North Carolina. Members of the High Point Police Department were sent to their home on 13 April 1998 after an out-of-town caller had contacted police and expressed concern that he was unable to reach the couple. Police arrived at the Thibodeaux home at approximately 10:00 p.m.

After observing the home for an hour, police approached and knocked on the door several times. When defendant answered, the officers standing at the doorway could see in clear view what appeared to be a woman lying face down between two couches in the living room. Also visible were what appeared to be blood stains on the walls and both couches. Based upon these observations, the police asked defendant to step outside, and they began to search the residence.

After placing defendant in a patrol car, Forsyth County Sheriff's Detective Dwayne V. Hedgecock advised defendant that law enforcement officers were there because there was a dead body in his house. In trial testimony, Detective Hedgecock described his subsequent conversation with defendant thusly:

> "He said, 'A dead body is in my house?' He asked me who was in the house and I replied, 'A female.' He said, 'You mean a woman?' And I replied, 'yes.' He looked at me in a very puzzled manner

when he asked about the body . . . . He asked me again why I was there and if I was a police officer. I told him that I was a detective with the Forsyth County Sheriff's Office and that I was there to investigate what had happened. He again asked me if there was a dead woman in his house, and I said, 'Yes, Ray, there is.' He said, 'You're kidding me.' I said, 'No, Ray, I'm not kidding you.' "

At the same time inside the Thibodeaux home, Forsyth County Sheriff's Deputy Robert Shinault, Jr., examined the body of the victim, noting there was a hole in the back of her skull and that her hands were severely bruised and discolored. He also found a phone cord wrapped around her neck.

Police Detective Elizabeth Culbreth, also on the scene, testified that she discovered a white trash bag in a box in the corner of the dining room. It contained a telephone that appeared to have blood on it. In the spare room, she saw a shirt that appeared to have blood on it. Detective Culbreth also noted a number of beer cans in the garbage bag and other cans around the house.

When Detective Hedgecock entered the house and went into the bedroom, he observed that the mattress and box spring of the bed had been pulled away, exposing the floor underneath. He also observed that the area immediately surrounding the victim was covered with blood splatter, and that there were faint footsteps in blood trailing from the bedroom into the kitchen.

North Carolina State Bureau of Investigation Special Agent Jennifer A. Elwell, who was employed as a forensic serologist, testified as to a number of items of evidence seized in the investigation. The shirt found in the spare room of the home showed the presence of human blood, as did the aforementioned telephone. A watch found in the bathroom and the tissue paper it was wrapped in were also examined for blood tracings. The tissue reacted positively to phenolphthalein, the chemical used to test for human blood. A small stain on the watch, as well as two shade-control rods found in the living room, also tested positive for human blood. Agent Elwell testified that a hammer found at the scene also contained traces of human blood on its surface.

Forsyth County Sheriff's Sergeant Darrell O. Hicks was tendered and accepted at trial as an expert in the field of latent fingerprint identification. Sgt. Hicks used an original fingerprint card of defendant as a comparison to prints lifted from the crime scene. He con-

cluded that the bloody fingerprints taken from the two shade-control rods and telephone were those of defendant. He further testified that there were no fingerprints found on the hammer, and that it appeared to have been wiped clean.

North Carolina State Bureau of Investigation Special Agent David Freeman was tendered and accepted as an expert in the field of forensic DNA analysis. Agent Freeman examined the evidence and concluded that the blood located on the hammer and tissue paper matched the DNA profile of the victim. He also testified that blood samples taken from the shirt, telephone, and watch all had a DNA pattern consistent with that of the victim.

On appeal to this Court, defendant brings forward twelve questions for review. For the reasons stated herein, we conclude that defendant's trial and capital sentencing proceeding were without prejudicial error and that the death sentence is not disproportionate.

[1] Defendant's first four questions presented before this Court relate to a prior civil domestic violence protective order hearing pursuant to N.C.G.S. § 50-B ("50-B hearing"), in which the victim, Ms. Thibodeaux, testified against defendant concerning a violent assault that took place in February 1997. Generally, defendant contends that the trial court's admission of the victim's testimony from the 50-B hearing is hearsay evidence and, as such, violates defendant's right to confront the witness against him as guaranteed by both the Sixth Amendment to the United States Constitution and Article I, § 23 of the North Carolina Constitution. Defendant asserts that the trial court erred under Rules 804(b)(1), 804(b)(5, 803(3), 404(b), and 403 of the North Carolina Rules of Evidence in allowing the State to introduce into evidence the transcript and audiotape testimony of the victim from the 50-B hearing. We disagree with defendant's contention. As discussed below, we further note that defendant failed to raise the Rule 804(b)(1) objection at trial. Thus, this argument is deemed waived. *See* N.C. R. App. P. 10(b)(1).

On 3 February 1997, at the 50-B hearing held in District Court, Guilford County, Judge Susan Bray presiding, Ms. Thibodeaux described defendant's alleged violent assault in part as follows:

> [H]e came into the living room where I was eating and he didn't say anything, he walked up and he slapped the plate of food out of my lap, and it went flying across the living room. And it smashed into the fireplace, and food got everywhere.

And so, of course, I became quite upset that that happened . . . . I went into the bedroom to change my shirt to get ready to leave, and he comes running into the bedroom, and he shut—we have two doors that access our bedrooms, one is into a hallway, a long hallway, because our bedroom is at the back of the house, and one door leads into a bathroom.

And he shut both doors, so that I could not escape, and he started hitting me with his fists, and I fell on the floor, and he started kicking me.

. . . .

. . . [H]e hit me with his fist on this side of my face, this has been over a week, so some of the swelling has gone down, and the bruises have began [sic] to clear up. But he hit me with his fist on this side of the face. This side of my face was swollen. I had a very severe black eye all under here.

He kicked me repeatedly over my entire body. I have some really bad bruises right here.

. . . .

. . . I got extremely scared because of the fact that this has been—this has happened to me on three other occasions, and my husband, when he gets angry he gets violent. And on the other occasions it's not like he gets upset and hits me a couple of times, and then it's over, I am used to the continual kicking, and the continual hitting, and I became very afraid.

I tried several times to get out one door that leads to the hallway, and every time I would turn for that door he would grab me and throw me down and start kicking me some more. And then when I would try to get toward the other door, he would grab me and throw me down.

And I began to realize that this was going to turn into a long ordeal, and that I was not going to escape. So, I figured if I can't get out of this bedroom, the only recourse I have is to get under the bed.

So, I went under the bed. And our bed is like very low to the floor. It's a very tight space I could crawl under. I just had to do the best I could and slide under. And where I was positioned

under the bed the frame work of the bed had, I was like pinned under the frame because I couldn't move.

And during the course of the event, this is about, approximately, a three hour ordeal, he told me that he was going to kill me. And at one point I said, "Well, Ray, you can kill me," you know, "But they are going to trace it to you, they are going to find out you did it."

And he said, "No they won't, because I will kill you. I will put your body in the trunk of your car, and I will get rid of your car, and they'll never know it was me."

And then at another point he says, "Annette, you're going to stay under that bed, and you're going to die under the bed, because I don't"—this happened Thursday night, and he didn't have to go back to work until Sunday night, and he said, "You're going to be under that bed for days, and you're going to die under the bed, because you're going to starve to death, and you're going to have to go to the bathroom on yourself."

And that's not the way he put it, but that's what it—what he was saying. And he said, "I've been sleeping for a while, and I'm refreshed, and I'm ready to go." So, I knew what he meant, he had had plenty of rest, and he had plenty of sleep. He had slept for several days, after coming off his job, so he was ready to have the energy to do what he was going to do.

And I kept asking him, I said, "Ray, why are you doing this to me?", and he kept saying, "Because you deserve it." He said, "I'm tired of your nagging me, and this is what you deserve."

And I said, "Well, Ray, I, I understand that you're angry at me, because I just told you I want to leave you," I said, "But—and you have a right to be angry," but I said, "hurting me is not the way to solve the problem, we should—if you're hurt that I told you I wanted to leave, then you should—we should just sit down and talk about this and work it out, and not—you don't hit me because you're angry."

And he said that it was his right to have the revenge.

Ms. Thibodeaux proceeded to explain in detail the manner in which defendant abused her during that evening. She testified that defendant next instructed her to take her shoes off, threatening her

by holding a dumbbell over her head and stating, " 'If you don't do what I say I will smash your skull in, and by the time I get through with you, you won't have a face.' " After she realized that he was going to tie her feet up, she retreated again to the area underneath the bed.

Ms. Thibodeaux testified that over the course of the next several hours, as she remained under the bed, defendant swung at her with a butcher knife, removed the mattress and poured boiling water on her, and "jabbed" at her with a mop handle and a steel weight lifting bar, resulting in extensive bruising to her legs and ankles. Ms. Thibodeaux stated that defendant eventually "just snapped out of it" and ended the assaultive conduct later that night.

Prior to defendant's trial in February 1999 for the murder of Ms. Thibodeaux, defendant filed a motion and an attached memorandum of law objecting to the State's introduction of the 50-B hearing transcript. In the motion and memorandum, defendant specifically objected to the admission of this evidence based on the North Carolina Rules of Evidence 803(3), 804(b)(5), and 404(b), but failed to object under Rule 804(b)(1). Moreover, during the trial court's evidentiary hearing on defendant's motion, defendant again failed to specifically object to the transcript and audiotape's admission into evidence based on Rule 804(b)(1). The trial court ultimately held the challenged hearsay statements to be admissible under Rules 804(b)(1), 804(b)(5), 803(3), 404(b), and 403.

During the trial, defendant merely reiterated his earlier objections to the aforementioned evidence, again failing to object on the Rule 804(b)(1) ruling. Thus, in the absence of a specific objection premised on Rule 804(b)(1), defendant has failed to properly preserve the issue for appellate review. *See* N.C. R. App. P. 10(b)(1). Accordingly, defendant is precluded from raising it for the first time on appeal. "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).

As to defendant's arguments under Rules 804(b)(5), 803(3), 404(b), and 403, upon examining the record on appeal, we find that the hearsay statements in question constitute, and are admissible as, statements of the declarant's then-existing mental, emotional, or physical condition pursuant to Rule 803(3). "In general, hearsay evidence is not admissible. However, Rule 803(3) of the North Carolina Rules of Evidence allows the admission of hearsay testimony into evi-

dence if it tends to show the declarant's then-existing state of mind. N.C.G.S. § 8C-1, Rule 803(3) (1997)." *State v. Rivera*, 350 N.C. 285, 288, 514 S.E.2d 720, 722 (1999) (citation omitted).

It is well established in North Carolina "that a murder victim's statements that she fears the defendant and fears that the defendant might kill her are statements of the victim's then-existing state of mind and are " 'highly relevant to show the status of the victim's relationship to the defendant.' " *State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996) (quoting *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996))." *State v. Hipps*, 348 N.C. 377, 392, 501 S.E.2d 625, 634 (1998). In the instant case, the victim's testimony from the 50-B hearing clearly relates to her relationship with her husband as well as to her fear of him. "We consistently have allowed evidence spanning the entire marriage when a husband is charged with murdering his wife in order " 'to show malice, intent, and ill will toward the victim.' " *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (quoting *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)). . . . Therefore, evidence of the entire pattern and history of violence between defendant and the victim was relevant." *State v. Murillo*, 349 N.C. 573, 591, 509 S.E.2d 752, 763 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 87 (1999).

Although Rule 802 of the North Carolina Rules of Evidence provides that "[h]earsay is not admissible except as provided by statute or by these rules," we conclude that the statements complained of were properly admitted as expressions of the victim's then-existing state of mind, pursuant to Rule 803(3). Rule 803(3), therefore, satisfies the exception requirement of Rule 802. As such, it is unnecessary for us to decide whether the contested evidence is also admissible under Rules 804(b)(5).

Defendant also argues that the trial court erred in allowing these hearsay statements into evidence under Rule 404(b) because the prejudicial effect of the statements substantially outweighs their probative value. *See* N.C.G.S. § 8C-1, Rule 403 (1999). We disagree. The admissibility of specific acts of misconduct by a defendant is governed by Rule 404(b), which provides:

> (b) *Other crimes, wrongs, or acts.*—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) (1999). In applying Rule 404(b), this Court has repeatedly held that "[t]estimony about a defendant-husband's arguments with, violence toward, and threats to his wife are properly admitted in his subsequent trial for her murder." *Murillo*, 349 N.C. at 591, 509 S.E.2d at 762; *see also State v. Syriani*, 333 N.C. 350, 376-78, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

When such testimony is ruled admissible at trial under Rule 404(b), it nevertheless remains subject to the balancing test of Rule 403. "The responsibility to determine whether the probative value of relevant evidence is outweighed by its tendency to prejudice the defendant is left to the sound discretion of the trial court." *Alston*, 341 N.C. at 231, 461 S.E.2d at 704. In the case *sub judice*, the trial court carefully considered the probative value of the transcript and audiotape as well as its prejudicial effect. During the hearing on this evidence, the trial court made specific findings of fact and concluded, "[U]pon a fair consideration of the nature of the evidence and the purposes for which the evidence may be received and upon consideration of the long line of cases that admit the entire history of the marriage to prove malice and intent and ill will, matters of that sort toward the victim, the Court is of the opinion and finds that the probative value of this testimony substantially outweighs any danger of unfair prejudice, confusion of the issues, or misleading of the jury, that the evidence should not be excluded."

Abuse of the trial court's discretion will be found only where the ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *Syriani*, 333 N.C. at 379, 428 S.E.2d at 133. Such is not the case here. Therefore, we hold that the trial court properly admitted these hearsay statements into evidence.

[2] In his next four questions presented, defendant argues that the trial court erred in allowing into evidence various witnesses' testimony about the victim's relationship with her husband, the defendant, and that such testimony was substantially more prejudicial than probative under Rule 403. Specifically, defendant argues that: (1) "[t]he trial court erred in allowing exhaustive evidence recounting statements made by the victim under Rule 803(3) as said statements

were not expressions of fear or otherwise emotion-based, but rather were mere recitations of fact"; (2) "[t]he trial court erred in allowing evidence under the residual hearsay exception of 804(b)(5) pertaining to unavailable witnesses when said evidence did not possess equivalent circumstantial guarantees of trustworthiness or was provable by other means"; (3) "[t]he trial court erred in allowing exhaustive propensity and character evidence of [defendant] under the guise of Rule 404(b) evidence"; and (4) "[t]he trial court erred in admitting evidence that was either irrelevant under Rule 401 or more prejudicial than probative under Rule 403 and as a result of the cumulative effect of the admission of said prejudicial evidence, the jury verdict was rendered under the influence of passion or prejudice and was arbitrary and capricious."

Through these arguments, defendant contends that the trial court erred in allowing the testimony of witnesses Deputy Robert Shinault, Jr.; attorney Georgia Nixon; Laura Teachey; Danny Dotson; and Officer Amber Goforth Blue under the Rule 803(3) then existing state of mind or emotion hearsay exception. We note, however, that a review of the transcript pages to which defendant cites in support of his argument as to Laura Teachey discloses that defendant mistakenly confused the witnesses' names and that the contested testimony is actually that of Robin Medley rather than that of Laura Teachey. Defendant also contends that the respective testimonies of Dotson, Medley, and Teachey were improperly admitted under Rule 804(b)(5). Further, defendant asserts that the trial court erred in admitting statements made by Deputy Shinault, Nixon, Judge Susan Bray, and Officer Blue as improper character evidence under Rule 404(b). In a separate but related argument, defendant asserts that the admission of Nixon's testimony was improper as it violated the victim's attorney-client privilege.

We note at the outset that although defendant objected as each of the aforementioned witnesses was called to testify at trial, he failed to substantively object during any portion of their testimonies to which he now assigns error. The transcript reveals that defendant objected to the designated witnesses as the State called them to testify, but did so only before the witnesses took the stand. Each time, the trial judge removed the jury from the courtroom and considered both the attorneys' forecast of evidence to be offered by the respective witness and the legal arguments surrounding the proffered testimony. After each of these conferences, the trial court made specific findings and found the forecasted testimony to be admissible under

various rules of evidence. The trial judge then instructed the jury to return to the courtroom and allowed each witness, in turn, to testify. During the testimony of each of the above witnesses, defendant failed to substantively object to their specific testimony as it was being introduced.

For example, when the State called Officer Blue to testify, defendant initially objected. During subsequent arguments out of the jury's presence, defendant's attorney predicated his objections on what he anticipated the witness would say, i.e.,"it is my understanding that the witness will testify about . . .," and "I believe she'll testify as to what Annette Thibodeaux had said . . ." After the State responded by arguing, in essence, that the proffered evidence was admissible under Rules 803(3) and 404(b), the trial court ruled for the State and allowed Officer Blue to be called as a witness.

During Officer Blue's direct examination, defendant made no objections to any of her actual testimony. The trial transcript also shows that witnesses Shinault, Nixon, Medley, and Teachey each appeared under similar circumstances, and that each testified without substantive objection by defendant. Although no objection or argument preceded the testimony of Danny Dotson, defendant made only two objections during the course of his testimony, neither of which related to hearsay or substantial prejudice.

Here, the arguments preceding the calling of the witnesses during trial were tantamount to motions *in limine*. We therefore will apply established principles relating to motions *in limine*. It is well settled 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)) (alteration in original), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999); *see also* N.C. R. App. P. 10(b)(1). Thus, in order to preserve for appeal the question of the admissibility of evidence offered by a witness, defendant must make an objection to such evidence *at the time it is actually introduced* at trial. As with motions *in limine*, it is insufficient for defendant to premise his objection on matters and evidentiary issues that he merely anticipates will be discussed by a prospective witness. Moreover, it is of no consequence if the witness' actual testimony substantively coincides with counsel's preliminary assumptions. For purposes of appeal preservation, objections to testimony must be

contemporaneous with the time such testimony is offered into evidence. *See* N.C. R. App. P. 10(b)(1); *and State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). The record shows that defendant failed to do so. Therefore, we find his arguments on these questions must fail. Additionally, as defendant has not alleged plain error in his arguments to this Court, he has waived appellate review of these issues on such grounds. *See* N.C. R. App. P. 10(c)(4); *and 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).

Although defendant offers separate arguments with regard to the respective testimonies of attorney Georgia Nixon and Judge Susan Bray, we find his contentions fail for the reasons set forth above. As for Judge Bray, defendant by reference expressly incorporates his prior arguments premised on hearsay and its potential prejudicial effect. Again, however, defendant failed at trial to object to Judge Bray's statements at the time they were introduced into evidence. Thus, he has waived his right to appellate review on the issue. The same applies to defendant's separate argument regarding the testimony of Nixon. Although defendant premises his argument here on a different legal principle—namely, that Nixon's testimony violated the attorney-client privilege—he again failed to object to her testimony in a timely manner. As a result, the substance of his argument is beyond the purview of this Court.

[3] In his next question presented, defendant claims that the trial court committed reversible error by failing to submit second-degree murder based on voluntary intoxication. We disagree. Second-degree murder is defined as "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*, 522 U.S. 1135, 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.* When 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.* Moreover, if there is no evidence of intoxication, "the court is not required to charge the jury thereon." *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). "The *presence of such evidence* is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954).

More specifically, this Court has stated:

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

State v. Williams, 343 N.C. 345, 365, 471 S.E.2d 379, 390 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997).

In the present case, defendant has failed to present any evidence to support an instruction for second-degree murder based on voluntary intoxication. Defendant relies primarily on Detective Hedgecock's testimony that, on 13 April 1998, soon after the detective arrived at the Thibodeauxs' residence, defendant appeared to have consumed a large quantity of alcohol, and based upon the detective's opinion and experience, defendant appeared impaired. Defendant, however, offers no evidence to show that he was voluntary intoxicated *at the time of the killing*. To the contrary, based on the autopsy results and the decomposition of the victim's body, the pathologist opined that Ms. Thibodeaux had been dead for at least twenty-four hours when officers discovered her body on 13 April. Therefore, defendant's evidence is insufficient to mandate an instruction on the issue of whether defendant was so voluntarily intoxicated at the time of the killing that he was incapable of forming a deliberate and premeditated intent to kill. Thus, the trial court properly refused to submit an instruction on second-degree murder, and this argument is overruled.

[4] Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now turn to the record and determine: (1) whether the record supports the aggravating circumstance found by the jury and upon which the sentence of death was based; (2) whether the death sentence was entered 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. *See* N.C.G.S. § 15A-2000(d)(2) (1999).

After thoroughly reviewing the record, transcripts, and briefs in this case, we conclude that the record fully supports the jury's finding of the aggravating circumstance that the crime was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). Further, we conclude that nothing in the record suggests that defendant's death sentence in this case was imposed under the influence of passion, prejudice, or any other arbitrary factor. We must now turn to our final statutory duty of proportionality review.

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). Our review also serves as a guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980).

We begin our proportionality analysis by comparing this case with other cases in which this Court has concluded that the death penalty was disproportionate. *See State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). We have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *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 case in which this Court has found the death penalty disproportionate. Here, defendant was convicted of murder on the basis of premeditation and deliberation. In three of the cases found disproportionate by this Court—*Benson*, *Stokes*, and *Rogers*—the defendants were convicted solely on the basis of the felony murder rule. That the jury convicted defendant under the theory of "premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Finally, the jury found the aggravating circumstance that the murder was espe-

cially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). Of the cases in which this Court found the death penalty to be 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. The defendant in *Stokes* was convicted solely on the basis of the felony murder rule, whereas defendant in the instant case was convicted of premeditated and deliberate murder. The defendant in *Bondurant* exhibited the kind of conduct that this Court has recognized as ameliorating. *State v. Flippen*, 349 N.C. 264, 278, 506 S.E.2d 702, 711 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). However, in the case *sub judice*, defendant showed no such apologetic or ameliorative conduct. The crime committed by defendant in this case was equally as brutal as other murders for which a death sentence was imposed. Additionally, there is evidence that the victim suffered before she died, and that she was conscious during at least part of her attack. The victim's hands were discolored and swollen. The left hand had twelve separate broken bones, and the right hand had similar injuries. These wounds were defensive-type wounds received while the victim was conscious as she tried to ward off blows to her head. The victim suffered six to eight individual contusions to the left side of her head, and six to eight abrasions on the back of her neck, with associated bruises. She sustained fifty to seventy-five discrete blows to the head, as well as a hole in her skull resulting from a blow with a hammer. This blunt trauma to the head was the victim's ultimate cause of death. The pathologist described the multitude of injuries to the victim as "overkill."

It is also proper 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. In addition, while it is important for this Court to review all the cases in the pool when engaging in our duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It is sufficient to state that we have concluded that the instant case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found the sentence of death disproportionate.

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was either excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of preju-

dicial error. Accordingly, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

BAHL v. TALFORD

No. 236P00

Case below: 138 N.C.App. 119

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

BAREFOOT v. THERMO INDUS., INC.

No. 211P00

Case below: 137 N.C.App. 384

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

BICKET v. McLEAN SEC., INC.

No. 1P97-2

Case below: 138 N.C.App. 353

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

BROOME v. CITY OF MOUNT HOLLY

No. 40P00

Case below: 136 N.C.App. 231

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 22 August 2000.

CHRISTENBURY SURGERY CTR. v. N. C. DEP'T OF HEALTH & HUMAN SERVS.

No. 305P00

Case below: 138 N.C.App. 309

Petition by respondent for writ of supersedeas and motion for temporary stay denied 14 July 2000.

CHRYSLER FIN. CO. v. OFFERMAN

No. 301P00

Case below: 138 N.C.App. 268

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

CUCINA v. CITY OF JACKSONVILLE

No. 261P00

Case below: 137 N.C.App. 99

Petition by defendant (City of Jacksonville) for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

DEP'T OF TRANSP. v. ROWE

No. 506A98-2

Case below: 131 N.C.App. 206

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 August 2000.

DOBROWOLSKA v. WALL

No. 270PA00

Case below: 138 N.C.App. 1

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 24 August 2000.

ESTATE OF FENNELL v. STEPHENSON

No. 267PA00

Case below: 137 N.C.App. 430

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 25 August 2000.

HOLT v. FOOD LION, INC.

No. 237P00

Case below: 136 N.C.App. 167

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

IN RE PRICE

No. 197P00

Case below: 137 N.C.App. 587

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

JACOBS v. CITY OF ASHEVILLE

No. 227P00

Case below: 137 N.C.App. 441

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 24 August 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

LEXINGTON STATE BANK v. MILLER

No. 245P00

Case below: 137 N.C.App. 748

Petition by defendants (Peggy Miller, Individually and Executrix of the Estate of Larry Eugene Miller, Sr., and Miller Dodge, Inc., formerly Welborn Motors, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

LONDON v. SNAK TIME CATERING, INC.

No. 320P00

Case below: 136 N.C.App. 473

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

MEDICAL MUT. INS. CO. v. MAULDIN

No. 222PA00

Case below: 137 N.C.App. 690

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 25 July 2000.

MILLER v. PIEDMONT STEAM CO.

No. 230P00

Case below: 137 N.C.App. 520

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

MILLS v. THOMAS

No. 345PA00

Case below: 138 N.C.App. 553

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 24 August 2000.

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

No. 328P00

Case below: 138 N.C.App. 530

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

OVERCASH v. CITY OF CONCORD

No. 329P00

Case below: 138 N.C.App. 554

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

PATTERSON v. PATTERSON

No. 253P00

Case below: 137 N.C.App. 653

Petition by intervenor (Paula S. Patterson) for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

ROGERS v. CITY OF WILMINGTON

No. 264P00

Case below: 137 N.C.App. 588

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

SIMMONS v. LANDFALL ASSOCS.

No. 323PA00

Case below: 138 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 24 August 2000.

SISKO v. PRITCHETT

No. 298P00

Case below: 138 N.C.App. 327

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

SMD ENTERS., INC. v. CITY OF MONROE

No. 276P00

Case below: 137 N.C.App. 772

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. BAKER

No. 239P00

Case below: 137 N.C.App. 772

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. BARKER

No. 309P00

Case below: 138 N.C.App. 304

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

STATE v. BLUE

No. 292PA00

Case below: 138 N.C.App. 404

Petition by Attorney General for writ of supersedeas allowed 24 August 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 24 August 2000.

STATE v. BLYTHER

No. 324P00

Case below: 138 N.C.App. 443

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. CALLAHAN

No. 219P00

Case below: 137 N.C.App. 588

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. CHESSON

No. 347P00

Case below: 139 N.C.App. 207

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 9 August 2000.

STATE v. CLONTZ

No. 223P00

Case below: 137 N.C.App. 588

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 24 August 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. CONNER

No. 219A91-3

Case below: 352 N.C.App. 358

Motion by defendant to reconsider the denial of a remand for evidentiary hearing dismissed 24 August 2000.

STATE v. CROCKETT

No. 271P00

Case below: 138 N.C.App. 109

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. FIEDLER

No. 284P00

Case below: 138 N.C.App. 328

Petition by defendant for writ of supersedeas denied 24 August 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000. Temporary stay dissolved 24 August 2000.

STATE v. FOWLER

No. 164A00

Case below: Mecklenburg County Superior Court

Motion by the State to dismiss capital appeal denied 24 August 2000 and the State's motion to impose sanctions is continued subject to further order of this Court.

STATE v. GOLPHIN

No. 441A98

Case below: Cumberland County Superior Court

Petition by defendants for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 24 August 2000.

STATE v. GRAY

No. 205P00

Case below: 137 N.C.App. 345

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. HARSHAW

No. 337P00

Case below: 138 N.C.App. 657

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. HAWKINS

No. 214A00

Case below: Wilkes County Superior Court

Joint motion to withdraw petition for writ of certiorari allowed 24 August 2000. Petition by defendant for writ of certiorari to review the order of the Superior Court, Wilkes County, dismissed as moot 24 August 2000. Motion by defendant to withdraw petition for writ of certiorari dismissed as moot 24 August 2000. Motion by defendant to maintain sealed transcript of the ex parte portion of the hearing below dismissed as moot 24 August 2000.

STATE v. JOYNER

No. 307P00

Case below: 138 N.C.App. 555

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 24 August 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. LAWRENCE

No. 585A97

Case below: 352 N.C. 1

Motion by defendant for temporary stay of mandate dismissed 14 July 2000. The clerk of this court is hereby directed to enter the judgment and issue the mandate pursuant to the opinion filed in this case on 16 June 2000.

STATE v. LINNEY

No. 302P00

Case below: 138 N.C.App. 169

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 24 August 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed ex mero motu 24 August 2000. Motion by Attorney General to deny defendant's petition for discretionary review dismissed as moot 24 August 2000. Motion by Attorney General to deny the defendant's motion for appropriate relief dismissed as moot 24 August 2000.

STATE v. MARLEY

No. 334P00

Case below: 126 N.C.App. 832

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

STATE v. McMAHAN

No. 310P00

Case below: 134 N.C.App. 187

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

STATE v. MILLER

No. 339P00

Case below: 138 N.C.App. 207

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. MILLS

No. 306P00

Case below: 138 N.C.App. 555

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 24 August 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. PARKER

No. 331P00

Case below: 138 N.C.App. 555

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. RILEY

No. 231A00

Case below: 137 N.C.App. 403

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000. Petition by defendant for writ of certiorari to review the orders of the North Carolina Court of Appeals (COAP00-294) denied 24 August 2000. Motion by the Attorney General to dismiss notice of appeal (dissent) allowed 24 August 2000.

STATE v. SHAW-EL

No. 272P00

Case below: 118 N.C.App. 586

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

STATE v. SMITH

No. 321P00

Case below: 138 N.C.App. 605

Motion by Attorney General for temporary stay allowed 25 July 2000.

STATE v. SMITH

No. 327P00

Case below: 138 N.C.App. 555

Motion by Attorney General to dismiss the appeal by defendant (Richard Smith) for lack of substantial constitutional question allowed 24 August 2000. Petition by defendant (Richard Smith) for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000. Petition by defendant (Jimmy Smith) for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

STATE v. STEEN

No. 530A98

Case below: 352 N.C. 227

By order of the Court 17 August 2000, the Clerk of this Court is hereby directed to enter the judgment and issue the mandate pursuant to the opinion filed in this case 13 July 2000. Motion by defendant to correct opinion, and for other relief dismissed 17 August 2000. Motion by defendant for temporary stay of mandate dismissed as moot 17 August 2000.

STATE v. SWINDLER

No. 282P00

Case below: 129 N.C.App. 1

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

STATE v. TODD

No. 293P00

Case below: 135 N.C.App. 633

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

STATE v. WALKER

No. 175P99-2

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 24 August 2000.

STATE v. WHITE

No. 322P00

Case below: 137 N.C.App. 386

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 24 August 2000.

THOMAS v. WASHINGTON

No. 152P00

Case below: 136 N.C.App. 750

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

WINSTON-SALEM WRECKER ASS'N v. BARKER

No. 185P00

Case below: 137 N.C.App. 178

Notice of appeal by plaintiffs pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 24 August 2000. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 24 August 2000.

PETITION TO REHEAR

GRAY v. N. C. INS. UNDERWRITING ASS'N

No. 84PA99

Case below: 352 N.C. 61

Petition by defendant to rehear pursuant to Rule 31 denied 3 August 2000. Petition by plaintiff to rehear pursuant to Rule 31 denied 3 August 2000.

STATE OF NORTH CAROLINA v. JERRY RAY CUMMINGS

No. 65A87-3

(Filed 6 October 2000)

1. **Prisons and Prisoners— defendant's prison records—no prosecutorial misconduct**

The State did not engage in prosecutorial misconduct in a capital sentencing proceeding by subpoenaing defendant's prison records and by disclosing those records during cross-examination of witnesses, because: (1) N.C.G.S. § 148-76 provides that these records shall be made available to the State; (2) defense counsel did not object to the subpoena at trial, but instead requested that defense counsel be given copies of all prison records received by the State; and (3) the record does not reveal any inappropriate references by the State to defendant's prison records.

2. **Constitutional Law— right to be present at all stages—preliminary qualifications of prospective jurors**

The trial court did not err by excusing several prospective jurors outside of defendant's presence in a capital sentencing proceeding, because: (1) defendant's right to be present at all stages of his trial does not include the right to be present during preliminary handling of the jury venires before defendant's own case has been called; and (2) the record reveals that prospective jurors with justifications for excusal from jury duty on the day defendant's case was called for trial were excused before the State called defendant's case.

3. **Jury— selection—capital sentencing—aggravating circumstances used—plain error inapplicable**

Although defendant asserts plain error to the prosecutor's use of examples of aggravating circumstances during the voir dire of prospective jurors which were not relied on in defendant's capital sentencing proceeding, the plain error doctrine does not apply to situations where a party has failed to object to statements made by the other party during jury voir dire, and defendant's failure to raise this issue at trial constitutes waiver under N.C. R. App. P. 10(b)(2).

4. Jury— challenge for cause—opposition to death penalty

The trial court did not abuse its discretion by excusing a prospective juror for cause based on her opposition to the death penalty in a capital sentencing proceeding because: (1) the prospective juror stated that she felt her personal beliefs would prevent her from being able to consider the death penalty; and (2) defendant did not take the opportunity to explore and elicit the prospective juror's views further.

5. Discovery— reciprocal—expert's raw data

The trial court did not err by ordering reciprocal discovery of raw data from defendant's expert witnesses in a capital sentencing proceeding because: (1) N.C.G.S. § 15A-905(b), governing the reciprocal discovery provisions applicable to criminal proceedings, provides that the State was entitled to this information; and (2) defense counsel stated that defendant did not object to copies of the data being provided to the State and, in fact, initiated the discussion of a court order compelling discovery.

6. Criminal Law— prosecutor's argument—parole—defendant's future dangerousness

The trial court did not commit plain error in a capital sentencing proceeding by allowing the State to interject the issues of parole and defendant's future dangerousness during opening statements, cross-examination of defendant, and cross-examination of two witnesses, because: (1) no evidence suggested that the prosecutor attempted to connect defendant's prior record and prior parole eligibility to improper parole considerations with respect to sentencing in this case; (2) the prosecutor did not imply that parole was a possibility in the instant case if the death sentence was not imposed; (3) the prosecutor's only reference to parole was in regard to defendant's 1966 life sentence for murder, from which defendant was paroled, and defendant opened the door to cross-examination on these issues by testifying about his previous life sentence and parole on direct examination; and (4) a prosecutor may urge the jury to recommend death out of concern for the future dangerousness of defendant.

7. Evidence— defendant's prior statement—recross-examination

The trial court did not abuse its discretion in allowing the State to conduct recross-examination of defendant concerning

defendant's statement that he was so drunk that he did not remember shooting and killing his uncle in 1966, and his statement that he had no memory of the killing of the victim in this case, because the questions were within the appropriate scope based on defendant's statements on redirect that he shot his uncle, and that he did not kill the victim in this case.

8. Evidence— expert testimony—voir dire—basis of opinion

The trial court did not err by allowing the State, without objection from defendant, to conduct a voir dire of a defense witness regarding the basis of his opinions prior to the witness being qualified as an expert in a capital sentencing proceeding because: (1) the voir dire occurred entirely outside the presence of the jury; (2) the plain error doctrine does not extend to statements made without objection outside of the presence of the jury during witness voir dire; and (3) defendant's failure to raise this issue during trial constitutes waiver under N.C. R. App. P. 10(b)(2).

9. Evidence— expert testimony—cross-examination—expert fees

The trial court did not abuse its discretion by allowing the State to cross-examine a defense witness concerning his fees, because: (1) an expert's compensation is a permissible cross-examination subject to test partiality; and (2) the record does not reveal that the question was asked in bad faith.

10. Evidence— defendant's prison records—cross-examination

The trial court did not commit plain error by allowing the State to cross-examine a witness with documents in defendant's prison records which were alleged to be not properly introduced into evidence, because defendant agreed to the admissibility of these documents before trial based on the parties stipulating that the documents were competent and admissible into evidence upon motion by either party.

11. Criminal Law— prosecutor's argument—victim's last thoughts

The trial court did not abuse its discretion by failing to intervene ex mero motu during the prosecutor's closing argument concerning the victim's last thoughts, because there is no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim.

12. Criminal Law— prosecutor's argument—callousness of killing—future dangerousness of defendant

The trial court did not abuse its discretion by failing to intervene ex mero motu during the prosecutor's closing argument concerning the callousness of the killing, the fact that defendant will be dangerous in the future, and that the State would like to give these factors as aggravating circumstances but it cannot, because: (1) the statement was a fair synopsis of these aspects of the case, and the prosecutor made clear to the jury that the only aggravating circumstance relevant to defendant's case was his prior capital felony conviction; (2) the prosecutor did not misstate the law and ask the jury to find aggravating circumstances which are not included in N.C.G.S. § 15A-2000(e); and (3) the trial court properly instructed the jurors on the one aggravating circumstance and jurors are presumed to follow the trial court's instructions.

13. Criminal Law— prosecutor's argument—catchall mitigating circumstance

Although defendant did not object and now contends the prosecutor provided an inaccurate explanation of the catchall mitigating circumstance under N.C.G.S. § 15A-2000(f)(9) during closing arguments of a capital sentencing proceeding in order to diminish the importance of mitigation and denigrate the list of nonstatutory mitigating circumstances, the trial court's failure to intervene did not amount to gross impropriety because: (1) the prosecutor specifically stated the mitigators offered by defendant had to be acceptable under the law; and (2) the prosecutor's arguments may legitimately attempt to minimize the significance of the mitigating circumstances.

14. Criminal Law— prosecutor's argument—defendant's background factors not mitigating circumstances

Even assuming arguendo that the prosecutor improperly argued during closing arguments of a capital sentencing proceeding that factors such as defendant's difficult childhood, alcoholism, and low IQ were not mitigating circumstances and could not be considered mitigating evidence by the jurors, any minimization of mitigating circumstances or confusion regarding their definition and purpose was clarified and corrected by the trial court immediately following arguments, and jurors are presumed to follow the trial court's instructions.

15. Criminal Law— prosecutor's argument—favorable diagnosis was reason defense expert hired

The trial court did not err in failing to intervene ex mero motu during the prosecutor's closing arguments stating that the defense expert was hired and paid by defendant for his favorable diagnosis and that the expert had testified only for defendants, because: (1) the prosecution is allowed wide latitude in its arguments and is permitted to argue not only the evidence presented, but also all reasonable inferences which can be drawn from the evidence; and (2) the prosecutor's statements were fully supported by direct evidence or by reasonable inferences which could be drawn from the evidence.

16. Criminal Law— prosecutor's argument—misstatement of defense expert's testimony

Even though the prosecutor's closing argument in a capital sentencing proceeding with regard to an aspect of the defense expert's testimony stating that the expert acknowledged that defendant would not have called him as a witness if he had not given a favorable diagnosis may have been incorrect, defendant did not challenge the prosecutor's recapitulation of the testimony and correct this misstatement at trial; the trial court's instruction cured the inaccuracy; and the inaccuracy was slight and did not infect the trial with unfairness.

17. Criminal Law— prosecutor's argument—future dangerousness of defendant

Although defendant contends the prosecutor injected his personal beliefs to the jury during closing arguments of a capital sentencing proceeding by stating that the future dangerousness of defendant was very relevant to a jury considering whether to give this defendant the death penalty, it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of defendant.

18. Criminal Law— prosecutor's argument—general deterrent effect of death penalty

Although defendant contends the prosecutor improperly appealed to the jury's emotions during closing arguments of a capital sentencing proceeding when he argued the death penalty was the only deterrent for defendant that would sufficiently protect prison guards, prisoners, and anyone defendant would encounter if he escaped, the prosecutor may urge the jury to sen-

tence a particular defendant to death to specifically deter that defendant from engaging in future murders; and the State is free to argue that defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff.

19. Criminal Law— prosecutor's argument—defendant's prior first-degree murder conviction

The trial court did not err by failing to intervene ex mero motu in a capital sentencing proceeding during the prosecutor's closing argument that no aggravating circumstance anywhere in the United States demands the death penalty like a prior first-degree murder, because: (1) the prosecutor did not urge the jury to disregard the law or mislead the jury but encouraged the jury to focus on the facts the prosecutor believed justified imposition of the death penalty; and (2) the argument was proper in light of the prosecutor's role as a zealous advocate.

20. Criminal Law— prosecutor's argument—biblical reference

The prosecutor's biblical reference during closing arguments of a capital sentencing proceeding to Christ's suggestion that we should "render unto Caesar" was not grossly improper because: (1) the reference meant it is the duty of the jury to follow the civil law as given by the trial court, which is the same admonition routinely stated in pattern jury instructions; and (2) the prosecutor did not contend the State's law or its officers were divinely inspired.

21. Criminal Law— prosecutor's argument—parole eligibility

The prosecutor did not improperly interject parole eligibility into the jury's consideration during closing arguments of a capital sentencing proceeding because the prosecutor's statement regarding parole was made in reference to defendant's previous life sentence for the murder of his uncle, and not in regard to the determination of defendant's sentence for the murder of the victim in this case.

22. Criminal Law— prosecutor's argument—cumulative effect

The cumulative effect of the prosecutor's allegedly improper closing arguments during a capital sentencing proceeding did not deny defendant due process of law since defendant has failed to shown on an individual or collective basis that the prosecutor's

arguments strayed so far from the bounds of propriety as to impede defendant's right to a fair trial.

23. Criminal Law— prosecutor's argument—mitigating circumstances

The trial court did not abuse its discretion or cause substantial and irreparable prejudice to defendant by denying defendant's motion for a mistrial in a capital sentencing proceeding based on the prosecutor's allegedly improper closing argument to the jury that a mitigating circumstance was something about the killing that makes the crime less severe or has a tendency to mitigate the crime, because: (1) the trial court instructed the jury before jury arguments were made that the closing arguments were not evidence in the case or instructions in the law; and (2) any minimization of mitigating circumstances or confusion regarding their definition caused by the prosecutor's argument was clarified and corrected by the trial court.

24. Sentencing— capital—aggravating circumstances—prior capital felony conviction

The trial court did not err in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(2) aggravating circumstance concerning defendant having been previously convicted of another capital felony, which was based on defendant's 1966 conviction of first-degree murder upon a plea of guilty, because: (1) it is enough that if a defendant was tried capitally and convicted, he could have received a death sentence; (2) a crime which is statutorily considered a capital felony maintains that status even if a defendant's case is not tried as a capital case; (3) although defendant pled guilty to first-degree murder and, under the now repealed N.C.G.S. § 15-162.1 his case was not a capital case, the crime of first-degree murder was still a capital felony; (4) defendant was not impacted by the invalidation of N.C.G.S. § 15-162.1 since he pled guilty to first-degree murder and was unaffected by the reasons for the statute's invalidation; (5) the trial court decided to submit the (e)(2) circumstance based on the Supreme Court's ruling in defendant's prior appeal stating the record supports the (e)(2) circumstance; and (6) the importance of the prior conviction in this case was that defendant had committed a prior murder, not that defendant was eligible for the death penalty.

25. Appeal and Error— preservation of issues—no argument in brief—issue waived

Although defendant alleges the trial court committed plain error in a capital sentencing proceeding by its jury instruction defining "mitigating circumstance," he has waived this argument by failing to provide an explanation, analysis, or specific contention in his brief as required by N.C. R. App. P. 28(a) and (b)(5).

26. Sentencing— capital—mitigating circumstances—instructions—burden of proof—no plain error

Although defendant contends the trial court committed plain error in a capital sentencing proceeding by its jury instruction describing defendant's burden of proof as to the existence of any mitigating circumstances, the instruction given has previously been held to be proper, and defendant has not cited any new arguments for reconsideration of this issue.

27. Sentencing— capital—mitigating circumstances—instructions—plain error standard

Although defendant contends the trial court's N.C.G.S. § 15A-2000(f)(2) jury instruction in a capital sentencing proceeding should be reviewed under the constitutional error standard set forth in N.C.G.S. § 15A-1443(b) based on the trial court submitting a circumstance that was more restrictive than the circumstance set out in N.C.G.S. § 15A-2000(f)(2), claims of improper wording of mitigating circumstance instructions which were not objected to at trial are reviewed under the plain error standard.

28. Sentencing— capital—mitigating circumstances—instructions—no plain error

Although defendant contends the trial court improperly worded its instruction on the (f)(2) mental or emotional disturbance mitigator in a capital sentencing proceeding by allegedly "lumping together" three disorders including borderline intelligence, alcohol dependence, and cognitive disorder, the trial court did not commit plain error in its jury instruction for the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance because: (1) these three disorders were also submitted individually to the jury, and none were found; (2) the disorders included together in the instruction given for the (f)(2) mitigating circumstance were not connected by any conjunctive wording, thus negating defendant's argument

that the jury was confused by the conjunctive linking of the disorders; and (3) defendant has not shown that absent the error, the jury would have reached a different result.

29. Sentencing— capital—mitigating circumstances mental or emotional disturbance—impaired capacity—peremptory instructions—controverted evidence

The trial court did not err in a capital sentencing proceeding by denying defendant's request for peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) statutory mitigating circumstance that the capital felony was committed while defendant was under the influence of mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(6) statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, because the evidence was in fact controverted.

30. Sentencing— capital—mitigating circumstances—impaired capacity—instructions—no plain error

The trial court did not commit plain error in a capital sentencing proceeding by its submission of the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance, concerning defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, because: (1) contrary to defendant's contention, there was no suggestion that defendant's borderline intellectual functioning, cognitive disorder, or alcohol dependence should be included as part of the instruction; (2) defense counsel indicated his concurrence with how the trial court planned to instruct on this circumstance; and (3) the jury unanimously found that the mitigating circumstances which individually addressed defendant's borderline intellectual functioning, cognitive disorder, and alcohol dependence either did not exist or did not have mitigating value.

31. Sentencing— capital—nonstatutory mitigating circumstances—jury free to reject

Although defendant contends the trial court erred in a capital sentencing proceeding by instructing the jury that it could reject proffered nonstatutory mitigating circumstances on the ground that the circumstances had no mitigating value, this argument has previously been rejected and defendant did not offer a new basis for reconsideration of this issue.

32. Sentencing— capital—nonstatutory mitigating circumstances—peremptory instructions—controverted evidence

The trial court did not err in a capital sentencing proceeding by denying defendant's request for peremptory instructions on the two nonstatutory mitigating circumstances that defendant is subject to being easily influenced by others and that defendant is subject to being victimized and/or harassed by others based on his low intelligence, because this evidence was controverted by evidence that: (1) defendant was the one who suggested the murder to his two cohorts and defendant devised the plan to lure the victim out of his house, revealing that defendant was a leader instead of a follower; and (2) defendant's assaultive episodes in prison showed him to be assertive and willing to use violence, instead of being a victim.

33. Sentencing— capital—nonstatutory mitigating circumstances—subsumption

The trial court did not err in a capital sentencing proceeding by refusing to submit defendant's requested seven nonstatutory mitigating circumstances separately, because the full substance of all the requested circumstances was subsumed into the circumstances which were submitted.

34. Sentencing— capital—mitigating circumstances—mental or emotional disturbance—catchall

The jury's sentencing decision in a capital trial was not unconstitutionally arbitrary based on its failure to find the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(9) catchall mitigating circumstance, because: (1) the evidence of defendant's mental or emotional distress was controverted; (2) the jury is free to reject the evidence and not find a circumstance even if the evidence is uncontradicted; and (3) the jury was properly instructed on the catchall circumstance, and in the absence of contradictory evidence, there is an assumption that the jury comprehended the trial court's instructions.

35. Sentencing— capital—nonstatutory mitigating circumstances

Although defendant contends the jury's sentencing decision was unconstitutionally arbitrary based on the jury's failure to find sixteen of the nonstatutory mitigating circumstances that were

submitted, the Supreme Court has consistently upheld the constitutionality of a jury rejecting a nonstatutory mitigating circumstance if none of the jurors find facts supporting the circumstance or if none of the jurors deem the circumstance to have mitigating value.

36. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence because: (1) defendant was convicted under the theory of premeditation and deliberation; (2) the murder was committed in the victim's home; (3) defendant has previously been convicted of a capital felony; and (4) defendant has numerous prior convictions.

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 Ellis, J., on 11 November 1997 after a capital resentencing proceeding held in Superior Court, Robeson County. Heard in the Supreme Court 20 September 1999.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

Sue A. Berry for defendant-appellant.

LAKE, Justice.

Defendant was tried at the 19 January 1987 Special Session of Superior Court, Robeson County, and was convicted of murder in the first degree. Upon recommendation of the jury, defendant was sentenced to death. On appeal, this Court found no error. *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988). The Supreme Court of the United States granted defendant's petition for writ of certiorari and, on 19 March 1990, vacated the judgment and remanded the case to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Cummings v. North Carolina*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990).

On remand, this Court found *McKoy* error in defendant's capital sentencing proceeding, vacated defendant's sentence of death and remanded for a new capital sentencing proceeding. *State v. Cummings*, 329 N.C. 249, 404 S.E.2d 849 (1991). The resentencing proceeding was held at the 20 October 1997 Criminal Session of Superior Court, Robeson County, and the sentencing jury again rec-

ommended a sentence of death. Accordingly, a sentence of death was again entered on 11 November 1997.

Defendant appeals to this Court as of right from the sentence of death. On appeal, defendant makes seventy-nine arguments, supported by seventy-nine assignments of error. We have carefully considered each of these arguments and conclude that defendant's capital resentencing proceeding was free of prejudicial error and that the death sentence is not disproportionate. We therefore uphold defendant's sentence of death.

The evidence supporting defendant's conviction for first-degree murder is summarized in this Court's prior opinion, *Cummings*, 323 N.C. 181, 372 S.E.2d 541. The basic facts are, as predicated upon an eyewitness account, that on the evening of 15 August 1986, defendant volunteered to kill the victim, Jesse Ward, because Ward and defendant's cousin, Grady Jacobs, had argued about a dog that Ward had sold to Jacobs. That same night, defendant shot and killed Ward in Ward's home. Additional evidence will not be repeated in this opinion except where necessary to discuss the issues now before us.

[1] In his first two assignments of error, defendant contends he was prejudiced when the State engaged in prosecutorial misconduct by subpoenaing all of defendant's confidential prison records and by the disclosure of those records during cross-examination of witnesses. Under section 148-76 of our General Statutes, it is the duty of the Records Section of the State prison system to maintain the combined case records of criminals. N.C.G.S. § 148-76 (1999). The statute specifically provides that "[t]he information collected shall be classified, compared, and made available to law-enforcement agencies, courts, correctional agencies, or other officials requiring criminal identification, crime statistics, and other information respecting crimes and criminals." *Id.*

In the instant case, the State subpoenaed defendant's prison records, and those records were made available to the State pursuant to the statutory mandate of section 148-76. Clearly, the State did not engage in prosecutorial misconduct by following statutory procedure in obtaining prison records. Additionally, defense counsel did not object to the subpoena at trial; rather, counsel made a motion, which was granted, that defense counsel be given copies of all prison records received by the State.

As to defendant's contention that he was prejudiced by disclosure of the prison records in the State's cross-examination of defense

witnesses, defendant provides no support for this contention. Notwithstanding his lack of specificity, we have reviewed the record and find that it does not reveal any inappropriate references by the State to defendant's prison records. We, therefore, find no error in the State's and trial court's adherence to the statutory mandate of section 148-76 and no evidence of prejudicial impact resulting from the release and review of defendant's records.

[2] In his next assignment of error, defendant contends the trial court committed reversible error by excusing, outside of defendant's presence and in violation of his constitutional right to be present, several prospective jurors summoned for a special venire. Prior to defendant's case being called for trial, the trial judge stated for the record that he had previously been contacted by jurors with special problems seeking excusal from jury duty. The trial judge identified each prospective juror by name and gave the reason for each juror's excusal. The trial judge excused one juror because he was ninety-three years old and suffered from Alzheimer's, he excused one because he was a full-time student who had served as a juror in several civil cases during that session of court and he excused three because they were out of the state or country.

" 'Defendant's right to be present at all stages of his trial does not include the right to be present during preliminary handling of the jury venires before defendant's own case has been called.' " *State v. Hyde*, 352 N.C. 37, 51, 530 S.E.2d 281, 291 (2000) (quoting *State v. Workman*, 344 N.C. 482, 498, 476 S.E.2d 301, 309-10 (1996)). The record in the present case reflects that prospective jurors with justifications for excusal from jury duty on the day defendant's case was called for trial were excused before the State called defendant's case. Accordingly, we conclude defendant had no right to be present during the preliminary qualification of these prospective jurors, and we overrule this assignment of error.

[3] In his fourth assignment of error, defendant asserts constitutional error occurred during the *voir dire* of prospective jurors when the prosecutor used examples of aggravating circumstances which were not relied on in defendant's sentencing proceeding. The record reveals that when explaining "how death penalty sentencing works," the prosecutor provided examples of the eleven aggravating circumstances set out by the legislature in section 15A-2000(e) of our General Statutes, including killing a police officer, killing while committing armed robbery and killing for pecuniary gain. When he gave

each example, the prosecutor stated clearly that the example of an aggravating circumstance being used did not apply to the case at hand and that it was "just an example."

Defendant did not object to the prosecutor's statements at trial and now asserts plain error. However, "we have previously decided that plain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000); *see also State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). We have " 'decline[d] 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.' " *Greene*, 351 N.C. at 566-67, 528 S.E.2d at 578 (quoting *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109-10). We now likewise decline to extend application of the plain error doctrine to situations where a party has failed to object to statements made by the other party during jury *voir dire*. Defendant's failure to raise this issue during his trial constitutes waiver, pursuant to Rule 10(b)(2) of the Rules of Appellate Procedure. N.C. R. App. P. 10(b)(2).

[4] Next, defendant contends the trial court erred in excusing prospective juror Inman for cause based on her opposition to the death penalty. 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) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)), *quoted in State v. Morganherring*, 350 N.C. 701, 724, 517 S.E.2d 622, 636 (1999), *cert. denied*, — U.S. —, 146 L. Ed. 2d 322 (2000). During *voir dire*, the following colloquy occurred:

> THE COURT: Do you have any personal, moral, or religious beliefs either against the death penalty or against life imprisonment as an appropriate sentence for a person convicted of first-degree murder?
>
> [PROSPECTIVE JUROR]: I don't believe in capital punishment.
>
> . . . .

[PROSECUTOR]: So is it—is it a correct statement to say that no evidence could get you to change your personal belief; is that correct?

[PROSPECTIVE JUROR]: I wouldn't want to. How should I say this? I don't think that I can give—say someone should be able to die, you know, in any shape or form.

[PROSECUTOR]: Okay. So that—that's a personal belief that you have?

[PROSPECTIVE JUROR]: Right.

[PROSECUTOR]: So, in other words, if part of your responsibility as a juror would be to come in here and sentence somebody to die, would you say that your ability to do that is impaired by your personal beliefs or would your personal beliefs even prevent you from being able to do that?

[PROSPECTIVE JUROR]: I think it would prevent me.

Based on prospective juror Inman's responses, the prosecutor moved for the juror's excusal for cause. Defense counsel did not object to the challenge for cause or follow up with additional questions for prospective juror Inman, and the trial court allowed the prosecutor's challenge.

Prospective jurors with reservations about capital punishment must be able to " '*state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.*' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986)) (alteration in original). 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*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998). This Court has previously stated 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). 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." *Wainwright*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852-53.

In the present case, Ms. Inman stated she felt her personal beliefs would "prevent" her from being able to consider the death penalty, and defendant did not take the opportunity to explore and elicit her views further. In light of the questions and responses here, we cannot conclude the trial court abused its discretion by excusing prospective juror Inman. This assignment of error is overruled.

[5] Next, in assignment of error six, defendant contends the trial court committed error by ordering reciprocal discovery of raw data from defendant's expert witnesses. The reciprocal discovery provisions applicable to criminal proceedings require defendants to produce the following for inspection and copying:

> results or reports of physical or mental examinations or of tests, measurements or experiments 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) (1999); *see also State v. McCarver*, 341 N.C. 364, 397-98, 462 S.E.2d 25, 44 (1995) (State entitled to inspect and copy incomplete personality test which provided expert witness with some "raw data"), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). In the instant case, defense counsel informed the trial court that two psychologists, who were witnesses for the defense, had confidentiality and/or ethical concerns with providing copies of "raw data" from their interviews of defendant unless the trial court so ordered. Defense counsel stated that defendant did not object to copies of the data being provided to the State and, in fact, initiated the discussion of a court order compelling discovery. In light of clear statutory requirements for reciprocal discovery, precedent upholding those requirements, and defendant's own request for a court order in this case, we find no error in the trial court's ordering such discovery.

After review of applicable law, defendant voluntarily abandoned issue seven.

[6] In assignments of error eight, nine, eleven and fourteen, defendant argues the trial court erred in allowing the State to interject the issue of parole during opening statements, cross-examination of

defendant and cross-examination of witnesses Gerald DeRoach and Dr. David Hattem. Defendant did not object to the prosecutor's questioning at trial and now asserts 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 . . . 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.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), *quoted in State v. Cole*, 343 N.C. 399, 419-20, 471 S.E.2d 362, 372 (1996), *cert. denied*, 519 U.S. 1064, 136 L. Ed. 2d 624 (1997). "In order to prevail under a plain error analysis, defendant must establish . . . 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)), *quoted in Morganherring*, 350 N.C. at 722, 517 S.E.2d at 634. *Morganherring*, 350 N.C. at 722, 517 S.E.2d at 634 (quoting *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)).

Defendant objects to several statements regarding parole made by the prosecutor during the resentencing proceeding. First, during opening statements, the prosecutor stated that the murder victim in the instant case was the second person defendant had murdered in cold blood and that defendant had committed the second murder while on parole from his life sentence for the 1966 murder of his uncle. Then, during cross-examination of defendant, the prosecutor asked defendant if his sentence for the 1966 murder had been for "the rest of his natural life." Next, during cross-examination of DeRoach, a volunteer literacy tutor at Central Prison, the prosecutor asked if DeRoach was aware that defendant had been sentenced to a "natural life" term beginning in 1966. Finally, during cross-examination of Dr. Hattem, a psychologist who evaluated defendant, the prosecutor

asked if Dr. Hattem had an opinion about whether defendant would be physically dangerous to other people either in prison or on parole. For the reasons stated below, we overrule the assignments of error associated with the aforementioned statements.

Defendant argues that this Court has consistently held that evidence regarding parole eligibility is not a relevant consideration in a capital sentencing proceeding. *See 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). We agree with defendant's statement of the law; however, our review of the record reveals no evidence suggesting that during opening statements or during cross-examination of witnesses, the prosecutor attempted to connect defendant's prior record and prior parole eligibility to improper parole considerations with respect to sentencing in *this* case. The prosecutor did not imply that parole was a possibility in the instant case if the death sentence was not imposed. His only reference to parole was in regard to defendant's 1966 life sentence for murder, from which sentence defendant was paroled. Given the context in which the unobjected-to statements of the prosecutor were made, we hold they were not improper.

We also note that during direct examination of defendant, defendant voluntarily testified regarding the 1966 murder of his uncle, his resulting life sentence, his escape attempts and escapes from prison, the crimes he committed while on escape, and the several times he was paroled and recommitted after parole violations. By testifying about his previous life sentence and parole, defendant effectively opened the door to cross-examination on these issues. *State v. Bowman*, 349 N.C. 459, 480, 509 S.E.2d 428, 441 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). The prosecutor's questions on cross-examination were merely a reiteration of facts regarding defendant's parole from his previous life sentence brought into evidence by defendant through his own testimony.

With regard to the prosecutor's questions to Dr. Hattem pertaining to the doctor's opinion of defendant's future dangerousness, this Court has previously held that a prosecutor may urge the jury to recommend death out of concern for the future dangerousness of the defendant. *State v. Steen*, 352 N.C. 227, 279, 536 S.E.2d 1, 31 (2000); *see also State v. Conner*, 345 N.C. 319, 333, 480 S.E.2d 626, 632-33, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). In the instant case, there is substantial evidence supporting a concern for the future dangerousness of defendant, not the least of which is the

fact that defendant had previously been convicted of murder. Defendant's contention that the trial court erred in allowing the prosecutor to ask for an opinion regarding defendant's future dangerousness is without merit.

[7] In his next assignment of error, defendant contends the trial court abused its discretion in allowing the State to conduct recross-examination of defendant, over defendant's objection, outside the scope of redirect examination. At the outset, we note that 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*, 523 U.S. 1109, 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*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999).

In the instant case, defendant testified on direct examination about the details of the 1966 murder of his uncle, Odis Bryant. On redirect, defense counsel asked defendant to tell the jury about the problems which occurred between defendant and George Moore, an inmate stabbed by defendant in prison. Defendant stated, "George Moore was a—a violent type person. I'm not saying that—that I haven't had some violence in my life as well. I don't know hardly how to explain it, but whenever I shot my uncle—." Defendant's counsel then interrupted defendant and said, "Tell us about you and George Moore," and defendant proceeded to do so. During redirect, defendant also stated several times that he did not kill Jesse Ward, the victim in this case.

On recross-examination, the prosecutor asked defendant if he remembered answering questions at his last hearing about his uncle's murder. When defendant answered affirmatively, the prosecutor asked defendant if he remembered saying, "I was so near drunk, they said I shot him," a statement which suggests defendant did not remember shooting his uncle. The prosecutor then asked defendant if defendant also remembered telling his psychiatrist that he had no memory of what happened in the Jesse Ward killing. Defense counsel objected to recross questioning regarding the murder of defendant's uncle on the basis that the redirect had focused on violent acts committed by defendant while in prison and, other than defendant's brief mention of his uncle, the redirect did not cover the uncle's murder or focus on the Jesse Ward murder. At the bench, the prosecutor noted

that defendant had stated during redirect that he shot his uncle and had also stated several times that he did not shoot Jesse Ward. The prosecutor argued that questioning regarding defendant's memory of both of the murders was, therefore, proper on recross, and the trial court agreed.

Although defense counsel stopped defendant before he spoke in detail about the murder of his uncle, defendant did state on redirect, "I shot my uncle." Defendant also stated that he did not kill Jesse Ward. We hold that these statements were sufficient to support the trial court's discretionary ruling that the questions on recross were within the appropriate scope and, therefore, we reject defendant's argument. This assignment of error is overruled.

[8] In assignment of error number twelve, defendant contends the trial court erred in allowing the State, without objection from defendant, to conduct a *voir dire* of defense witness Dr. Hattem regarding the basis of his opinions prior to the witness being qualified as an expert. We note that the *voir dire* defendant objects to occurred entirely outside the presence of the jury; therefore, we find no basis, and defendant offers no basis, for how the jury could have been prejudiced by the questions asked. Taking the impossibility of prejudicial impact into consideration, and applying the same reasoning applied in assignment of error number four where we declined to extend application of the plain error doctrine to statements made without objection during jury *voir dire*, we now decline to extend application of the plain error doctrine to statements made without objection, outside the presence of the jury, during witness *voir dire*. Defendant's failure to raise this issue during his trial constitutes waiver pursuant to Rule 10(b)(2). This assignment of error is dismissed.

[9] In defendant's next assignment of error, he contends the trial court erred by allowing the State to cross-examine defense witness Hattem concerning fees charged by the witness and by allowing the State to pose a question that required conjecture on the part of the witness. Specifically, the prosecutor asked defendant's psychologist:

> Q. And, if you had been of the opinion that [defendant] did not qualify for these particular mitigating circumstances, do you think [defendant's attorney] would put you up on there—on the stand and you'd be making a hundred and fifty dollars [an] hour right now?

Although defendant contends he objected to the prosecutor's question, the actual objection was to the form of the question, which we would agree was poorly phrased. As to the substance of the question, "this Court has consistently held that 'an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called.' " *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 636 (1994) (quoting *State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988)), *quoted in State v. Lawrence*, 352 N.C. 1, 22, 530 S.E.2d 807, 821 (2000). Additionally, we have held that "the scope of permissible cross-examination is limited only by the discretion of the trial court and the requirement of good faith." *Locklear*, 349 N.C. at 156, 505 S.E.2d at 299. " 'A prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith.' " *State v. Fleming*, 350 N.C. 109, 139, 512 S.E.2d 720, 740 (quoting *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992)), *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). The record does not support defendant's broad and unsubstantiated allegation that this question by the prosecutor was asked in bad faith. The trial court did not abuse its discretion in overruling defendant's objection.

[10] In his fifteenth and sixteenth assignments of error, defendant contends the trial court erred in allowing the State to cross-examine Dr. Hattem with documents which were not properly introduced into evidence. Defendant acknowledges that no objection was made at trial and that, therefore, these issues may be reviewed only for plain error.

The documents defendant contends were not properly admitted into evidence were part of defendant's North Carolina Department of Correction prison records, which the parties had stipulated before trial were "true, accurate, and authentic copies of the original records" and were "competent and admissible into evidence at [the] sentencing hearing upon the motion of either party." Defendant had agreed, therefore, to the admissibility of the documents in question before trial. Defense witness Dr. Hattem testified that the defense had provided him with the complete prison records for his review, and the doctor answered questions regarding the content of those records during examination. Defendant does not challenge the accuracy of the prison records or the veracity of the statements made by Dr. Hattem regarding their contents. Under these circumstances, and using plain error analysis, any error in the introduction of part of the stipulated documents into evidence without adequate foundation is

not the type of exceptional case where we can say that the claimed error is so fundamental that justice could not have been done. Accordingly, we find no merit in these arguments and overrule the assignments of error on which they were based.

After review of applicable law, defendant voluntarily abandoned issues seventeen and eighteen.

In assignments nineteen through thirty and thirty-two, defendant assigns error to portions of the State's closing arguments, though no objection was interposed during any portion of the closing arguments. When the defense fails to object to a prosecutor's argument, "the remarks '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.' " *State v. Basden*, 339 N.C. 288, 300, 451 S.E.2d 238, 244 (1994) (quoting *State v. Brown*, 327 N.C. 1, 19, 394 S.E.2d 434, 445 (1990)), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995). Having examined defendant's thirteen assignments of error relating to the prosecutor's closing arguments for gross impropriety requiring *ex mero motu* intervention by the trial court, we find no error and address each argument below.

In reviewing the prosecutor's arguments, we must stress that "prosecutors are given wide latitude in their argument[s]." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). Additionally, "the boundaries for jury argument at the capital sentencing proceeding are more expansive than at the guilt phase." *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513-14, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). In fact, " 'prosecutors have a duty to advocate zealously that the facts in evidence warrant imposition of the death penalty.' " *Id.* at 360, 514 S.E.2d at 514 (quoting *State v. Williams*, 350 N.C. 1, 25, 510 S.E.2d 626, 642, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999)). To determine the propriety of the prosecution's argument, the Court must review the argument in context and analyze the import of the argument within the trial context, including the evidence and all arguments of counsel. *Darden v. Wainwright*, 477 U.S. 168, 179, 91 L. Ed. 2d 144, 156 (1986).

[11] Defendant first objects to the prosecutor's speculation about the victim's last thoughts when the prosecutor posed the following questions to the jury:

> Was he thinking that he'd never have the opportunity to bounce his grandchildren on his knee; never have the opportunity to go out and have another good meal; read a good book; do things that we all, in our everyday lives, take for granted? No. He was laying [sic] there thinking what did I do to deserve to die? What did I do to deserve to be gunned down in my own home?

Defendant contends the prosecutor's argument was designed to inflame the jury and was grossly improper. Although this Court has held that it will not condone an argument asking jurors to put themselves in place of the victim, "this Court has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim." *State v. Warren*, 348 N.C. 80, 109, 499 S.E.2d 431, 447, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998); *see also State v. Woods*, 345 N.C. 294, 312, 480 S.E.2d 647, 655, *cert. denied*, 522 U.S. 875, 139 L. Ed. 2d 132 (1997). In the instant case, the prosecutor's argument was fairly premised on the testimony presented by the family members who found the victim's dead body. The argument did not misstate or manipulate the evidence and was not improper.

[12] The next part of the closing argument defendant contends was improper was the prosecutor's statement that

> [t]here are a lot of other things about this case like the callousness of the killing, the fact that the defendant will be dangerous in the future, that we would like to give you as aggravating circumstances, but we cannot do that. We are limited by the law.

Defendant argues the State improperly argued its desire to present aggravating circumstances which are not specifically listed as aggravating circumstances in section 15A-2000(e), and contends the trial court should have intervened *ex mero motu*.

Although the prosecutor did make the statement referenced by defendant, the statement was a fair synopsis of these aspects of the case, and the prosecutor made clear to the jury that there was only one aggravating circumstance relevant to defendant's case under North Carolina law, that defendant had a prior capital felony conviction. In his argument, the prosecutor did not misstate the law or ask the jury to find aggravating circumstances which are not included in section 15A-2000(e). The trial court properly instructed the jurors on

the one aggravating circumstance and cautioned the jurors that they were to apply the law as given to them and "not as you think it is or as you might like it to be." This Court presumes that jurors follow the trial court's instructions. *State v. Richardson*, 346 N.C. 520, 538, 488 S.E.2d 148, 158 (1997), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998). Therefore, even assuming the prosecutor's argument was improper, the trial court's instructions would have cured the impropriety. *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996).

[13] Defendant next contends the prosecutor presented an inaccurate explanation of the catchall mitigating circumstance in section 15A-2000(f)(9) which diminished the importance of mitigation and denigrated the list of nonstatutory mitigating circumstances. In explaining mitigating circumstances, the prosecutor made the following statement:

> [T]here are nine mitigating circumstances there in the statute. But number nine says any other circumstance arising from the evidence which the jury deems to have mitigating value. What they use that number nine for is to come up with anything that they can think of to fill up this issues and recommendation sheet with as many as they can think of to try to get you to find them and use them to balance. Anything that they come up with, under the law, the Judge has to submit to you.
>
> And what they do is they just try to think of everything that they can possibly think of and put it all down here in the hopes that you will find all or most of them and it's used . . . to play the numbers game.
>
> And the first thing I'd like to say to you is numbers mean nothing. You assign the value to any aggravating circumstance and you will assign the value to any mitigating circumstance. So there can be a hundred mitigating circumstances and one aggravating circumstance and the aggravating circumstance can still outweigh the mitigating circumstances.

Defendant contends the prosecutor erroneously argued that the trial court must submit anything the defense can come up with to fill up the issues and recommendation sheet. While we agree that in contrast to its consideration of statutory mitigating circumstances, the trial court may consider nonstatutory circumstances but is not required to do so, *State v. Cameron*, 314 N.C. 516, 518-19, 335 S.E.2d

9, 10 (1985), we disagree with defendant's characterization of the prosecutor's argument. The prosecutor specifically stated that the mitigators offered by defendant had to be acceptable "under the law." "The prosecutor's arguments complained of here were an attempt to minimize the value of the mitigating circumstances," *Thomas*, 350 N.C. at 361, 514 S.E.2d at 514, and it is well settled that "prosecutors may legitimately attempt to deprecate or belittle the significance of mitigating circumstances," *Basden*, 339 N.C. at 305, 451 S.E.2d at 247, *quoted in Thomas*, 350 N.C. at 361, 514 S.E.2d at 514. We conclude this unobjected-to argument did not amount to gross impropriety requiring intervention by the trial court on its own motion.

[14] In assignments of error twenty-two and twenty-six, part of the assignments of error pertaining to the closing arguments, defendant contends the prosecutor improperly argued that factors such as defendant's difficult childhood, alcoholism and low IQ were not mitigating circumstances and could not be considered mitigating evidence by the jurors. The prosecutor stated that mitigating circumstances are those circumstances which may be considered extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first-degree murders. He also stated that circumstances which take place before or after the killing, such as defendant's difficult childhood, have nothing to do with the killing and are therefore not mitigating.

Defendant argues that a mitigating circumstance does not have to relate to what happened to the victim but rather may relate to any aspect of defendant's character or record, or circumstance of the particular offense which might support the imposition of a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 988 (1978); *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981).

The prosecutor in this case zealously encouraged the jury to consider and question whether aspects of the defendant's character, record and background should reduce defendant's moral culpability for the killing. This Court has held it is not error for the trial court to fail to interject *ex mero motu* in response to a prosecutor's argument that a proffered mitigator has little value. *Thomas*, 350 N.C. at 361, 514 S.E.2d at 514; *see also State v. Geddie*, 345 N.C. 73, 100, 478 S.E.2d 146, 160 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997); *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). We have also

held it is not error for the trial court to fail to interject *ex mero motu* in response to a prosecutor's argument that proffered nonstatutory mitigators have no value at all. *State v. Powell*, 340 N.C. 674, 694, 459 S.E.2d 219, 229 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996).

Prior to closing arguments in the present case, the trial court instructed the jury that the final arguments were neither evidence in the case nor instructions on the law, but were given to assist the jury in evaluating the evidence. After closing arguments, the trial court instructed the jury as follows:

> It is now your duty to decide from all the evidence presented what the facts are. You must then apply the law, which I'm about to give you, concerning punishment to those facts.
>
> It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be. . . .
>
> . . . .
>
> 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 a crime than first-degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first-degree murders.
>
> Our law identifies several possible mitigating circumstances. However, in considering Issue 2, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstance arising from the evidence which you deem to have mitigating value.

The trial court went on to outline and submit statutory mitigating circumstances, which the jury had the duty to consider as having mitigating value if determined to exist, including whether defendant was under the influence of a mental or emotional disturbance and whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were impaired. Further, as to nonstatutory mitigating circumstances, the trial court instructed the jury to assess whether defendant was the

product of a socially deprived environment and whether the submitted circumstances that he dropped out of school at age fourteen, could not read or write until after he was fifty, began drinking alcohol at an early age, was an alcoholic when the offense was committed, overcame illiteracy and regularly attended church while in prison, suffered from serious health problems, had a full scale IQ of 74, and is easily influenced by others should be found to exist and to have mitigating value. In addition, the jury was instructed that it had the duty to consider any other circumstances which the jury could find from the evidence. Therefore, any minimization of mitigating circumstances or confusion regarding their definition and purpose resulting from arguments of counsel was clarified and corrected by the trial court immediately following arguments. This Court presumes that jurors follow the trial court's instructions. *Richardson*, 346 N.C. at 538, 488 S.E.2d at 158. Assuming *arguendo* that the prosecutor's argument about mitigating circumstances was improper in any respect, the trial court's accurate instructions would have cured the impropriety. *Buckner*, 342 N.C. at 238, 464 S.E.2d at 437.

[15] In assignment twenty-three, again relating to the reasonableness of the closing argument, defendant contends the prosecutor's arguments inferring bias on the part of Dr. Hattem were grossly improper and required intervention by the trial court *ex mero motu*. The prosecutor stated that Dr. Hattem was hired and paid by defendant for his favorable diagnosis and that Dr. Hattem had testified only for defendants, thus implying bias in favor of all defendants. As stated previously in this opinion, the prosecution is allowed wide latitude in its arguments, especially at sentencing, and is permitted to argue not only the evidence presented, but also all reasonable inferences which can be drawn from the evidence. *State v. Chandler*, 342 N.C. 742, 757, 467 S.E.2d 636, 645, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996). The prosecutor's statements identified by defendant as being objectionable, but not objected to by defendant at trial, were fully supported by the direct evidence of record or by reasonable inferences which could be drawn from that evidence. They did not exceed the "broad bounds allowed in closing arguments at the capital sentencing proceeding." *Thomas*, 350 N.C. at 362, 514 S.E.2d at 514.

[16] Defendant next contends that during closing, the prosecutor improperly stated that Dr. Hattem acknowledged that defendant would not have called Dr. Hattem as a witness if he had not given a favorable diagnosis. In actuality, in response to the prosecutor's

question, Dr. Hattem stated that the prosecutor would have to ask defense counsel that question.

We note for emphasis that, once again, defendant did not take the opportunity to challenge the prosecutor's recapitulation of the testimony and correct this misstatement at trial. The jurors were left to follow the trial court's instruction that "if [their] recollection of the evidence differs from that of the court or of the district attorney or the defense attorney, [they were] to rely solely upon [their] recollection of the evidence in [their] deliberations." We conclude that even though the prosecutor's argument in regard to this aspect of Dr. Hattem's testimony may have been incorrect, the trial court's instruction cured the inaccuracy. *Buckner*, 342 N.C. at 238, 464 S.E.2d at 437. This inaccuracy in the prosecutor's portrayal of the expert's testimony was slight and did not so infect the trial with unfairness as to deny defendant due process of law.

[17] In defendant's next assignment of error pertaining to closing arguments, defendant contends the prosecutor, in his argument that the future dangerousness of defendant was "very relevant to a jury considering whether or not to give this defendant the death penalty," impermissibly injected his personal beliefs into jury arguments. However, as previously stated in this opinion, this Court has 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." *Williams*, 350 N.C. at 28, 510 S.E.2d at 644. The prosecutor's argument was proper in light of his role as a zealous advocate. *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).

[18] In assignment of error twenty-seven, defendant argues the prosecutor improperly appealed to the jury's emotions during closing when he argued the death penalty was the only deterrent for defendant that would sufficiently protect prison guards, prisoners and anyone defendant would encounter if he escaped. This Court has consistently "approved prosecutorial arguments urging the jury to sentence a particular defendant to death to specifically deter that defendant from engaging in future murders." *State v. McNeil*, 350 N.C. 657, 687, 518 S.E.2d 486, 504 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 321 (2000). We have also held that the State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. *Steen*, 352 N.C. at 279, 536

S.E.2d at 31; *see also State v. Richmond*, 347 N.C. 412, 445, 495 S.E.2d 677, 695-96, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). The prosecutor's argument regarding future dangerousness was not improper.

[19] Next, defendant contends the prosecutor improperly argued that "no aggravating circumstance anywhere in the United States demands the death penalty like a prior first-degree murder." In this argument, the prosecutor did not urge the jury to disregard the law or mislead the jury, but "simply encouraged the jury to focus on the facts [the prosecutor] believed justified imposition of the death penalty." *State v. Bishop*, 343 N.C. 518, 553, 472 S.E.2d 842, 861 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). In a similar case, this Court found the prosecutor's argument that "if the aggravating circumstances don't outweigh the mitigating circumstances that you may find, then there will never be a case where they do," was proper "in light of [the prosecutor's] role as a zealous advocate." *McCollum*, 334 N.C. at 227, 433 S.E.2d at 154. In the instant case, we conclude that the prosecutor's argument in this regard was proper as well and did not warrant the trial court's intervention *ex mero motu*.

[20] In his next assignment of error, assignment twenty-nine, defendant contends the prosecutor improperly argued a biblical reference when he said:

> I want you to also remember what Jesus said when the Pharisees tried to trip him up and asked Him should we pay taxes. And Jesus said well, who's on the coin? And the answer was Caesar. Jesus said well, render unto Caesar what is Caesar's.
>
> And, ladies and gentlemen, in this case, the defendant belongs to Caesar and that means that defendant belongs to the death penalty under the law of the land. And Christ was saying to follow the law and give to God what's God's. Give to Caesar what is Caesar's and this defendant belongs to Caesar.

"Biblical references this Court has disapproved have been arguments to the effect that the law enforcement powers of the State come from God and that to resist those powers is to resist God." *Geddie*, 345 N.C. at 100, 478 S.E.2d at 160. When the potential impact of a biblical reference is slight, it does not amount to gross impropriety requiring the trial court's intervention. *Williams*, 350 N.C. at 26-27, 510 S.E.2d at 643; *see also 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).

The prosecutor's argument in the case *sub judice*, although inartfully stated, was not grossly improper. As read in context, the prosecutor's reference to Christ's suggestion that we should "render unto Caesar" means, in essence, that it is the duty of the jury to follow the civil law, as given by the trial court. This is the same admonition routinely stated by our trial courts in pattern jury instructions. The prosecutor did not contend that the State's law or its officers were divinely inspired; he merely urged the jury to return a recommendation of death under the law. This assignment of error is overruled.

[21] Defendant next contends the prosecutor improperly interjected parole eligibility into the jury's consideration during closing arguments when he said, "You know he was paroled from his life sentence and he acquired the same weapon he used to kill [his uncle] with." Defendant correctly cites precedent holding that evidence regarding parole eligibility is not a relevant consideration in a capital sentencing proceeding. *See Conaway*, 339 N.C. at 520, 453 S.E.2d at 845. However, defendant has misapplied the contextual application of that holding. In *Conaway*, the holding was in response to the question of whether a jury should consider parole eligibility in determining whether a defendant should be given a life sentence instead of the death penalty. In the case *sub judice*, the prosecutor's statement regarding parole was made in reference to defendant's previous life sentence for the murder of his uncle, not in regard to the determination of defendant's sentence for the murder of Ward. Therefore, the *Conaway* precedent cited by defendant is not applicable to the reference to parole made by the prosecutor in the case at hand.

With regard to the question of whether the prosecutor improperly interjected defendant's *prior* parole eligibility in this case, we have reviewed this same issue in assignments of error eight, nine, eleven and fourteen of this opinion and, based on the reasoning applied there, we conclude there was no error here and overrule these assignments of error.

After review of applicable law, defendant voluntarily abandoned issue thirty-one.

[22] In assignment thirty-two, defendant's final assignment of error relating to closing arguments, he argues that the cumulative effect of the prosecutor's allegedly improper arguments so infected the trial with unfairness as to deny defendant due process of law. For all of the reasons explained above for each of defendant's individual contentions regarding the prosecution's closing arguments, we hold this

final argument lacks merit. Defendant has not shown on an individual or collective basis that the prosecutor's arguments "stray[ed] 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.

[23] After counsel completed their closing arguments, and before the trial court charged the jury, defense counsel filed a motion for mistrial based upon "the improper closing argument of Assistant District Attorney Rodney G. Hasty wherein he advised the jury that a mitigating circumstance was something about the killing that makes the crime less severe or has the tendency to mitigate the crime." The trial judge heard oral arguments on the motion and pointed out that before jury arguments were made, he had instructed the jury that the closing arguments were not evidence in the case or instructions in the law. The trial judge also referred counsel to instructions he intended to give the jurors concerning their duty to apply the law as given to them by him. The trial judge stated that he believed these instructions would cure any misstatement in the prosecutor's argument and, accordingly, he denied the motion for mistrial. Defendant now contends, in assignment thirty-three, that the prosecutor's misstatement of the law in this case was too serious to be cured by the trial court's final instructions and that the trial court erred in denying defendant's motion for mistrial.

Section 15A-1061 of our General Statutes provides that the trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1999). 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, 422-23 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). A mistrial is " 'a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.' " *State v. Sanders*, 347 N.C. 587, 601, 496 S.E.2d 568, 577 (1998) (quoting *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)).

As stated in our review and analysis pertaining to issues twenty-two and twenty-six, any minimization of mitigating circumstances or confusion regarding their definition caused by the prosecutor's argument was clarified and corrected by the trial court immediately following arguments. Assuming *arguendo* that this further reference by

the prosecutor about mitigating circumstances was lacking or improper in any respect, the trial court's instructions would have cured the impropriety. *Buckner*, 342 N.C. at 238, 464 S.E.2d at 437. Accordingly, we hold the trial court did not abuse its discretion or cause substantial and irreparable prejudice to defendant's case in denying defendant's motion on this basis for mistrial. This assignment of error is overruled.

After review of applicable law, defendant voluntarily abandoned issue thirty-four.

[24] In arguments thirty-five through thirty-eight, defendant contends the sole aggravating circumstance submitted by the trial court and found by the jury in this case was not supported by the record. The aggravating circumstance submitted was the (e)(2) aggravator, which reads in pertinent part, "[t]he defendant had been previously convicted of another capital felony," N.C.G.S. § 15A-2000(e)(2) (1999), and which was submitted based upon defendant's 1966 conviction of first-degree murder upon a plea of guilty. Defendant argues that his guilty plea was entered under N.C.G.S. § 15-162.1, which was repealed effective 25 March 1969, and under that statute if a defendant tendered a plea of guilty to first-degree murder and that plea was agreed to by the solicitor for the State and approved by the presiding judge, the acceptance had the effect of limiting defendant's potential punishment to a life sentence and precluding a sentence of death. Defendant argues, therefore, that since he was not eligible for the death penalty by virtue of his plea, he was not convicted of a capital felony, as required by the (e)(2) aggravating circumstance. We disagree.

At the outset, we note that there is a relevant distinction between a "capital case" and a "capital felony" and the way each is affected when it is determined whether the death penalty will or will not be presented to the jury as a sentencing option. In defining a "capital felony," it is necessary to interpolate definitions outlined in two different statutes. Section 14-17 of our General Statutes provides that "[a] murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000." N.C.G.S. § 14-17 (1999). Section 15A-2000(a)(1) defines a "capital felony" as "one which *may be* pun-

ishable by death." N.C.G.S. § 15A-2000(a)(1) (emphasis added). Reading these two sections together, there is no question that first-degree murder is a "capital felony," and that "[t]he test is not the punishment which *is* imposed, but that which *may be* imposed." *Fitzpatrick v. United States*, 178 U.S. 304, 307, 44 L. Ed. 1078, 1080 (1900) (emphasis added).

This Court has approved the definition of a "capital case" " 'as one in which the death penalty may, but need not necessarily, be imposed.' " *State v. Barbour*, 295 N.C. 66, 70, 243 S.E.2d 380, 382-83 (1978) (quoting *State v. Clark*, 18 N.C. App. 621, 624, 197 S.E.2d 605, 607 (1973)). However, "whether or not a particular defendant depending upon the date his crime was committed faces the death penalty the crime of first degree murder is a '*capital offense*' . . . . This is so notwithstanding that the trial itself may not be a 'capital case.' " *State v. Sparks*, 297 N.C. 314, 321, 255 S.E.2d 373, 378 (1979). "A case loses its 'capital' nature if it is determined that while the death penalty is a possible punishment for *the crime charged*, it may not be imposed in *that particular case*." *State v. Jackson*, 317 N.C. 1, 7, 343 S.E.2d 814, 818 (1986), *sentence vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). A capital felony may be treated as a noncapital case when the State has no evidence of any aggravating circumstances. *State v. Britt*, 320 N.C. 705, 710, 360 S.E.2d 660, 662 (1987); *see also State v. Braswell*, 312 N.C. 553, 559, 324 S.E.2d 241, 246 (1985) (prosecution announced that it would not seek the death penalty due to a lack of any aggravating circumstances); *State v. Leonard*, 296 N.C. 58, 62, 248 S.E.2d 853, 855 (1978) (prosecution announced at the beginning of the trial that the State would not seek the death penalty). This does not, however, change the fact that defendant in the instant case was previously convicted of having committed an offense that is a "capital felony." A crime which is statutorily considered a "capital felony" maintains that status even if a defendant's case is not tried as a "capital case." It is enough that *if* a defendant was tried capitally and convicted, he *could* have received a death sentence. *State v. Flowers*, 347 N.C. 1, 34, 489 S.E.2d 391, 410 (1997) (holding (e)(2) appropriate where evidence showed defendant was convicted of first-degree murder and tried capitally, but received a life sentence), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Therefore, although defendant pled guilty to first-degree murder and, under the now repealed N.C.G.S. § 15-162.1, his case was not a "capital case," the crime of first-degree murder was still a "capital felony."

In support of his argument, defendant relies on precedent in *State v. Bunning*, 338 N.C. 483, 450 S.E.2d 462 (1994). In *Bunning*, the defendant pled guilty to first-degree murder in Virginia in 1973. The death penalty was not in effect in Virginia at that time, as the Supreme Court of Virginia had held, in *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972), that part of the Virginia statute that allowed the death penalty was unconstitutional. At Bunning's 1992 trial for murder in North Carolina, the 1973 Virginia conviction for murder was used to support the submission of the (e)(2) aggravator. On appeal, this Court reasoned that because defendant could not have received the death penalty for the crime to which he pled guilty in Virginia, he had not pled guilty to a capital felony, and therefore the (e)(2) aggravator was improperly submitted. *Bunning*, 338 N.C. at 493-94, 450 S.E.2d at 467.

Defendant argues that the *Bunning* precedent applies to his case and dictates that because defendant could not have received the death penalty for his 1966 plea of guilty, there was no support for the (e)(2) aggravator in his present case. He further argues the definition of "capital felony" in (e)(2) requires that a particular sentencer could have sentenced the defendant to death after the defendant's conviction and not merely that defendant was convicted of a crime which, under other circumstances, may have been punishable by death. We disagree.

In contrast to the case *sub judice*, in *Bunning* there was not a possibility that the defendant could receive the death penalty under his Virginia conviction, whether he pled guilty or was found guilty by a jury. In the instant case, the death penalty was in place in North Carolina in 1966, and the crime of first-degree murder to which defendant pled guilty was punishable by death, as it is now. When defendant's plea of guilty was accepted by the prosecutor and approved by the trial court, the case itself may have lost its capital nature with respect to punishment; however, his crime remained a capital crime. Had the prosecutor or trial judge refused to accept defendant's tender of a guilty plea, defendant could have received a death sentence or life imprisonment, depending upon the recommendation of the jury. N.C.G.S. § 15-162.1(a) (1965) (repealed 1969).

Defendant additionally argues there was no constitutional death penalty in North Carolina at the time he pled guilty to first-degree murder and, therefore, he could not have pled guilty to a capital felony. Defendant bases this contention on the fact that his guilty plea was entered under section 15-162.1 and in 1969 this statute was inval-

idated because "the Federal Constitution does not permit the establishment of a death penalty applicable only to those defendants who assert their constitutional right to contest their guilt before a jury." *State v. Anderson*, 281 N.C. 261, 267, 188 S.E.2d 336, 340 (1972).

Section 15-162.1(b) provided that, if a defendant's guilty plea was accepted, the defendant would receive a sentence of life imprisonment. *Id.* at 267, 188 S.E.2d at 341. However, at the time, N.C.G.S. § 14-17 required punishment by death upon a conviction for first-degree murder unless the jury recommended life imprisonment. *Id.* Therefore, those who asserted their constitutional right to contest their guilt for first-degree murder and were subsequently convicted risked receiving the death penalty, whereas those whose guilty pleas were accepted did not. This inconsistency was recognized as being unconstitutional by the United States Supreme Court and, consequently, defendants who received death sentences while section 15-162.1 was in effect had their sentences changed to life imprisonment. *Id.* at 266, 188 S.E.2d at 340.

The foregoing notwithstanding, defendant's argument that there was not a constitutional death penalty in this state at the time of his guilty plea is without merit. This Court has observed that decisions that have ruled capital punishment statutes as unconstitutional have "not affect[ed] the validity of a defendant's conviction of a capital crime; [they] merely deprived the Court of the power to impose the death sentence." *State v. Alexander*, 284 N.C. 87, 94, 199 S.E.2d 450, 455 (1973), *cert. denied*, 415 U.S. 927, 39 L. Ed. 2d 484 (1974). Additionally, defendant was not impacted by the invalidation of section 15-162.1, as he did plead guilty to first-degree murder and, therefore, was unaffected by the reasons for the statute's invalidation.

Further, when defendant raised his concerns about the propriety of submitting the (e)(2) aggravating circumstance at trial, the alternative (e)(3) circumstance, prior conviction of a felony involving the use or threat of violence, was suggested by the State. In deciding to submit the (e)(2) circumstance, the trial court primarily relied on this Court's ruling in defendant's prior appeal where we stated, as to this circumstance, that "[a]fter full and cautious deliberation, we conclude that the record fully supports the jury's finding of the aggravating circumstance submitted." *Cummings*, 323 N.C. at 196, 372 S.E.2d at 551.

We note that there is little distinction between the (e)(2) and the (e)(3) aggravators. *Warren*, 348 N.C. at 118, 499 S.E.2d at 452. Both circumstances reflect upon a defendant's character as a recidivist and tend to demonstrate that the crime committed was part of a long-term course of violent conduct. *Brown*, 320 N.C. at 224, 358 S.E.2d at 30. The importance of the prior conviction in this case was that defendant had committed a prior murder, not that defendant was eligible for the death penalty.

When defendant pled guilty to first-degree murder in 1966, he pled guilty to a crime that the legislature had classified as a capital felony, a crime for which the possibility of a death sentence then existed. He avoided the possibility of a death sentence by pleading guilty; however, we do not believe it was the legislature's intent to allow defendants who plead guilty to first-degree murder to avoid an aggravating circumstance that would have been applicable had they been found guilty by a jury. As previously discussed, defendant's guilty plea to first-degree murder did not alter the classification of the offense as a capital felony. Therefore, after careful consideration of defendant's current appeal of the submission of the (e)(2) aggravator, we reaffirm our conclusion that the record fully supports the submission and finding of this aggravating circumstance. The trial court properly instructed the jury to consider the (e)(2) aggravator, and this assignment of error is overruled.

[25] In assignment thirty-nine, defendant maintains the trial court erred in its instruction to the jury defining "mitigating circumstance." Although defendant concedes that he made no objection at trial to the instruction given, which we note was quoted from North Carolina criminal pattern jury instruction 150.10, he urges this Court to review the instruction for plain error.

The importance of a timely objection to jury instructions is set out in Rule 10(b)(2) of the Rules of Appellate Procedure, which provides that "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection." N.C. R. App. P. 10(b)(2). "The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. As discussed previously in this

opinion, "a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4).

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than [the burden] imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). In meeting the heavy burden of plain error analysis, a defendant must convince this Court, with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict. *Fleming*, 350 N.C. at 132, 512 S.E.2d at 736; *see also State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). "[D]efendant *has the burden of showing* . . . (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (emphasis added).

Although defendant alleges plain error in the title of the presentation of assignment of error thirty-nine, he provides no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done. The right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's instruction amounted to plain error, as required by subsections (a) and (b)(5) of Rule 28. N.C. R. App. P. 28(a), (b)(5). To hold otherwise would negate those requirements, as well as those in Rule 10(b)(2). *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule. By simply relying on the use of the words "plain error" as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review. *See* N.C. R. App. P. 10(c)(4); *State v. Braxton*, 352 N.C. 158, 196, 531 S.E.2d 428, 450-51 (2000); *State v. Call*, 349 N.C. 382, 415, 508 S.E.2d 496, 516 (1998). Accordingly, we hold that defendant has waived appellate review of this assignment of error, and it is dismissed.

[26] Defendant next maintains the trial court committed plain error in its instruction to the jury describing defendant's burden of proof as to the existence of any mitigating circumstances. The instruction given has previously been held to be proper, and defendant concedes that his argument has previously been rejected by this Court in *State v. Payne*, 337 N.C. 505, 533, 448 S.E.2d 93, 109 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Defendant has not cited any new arguments supporting reconsideration of this issue, and this assignment of error is therefore overruled.

[27] Defendant's complaint under assignment of error forty-one concerns the trial court's manner of instructing on the mitigating circumstance provided by section 15A-2000(f)(2), which reads: "(2) [t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). In the jury instruction given, the trial court said:

> It is your duty to consider the following mitigating circumstances and any others which you find from the evidence:
>
> Number 1: Consider whether this murder was committed while the defendant was under the influence of a mental or emotional disturbance.
>
> A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills.
>
> You would find this mitigating circumstance if you find that the defendant had borderline intelligence, suffered from the mental disorder of alcohol dependence, suffered from the mental order [sic] of cognitive disorder, and that as a result, the defendant was under the influence of a mental or emotional disturbance when he killed the victim.

Defendant contends this instruction improperly limited the scope of the circumstance by "lumping together" in the conjunctive the potential bases for finding the circumstance. Defense witness Dr. Hattem testified that defendant was under the influence of three mental disorders at the time of the crime: borderline intelligence, alcohol dependence, and cognitive disorder. Defendant maintains that because of the way the instruction was worded, if a juror rejected any one of these diagnoses, he or she would reject the mitigating circumstance completely.

At the outset, we must again discuss the standard of review applicable to defendant's assignment of error. Defendant concedes that he did not object to the trial court's instructions on (f)(2). In fact, the record shows that before giving the instruction to the jury, the trial court read the instructions to the parties, and defendant specifically stated that he had *no* objection to the wording given. However, in spite of his agreement to the suggested instructions, defendant now submits this issue should not be reviewed for plain error, but rather should be reviewed under the constitutional error standard as set forth in N.C.G.S. § 15A-1443(b). As support, defendant cites this Court's holding that when a trial judge fails to submit a statutory mitigating circumstance supported by the evidence, the constitutional error standard of review applies. *State v. Mahaley*, 332 N.C. 583, 598, 423 S.E.2d 58, 67 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). Defendant contends that because the trial court submitted a circumstance that was more restrictive than the circumstance set out in section 15A-2000(f)(2), the trial court effectively precluded consideration of the mitigating circumstance. We disagree.

Defendant's claim of error does not relate to a question of submission of the (f)(2) circumstance, as was the case in *Mahaley*, but rather relates to the wording of the instruction as it was given. This Court has consistently reviewed claims of improper wording of mitigating circumstance instructions which were not objected to at trial under the plain error standard. *See Steen*, 352 N.C. at 269, 536 S.E.2d at 25; *State v. Hedgepeth*, 350 N.C. 776, 788, 517 S.E.2d 605, 613 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 223 (2000); *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). Accordingly, defendant's assignment of error is reviewed for plain error only.

[28] In reviewing the record to determine the validity of defendant's assertion that he was prejudiced by the wording of the trial court's instruction on the (f)(2) mitigator, we note that the three disorders

defendant maintains were improperly lumped together as part of the instruction were also submitted individually to the jury. The three disorders included in the instruction for the (f)(2) mitigator, submitted as statutory mitigating circumstance number one, were borderline intelligence, alcohol dependence and cognitive disorder. In nonstatutory mitigating circumstance number seven, the jury unanimously found that the fact that defendant was an alcoholic when the offense was committed either did not exist or did not have mitigating value. In nonstatutory mitigating circumstance number sixteen, the jury unanimously found that the fact that defendant has a full scale IQ of 74, which falls in the borderline range of intellectual functioning, either did not exist or did not have mitigating value. As to the claim of a cognitive disorder, a number of the nonstatutory mitigating circumstances submitted relate to cognitive disorders, and the jury unanimously found either that none of them existed or that none had mitigating value. These include circumstances four (while attending school, defendant was held back three different times), five (defendant dropped out of school in the sixth grade), fifteen (cognitive disorder and borderline intellectual functioning cannot be treated successfully), seventeen (subject to be easily influenced by others), and eighteen (subject to being victimized and/or harassed by others because of his low intelligence). Additionally, the (f)(6) statutory mitigating circumstance, "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired," specifically relates to cognitive disorder and was submitted to and not found by the jury. There were, in fact, nineteen mitigating circumstances submitted to the jury in this case and none of the nineteen were found to exist, or to have value in the case of the nonstatutory circumstances, by the jury. Of relevance to this particular assignment of error, however, is the fact that none of the mitigating circumstances representing or relating to the same circumstances defendant claims were inappropriately "lumped together" as part of the (f)(2) mitigator were found individually.

Further, we note that the disorders included together in the instruction given for the (f)(2) circumstance were not connected by any conjunctive wording. Therefore, defendant's argument that the jury was confused by the conjunctive linking of the disorders supporting the (f)(2) mitigator is without merit. Defendant has not shown that absent the error, the jury probably would have reached a different result in this resentencing proceeding, and this assignment of error is overruled.

[29] In numbering the assignments of error, defendant did not use number forty-two. Therefore, we now review assignment of error forty-three in which defendant contends the trial court erred in denying his request for a peremptory instruction on the statutory mitigating circumstance that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, as set forth in N.C.G.S. § 15A-2000(f)(2). In a related assignment of error, number forty-five, defendant contends the trial court also erred in denying defendant's request for a peremptory instruction on the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, as set forth in N.C.G.S. § 15A-2000(f)(6). Defendant asserts that he presented plenary evidence of his borderline intelligence, alcohol dependence and cognitive disorder, all of which was sufficient to support a peremptory instruction on these mitigators.

> If requested, a trial court should give a peremptory instruction for any statutory or nonstatutory circumstance that is supported by uncontroverted and manifestly credible evidence. If the evidence supporting the circumstance is controverted or is not manifestly credible, the trial court should not give the peremptory instruction. The 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.

Bishop, 343 N.C. at 557, 472 S.E.2d at 863.

In the instant case, defendant's evidence supporting the (f)(2) and (f)(6) mitigating circumstances was in fact controverted. The State offered into evidence a forensic psychiatric evaluation done by Dr. Eugene Douglas. Contrary to conclusions reached by defense witness Dr. Hattem, Dr. Douglas concluded there was no evidence that defendant was under the influence of an emotional or mental disturbance or that defendant would not be able to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time he committed the murder in this case. The doctor also concluded that defendant's alcoholism did not constitute diminished capacity or impairment in his ability to conform his conduct to the requirements of the law. The fact that Dr. Douglas' evaluation was performed two months after the murder was committed, whereas the evaluation done by defendant's expert was performed eleven years after the murder, was also raised as to the value of each

evaluation. Because we conclude that the evidence as to the (f)(2) and (f)(6) mitigating circumstances was controverted, we overrule assignments of error forty-three and forty-five.

[30] Under assignment of error forty-four, defendant contends the trial court's submission of the statutory mitigating circumstance specified in section 15A-2000(f)(6), "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired," improperly excluded mitigating evidence of borderline intellectual functioning, cognitive disorder or alcohol dependence from the scope of the circumstance. Defendant argues the trial court limited the jury's consideration of this circumstance to whether the defendant had drunk a fifth of liquor and, if he had, whether it impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. For the reasons stated in our discussion of assignment forty-one, where defendant assigned error to the wording of the (f)(2) instructions given, assignment forty-four, also based on wording of the instructions given, is reviewed for plain error only.

We first note that before the trial court instructed the jury, there was some discussion between the parties on the wording of the instruction in regard to how much alcohol defendant had consumed. However, there was no suggestion that the disorders about which Dr. Hattem had testified should be included as part of the instruction on the (f)(6) circumstance. In fact, defense counsel indicated his concurrence with how the trial court planned to instruct on this circumstance.

We further note that the disorders defendant now claims should have been included as part of the (f)(6) instruction were included in the instruction for the (f)(2) circumstance. For the same reasons we found defendant was not prejudiced by the form of the instruction in the (f)(2) instruction in issue forty-one, we find defendant could not have been prejudiced by the exclusion of defendant's alleged disorders from the (f)(6) instruction. The jury unanimously found that the mitigating circumstances which individually addressed defendant's borderline intellectual functioning, cognitive disorder and alcohol dependence either did not exist or did not have mitigating value. It is illogical to assume that the cumulative consideration of those disorders as part of the (f)(6) mitigating circumstance instruction would have resulted in a different conclusion by the jury. This assignment of error is therefore overruled.

[31] Defendant next maintains, in assignment forty-six, that the trial court committed reversible error by instructing the jury that it could reject proffered nonstatutory mitigating circumstances on the ground that the circumstances had no mitigating value. This argument has previously been rejected by this Court. *See State v. Womble*, 343 N.C. 667, 694, 473 S.E.2d 291, 307 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997); *State v. Hill*, 331 N.C. 387, 418, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). Defendant offers no basis for this Court to reconsider this question. This assignment of error is therefore overruled.

[32] Next, defendant contends the trial court erred in denying defendant's request for peremptory instruction on two nonstatutory mitigating circumstances: (1) that defendant is subject to being easily influenced by others, and (2) that defendant is subject to being victimized and/or harassed by others because of his low intelligence. Defendant raises these arguments in issues forty-seven and forty-eight, respectively.

This Court has repeatedly held that " 'a trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence.' " *Richmond*, 347 N.C. at 440, 495 S.E.2d at 692 (quoting *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996)). Conversely, if the evidence in support of the mitigating circumstance is controverted, a peremptory instruction is not required. *Womble*, 343 N.C. at 683, 473 S.E.2d at 300.

In the instant case, defendant has failed to provide any citation to the record establishing the introduction of any evidence that suggests defendant is easily influenced or victimized by others. We will assume that such evidence exists since the trial court did submit these two circumstances for the jury's consideration; however, any such evidence was not uncontroverted. Defendant was the one who first suggested the murder in this case to his two cohorts, and defendant devised the plan to try to lure the victim out of his house. This evidence portrays defendant as a leader, not as a follower. Defendant's own testimony about his many assaultive episodes in prison also did not show him to be a victim, but rather as someone who is assertive and quite willing to use violence to handle problems with other inmates. After a complete review of the record, we conclude the evidence of these two nonstatutory mitigating circumstances was, in

fact, controverted. The trial court did not err in denying to give peremptory instructions on these mitigators, and these assignments of error are overruled.

[33] In assignments forty-nine through fifty-five, defendant contends the trial court erred in denying defendant's request to submit separately seven nonstatutory mitigating circumstances which he requested in writing. In total, defendant requested one statutory mitigating circumstance and twenty-three nonstatutory mitigating circumstances. At the close of evidence, a charge conference was held during which the trial court indicated it would combine several of defendant's separate requests that were duplicative or subsumed within other circumstances. As a result, the jury was instructed on three statutory mitigating circumstances, two of which were identified as necessary through the initiative of the trial court and included the (f)(9) catchall instruction, and sixteen nonstatutory mitigating circumstances.

The trial court in a capital sentencing proceeding must submit for consideration by the jury a nonstatutory mitigating circumstance which the defendant requests if the circumstance " 'is one which the jury could reasonably find had mitigating value, and . . . there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury.' " *State v. Roseboro*, 351 N.C. 536, 551, 528 S.E.2d 1, 11 (2000) (quoting *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988)). However, "the refusal of the trial court to submit the proposed mitigating circumstance is not error when the proposed circumstance is subsumed in the other mitigating circumstances submitted to the jury." *Id.* at 552, 528 S.E.2d at 11; *see also Richmond*, 347 N.C. at 438, 495 S.E.2d at 691.

Of defendant's seven assignments of error resulting from the trial court's refusal to submit requested nonstatutory circumstances, one resulted from defendant's own agreement to the duplicative nature of an instruction. In his request for mitigating instructions, defendant included six separate requests that dealt with alcohol or alcohol dependence. Three were submitted to the jury as requested; two were combined and submitted as part of the statutory (f)(2) mitigator, to be discussed below; and one was eliminated as duplicative.

As part of the six requests dealing with alcohol dependence, defendant requested instruction that "because of his excessive drinking [defendant] became an alcoholic" and the instruction that "[defendant] was an alcoholic when this offense was committed."

Defense counsel conceded at the charge conference that these two instructions were "duplicitous." Therefore, because these two requests were admittedly duplicative, the trial court did not err in refusing to submit them separately.

As to the other six nonstatutory circumstances that were requested and denied, we first note that defendant's entire request for mitigating circumstances included only one statutory mitigator, N.C.G.S. § 15A-2000(f)(6): that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." The trial court recognized, however, that there was some evidence produced to support the (f)(2) statutory circumstance that "defendant was under the influence of a mental or emotional disturbance," N.C.G.S. § 15A-2000(f)(2), and that it would be error not to submit that mitigating circumstance. *See State v. Wilson*, 322 N.C. 117, 144-45, 367 S.E.2d 589, 605 (1988). The trial court also recognized that six of the nonstatutory mitigating circumstances requested by defendant were all aspects of the (f)(2) mitigator. As submitted by defendant, these were worded as follows: defendant suffers from the mental disorder of alcohol dependence, psychological testing reveals that defendant has borderline intelligence, defendant suffers from the mental disorder of borderline intellectual functioning, defendant suffers from the mental disorder of cognitive disorder, defendant's mental disorder of borderline intelligence combined with his drinking at the time the offense occurred rendered him incapable of thinking logically or rationally, and defendant suffers from a cognitive disorder which limits his ability to plan ahead. These requests all dealt with defendant's alleged mental disorders of borderline intelligence, alcohol dependence and cognitive disorder. The jury instruction given by the trial court for the (f)(2) mitigator specifically identified the mitigating evidence defendant relied on in the six nonstatutory circumstances requested, including language regarding borderline intelligence, alcohol dependence and cognitive disorder. Therefore, the trial court properly held that these six requests were subsumed within the (f)(2) mitigating circumstance.

In addition to the (f)(2) circumstance, other submitted mitigating circumstances allowed the jury to further consider all of the evidence relating to defendant's borderline intelligence, alcohol dependence and cognitive disorder. The trial court submitted the nonstatutory mitigators that defendant's cognitive disorder and borderline intellectual functioning cannot be treated successfully and that defendant

has a full scale IQ of 74, which falls in the borderline range of intellectual functioning. Based on all of the statutory and nonstatutory mitigating circumstances submitted to the jury in this case, it is clear that the jury was not prevented from considering any potential mitigating evidence. In addition, the jury was always free to consider any evidence offered under the (f)(9) catchall mitigating circumstance and to give the evidence mitigating value. *See State v. Bonnett*, 348 N.C. 417, 446, 502 S.E.2d 563, 582 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999); *McLaughlin*, 341 N.C. at 448, 462 S.E.2d at 12-13. The trial court did not err by refusing to submit the requested nonstatutory mitigating circumstances separately because, viewed contextually, the full substance of all the requested circumstances was subsumed into the circumstances which were submitted. These assignments of error are overruled.

Defendant raises four additional issues which he concedes have been previously decided contrary to his position by this Court: (1) in two assignments of error, defendant contends the trial court erred when instructing the jury on verdict sheet issues three and four that it "may" consider mitigating circumstances that it found to exist in issue two; (2) in one assignment of error, defendant contends the trial court erred by failing to instruct the jury on the effect of a nonunanimous verdict; and (3) defendant contends the trial court erred in its instruction in response to the jury's inquiry concerning parole eligibility. 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.

In the record on appeal, defendant numbered two assignments of error as assignment "sixty." However, defendant briefed only one of these assignments of error. Therefore, pursuant to Rule of Appellate Procedure 10(c)(4), the assignment of error which was not briefed by defendant—that the jury's failure to consider the (f)(6) mitigating circumstance violated defendant's constitutional rights—has been waived.

[34] In assignment of error sixty that was briefed and in assignment of error seventy-seven, defendant contends that because the jury did not find evidence of two of the statutory mitigating circumstances which were submitted, the jury's sentencing decision was "unconsti-

tutionally arbitrary." Defendant assigns error to the jury's failure to find (i) this murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (ii) the catchall, N.C.G.S. § 15A-2000(f)(9).

Defendant does not contend the jury instructions given by the trial court regarding the statutory mitigating circumstances were in error. With regard to the (f)(2) mitigator, defendant bases his contention that the verdict was arbitrary simply on the grounds that the jury disregarded the testimony of his experts. However, defendant overlooks the fact that the State introduced evidence which directly controverted defendant's experts, through the testimony of Dr. Douglas, who concluded there was no evidence that defendant was under the influence of an emotional or mental disturbance at the time he committed the murder. Notwithstanding this contradicting evidence, when mitigating evidence is truly uncontradicted, at most, the defendant is entitled to a peremptory instruction, and even then, the jury may reject the evidence and not find the circumstance. *Conner*, 345 N.C. at 330, 480 S.E.2d at 630. "[E]ven where all of the evidence supports a finding that the mitigating circumstance exists . . . , the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence." *State v. Alston*, 341 N.C. 198, 256, 461 S.E.2d 687, 719-20 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

With regard to the fact that the jury did not find the "catchall" circumstance to exist or to have value, the trial court properly instructed the jurors to "consider any other circumstance or circumstances arising from the evidence which [they] deem[ed] to have mitigating value." In the absence of contradictory evidence, we must assume the jury comprehended the trial court's instructions. *State v. Bond*, 345 N.C. 1, 28-29, 478 S.E.2d 163, 177 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). There was no evidence in this case suggesting the jury did not comprehend the instructions given. Defendant's assignments of error sixty and seventy-seven are overruled.

[35] In assignments of error sixty-one through seventy-six, defendant individually addresses the sixteen nonstatutory mitigating circumstances submitted to the jury and contends that because the jury did not find evidence of any of these circumstances, the jury's sentencing decision was "unconstitutionally arbitrary." Defendant does not contend the jury instructions given by the trial court regarding the nonstatutory mitigating circumstances were not consistent with

the approved pattern jury instructions of this state. He does, however, contend that the instructions given violate his Eighth Amendment rights in that the jury was instructed that it could reject nonstatutory mitigating circumstances, even if factually supported, because the jury did not deem the circumstance to have mitigating value. This Court has reviewed and consistently upheld the constitutionality of a jury rejecting a nonstatutory mitigating circumstance if none of the jurors find facts supporting the circumstance *or* if none of the jurors deem the circumstance to have mitigating value. *See State v. Golphin*, 352 N.C. 364, 483, 533 S.E.2d 168, 245 (2000); *Lawrence*, 352 N.C. at 31, 530 S.E.2d at 826; *Basden*, 339 N.C. at 304, 451 S.E.2d at 247; *State v. Green*, 336 N.C. 142, 173, 443 S.E.2d 14, 32, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). In the instant case, four of the nonstatutory mitigating circumstances submitted and not found dealt with defendant's childhood. Defendant was forty-six years old at the time he committed the crimes in this case. A jury could rationally have found that the circumstances of defendant's childhood did not influence his violent criminal activity at the age of forty-six, and therefore, they were not mitigating. Two other mitigating circumstances dealt with defendant's alcoholism. However, there was ample evidence presented at resentencing that defendant exhibited violent tendencies, while in prison for example, even when he was not drinking. Several mitigating circumstances addressed defendant's regular participation in prison church activities. Again, however, this evidence was contradicted by defendant's violent acts in and out of prison. In the instant case, the jury could rationally have concluded, on the basis of the evidence, that all submitted nonstatutory circumstances had no mitigating value. These assignments of error are without merit and are, therefore, overruled.

PROPORTIONALITY REVIEW

[36] In defendant's final two assignments of error, he contends the jury's failure to find any mitigation in this case demonstrates the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factors and that the sentence of death in this case was disproportionate to other first-degree murder cases. We are required by section 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." N.C.G.S. § 15A-2000(d)(2); *see also McCollum*, 334 N.C. at 239, 433 S.E.2d at 161. After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we are convinced that the jury's finding of the aggravating circumstance submitted—that defendant had been previously convicted of another capital felony—was supported by the evidence and that the evidence which could be considered supportive of mitigating circumstances was controverted. We 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. We therefore turn to our final statutory duty of proportionality review.

In the present case, defendant was resentenced to death for his 6 October 1988 conviction for first-degree murder under the theory of premeditation and deliberation. Following the capital resentencing proceeding, the jury found the one submitted aggravating circumstance, that defendant had been previously convicted of another capital felony, as set out in section 15A-2000(e)(2). The trial court submitted three statutory mitigating circumstances to the jury, including the "catchall" statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), and sixteen nonstatutory mitigating circumstances. However, the jury did not find any of the submitted statutory mitigating circumstances to exist or any of the submitted nonstatutory mitigating circumstances to exist and to have mitigating value.

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. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162.

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, 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). Also, the murder in this case was committed in the victim's home. A murder occurring inside the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the . . . invasion of an especially private place, one in which a person has a right to feel secure." *Brown*, 320 N.C. at 231, 358 S.E.2d at 34, *quoted in State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). Further, this Court has never found the sentence of death disproportionate where the defendant has been previously convicted of a capital felony. *See State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000); *Braxton*, 352 N.C. 158, 531 S.E.2d 428; *Warren*, 348 N.C. 80, 499 S.E.2d 431; *Flowers*, 347 N.C. 1, 489 S.E.2d 391. In fact, of the cases in which this Court has found the death penalty disproportionate, "none involved a defendant with any prior convictions for violent felonies." *Flowers*, 347 N.C. at 45, 489 S.E.2d at 417.

In four of the seven cases which this Court has found to be disproportionate, the defendant had no prior criminal record. *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. In the other three cases, the defendant had no prior violent felony convictions. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703. In the present case, defendant has numerous previous convictions, including first-degree murder of his uncle, larceny, two counts of auto larceny, breaking and entering, several escapes from prison, and three counts of driving under the influence. Defendant also testified about several incidents of extreme violence with other prison inmates. Defendant's criminal history, riddled with serious violent offenses, is very dissimilar to the criminal history of the defendants for whom this Court has found the death sentence disproportionate.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all 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." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair capital resentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. CHARLIE JAMES MACKEY

No. 244A00

(Filed 6 October 2000)

1. Evidence— expert testimony—relevance—usefulness to jury

The trial court did not err in a cocaine prosecution by excluding the testimony of a defense expert on drug investigative procedures as irrelevant. The roles of the undercover officer and the Sheriff in this case require no expert explanation; the jury was perfectly capable of interpreting the State's evidence. Testimony regarding the credibility of a witness is not admissible and

defendant did not intend to elicit testimony addressing either material elements of the offenses charged or a material defense. Even assuming that the testimony was admissible under N.C.G.S. § 8C-1, Rule 702, the trial court has wide discretion in determining the admissibility of expert testimony and did not abuse that discretion in this case.

2. Evidence— offer of proof—not necessary—dialogue with court

There was no prejudicial error in a cocaine prosecution in the trial court's refusal of defendant's offer of proof where the dialogue of defense counsel and the court was sufficient to establish the essential content or substance of the witness's testimony.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 734, 530 S.E.2d 306 (2000), finding no error in judgments entered 5 November 1998 by Duke, J., in Superior Court, Hyde County. Heard in the Supreme Court 14 September 2000.

Michael F. Easley, Attorney General, by Douglas A. Johnston, Special Deputy Attorney General, for the State.

Steven P. Rader for defendant-appellant.

WAINWRIGHT, Justice.

On 9 February 1998, Charlie James Mackey (defendant) was indicted for possession with intent to sell and deliver cocaine and the sale and delivery of cocaine. On 8 June 1998, defendant was again indicted for the same offenses in connection with a second sale of cocaine. Defendant was tried before a jury at the 2 November 1998 Criminal Session of Superior Court, Hyde County. On 5 November 1998, the jury found defendant guilty of all charges, and the trial court imposed consecutive sentences of ten to twelve months' imprisonment for each charge. Defendant appealed to the North Carolina Court of Appeals. On 2 May 2000, the Court of Appeals, with one judge dissenting, found no error. *State v. Mackey*, 137 N.C. App. 734, 530 S.E.2d 306 (2000). Defendant appeals to this Court from the decision of the Court of Appeals on the basis of the dissent.

The State's evidence at trial tended to show that on 15 November 1996, Art Manning (Manning), a retired police officer, was assisting the Hyde County Sheriff's Department. Manning was operating in an

unpaid, undercover capacity. Sheriff David Mason (Sheriff Mason) of Hyde County requested that Manning assist him with drug trafficking investigations within the jurisdiction. Pursuant to the "undercover campaign," Manning was instructed to purchase drugs from anyone who was selling them. Prior to his involvement with the Hyde County Sheriff's Department, Manning worked for thirty years with undercover drug investigations throughout the state.

Operating with the Hyde County Sheriff's Department, Manning purchased crack cocaine from defendant on two separate occasions. During the evening of 15 November 1996, between 6:00 and 6:30 p.m., Manning entered Blount's Playground, a small bar and poolroom located between Swan Quarter and Engelhard. While playing pool with Ricky Spencer (Spencer), a paid confidential informant, defendant motioned for Manning to step outside. Spencer had previously introduced Manning and defendant to each other. Once outside, defendant asked Manning "was he looking," and Manning stated that he was. Manning understood that "looking" was terminology indicating a desire to purchase drugs.

Manning walked with defendant to his light-blue 1994 Dodge van. Defendant entered the van, rolled down the window, and told Manning that he had some "20's," pieces of crack cocaine worth twenty dollars each. Manning stated, "I'll take a couple." Manning and defendant then drove down the road in separate vehicles. Thereafter, defendant pulled into a driveway, and Manning pulled onto the side of the road. Manning walked to defendant's van window, and defendant handed Manning "two off-colored white rock-like substances." Manning handed defendant two twenty dollar bills, at which time defendant departed in the direction of Blount's Playground.

After the transaction, Manning contacted Sheriff Mason and they met at a predetermined location at 9:30 p.m. Manning placed the substances he purchased from defendant into an evidence bag that Sheriff Mason was holding. Manning then dictated a debriefing report. Sheriff Mason wrote down everything Manning reported. Manning told Sheriff Mason that defendant was wearing a blue and orange ball cap, a dark blue jacket, blue jeans, and white tennis shoes. Manning also described defendant as a black male, approximately 27 years old, 70 inches tall, 160 pounds, with black hair, brown eyes and a medium build. Manning later testified that he had no doubt the person who sold him drugs was defendant.

After completing the debriefing, Manning returned to Blount's Playground and engaged in a conversation with Darryl Selby (Selby). At approximately 11:00 p.m., Selby asked Manning to step outside. Once outside, Selby asked Manning if he "was looking." Manning stated that he was looking for "a couple of 50's," pieces of crack cocaine worth fifty dollars each. Selby stated, "As soon as my man gets back, I'll take care of you." At approximately 11:10 p.m., defendant arrived in the same 1994 Dodge van that Manning had seen defendant operating during the previous drug sale.

After defendant arrived, Selby stated, "Wait right here for me. We have got to go cut it up." Selby and defendant returned at approximately 11:29 p.m., in the same 1994 Dodge van. Selby exited the vehicle, walked to Manning and stated, "Walk over to the van. My man C.J.'s got your two 50's." When Manning walked to the van, defendant handed him a clear, small Ziplock bag containing two large and three small off-white rock-like substances. At 11:30 p.m., Manning handed defendant four twenty dollar bills and two ten dollar bills. After that transaction, Manning met with Sheriff Mason for another debriefing report at 2:30 a.m. on 16 November 1996.

At trial, Manning testified on cross-examination that he has an independent recollection of what took place on the evening of 15 November 1996, but he used the notes made by Sheriff Mason to be "absolutely accurate." Defendant's counsel elicited testimony from Manning that Hyde County is one of the toughest counties to "break into" as an undercover informant because "dope" is sold out of houses. However, Spencer, a confidential informant, was able to help him in this regard. Manning further testified that Spencer introduced him to defendant before the buy and that Spencer was the only person accompanying Manning on the night he purchased the drugs. Manning also testified that he was not shown photos of defendant before the buys, was not wearing any recording devices, did not use marked bills, and was not frisked by the Sheriff after the buys.

Defendant presented the following evidence about Manning's undercover activities and his personal drug use: that Manning smoked drugs, occasionally smoking drugs with Spencer, and that Manning purchased drugs from one person but labeled them as coming from another person.

On redirect examination, Manning testified that it is difficult to "work drugs" in Hyde County because people in the drug trade deal out of residences or make deliveries. Manning stated that you have to

know the drug dealers to "work drugs" successfully. Manning also explained that he did not use marked bills because, in order to maintain his cover and continue the operation, arrests could not be made immediately after the drug sales. Manning further testified that he did not give drugs to Spencer.

[1] In defendant's first assignment of error, he contends the Court of Appeals erred in affirming the trial court's refusal to allow Kenneth Johnson (Johnson) to testify as an expert witness. We disagree.

At trial, defense counsel attempted to tender Johnson, an employee of Blackmon Detective Services and a retired police officer of thirty years, as an expert witness in drug investigation procedures. The trial court did not allow Johnson's testimony. Defendant argues that the State's entire prosecution was based on the testimony of Manning and that defendant should have been able to attack Manning's credibility by offering expert testimony about undercover police procedures.

During the trial, the following dialogue occurred:

> THE COURT: Okay. Mr. Philbeck [defense counsel], tell me in your own words what you intend to elicit from this witness.
>
> . . . .
>
> MR. PHILBECK: Your Honor, for our case, and this is important, and we looked at the actual drug undercover operation here. Major Johnson has extensive experience, 30 years of experience in this, and has taught. His experience I think could be unmatched in this state. He can talk about the standards of drug investigations. He can talk about how they operate and what is a good undercover operation and what is a poor operation at the buy/sell level, at the informant level, buy/sell level, from that end. He's been a part of this. He has extensive experience with implementation and coordination of five major undercover operations. These operations consisted of over 1532 arrests, one million dollar's [sic] worth of illicit drugs seized, and five hundred thousand dollar's [sic] worth of stolen property recovered. He organized and supervised the first major crimes task force unit while with the Raleigh Police Department. He has been involved—he's looked at his own officers and investigated his own officers. He's brought forth and investigated corruption with his own organization from officers who make buys and get so wrapped into it that they lose sight of what they're there for. He has extensive profes-

sional affiliations and professional certifications. He is an instructor of criminal justice training. He's been on numerous committees which deal[] with law enforcement, the drug investigation area. And, he has plenty of additional training, including the Narcotic Unit Commander School, I'd like to point out, from the University of Georgia. And, if you look at the purpose of witness testimony, expert witness testimony, it's to help the jury understand, and, without Major Johnson testifying as to certain standards that are important and universal—it's not just a Raleigh thing; it's for any drug operation—he can help that jury understand. Without him, I can't argue to the jury what was a good investigation or what was not good from the buy/sell level, and I got to have [sic] that covered in fairness to Mr. Mackey as far as what he faces. It goes totally to our theory of the case and it is very important that we have that. I'd be glad to submit a resume, if I could, of the [M]ajor, and you can see what his background and qualifications are.

THE COURT: Is that all you have?

MR. PHILBECK: Yes, sir.

MR. NORTON [prosecutor]: If Your Honor please, the question is not what this gentleman did in Raleigh, whether or not he investigated officers, but the question is what occurred in this case. He's talking about some standard that they teach in Raleigh or some community college that has no relevance to what we are trying here. He either bought dope from him or he didn't.

MR. PHILBECK: Your Honor, if I may address the Court. We have at issue the things like where Mr. Manning has testified that he had two or three operations going on at the same time. I don't have my notes handy right here—

THE COURT: Let me ask you this. Let me cut it to the chaff [sic]. Mr. Philbeck, I want you to tell me how this evidence that you're offering is relevant to the determination of a consequential fact in the litigation in this case.

MR. PHILBECK: Your Honor, it deals with standards; it deals with the mentality of Mr.—

THE COURT: That's not a consequential fact. . . . [Y]ou have got to show that it's relevant to the determination of a consequential fact in this case. If you'll just tell me what that is, I'll

allow it in. If you cannot tell me, I won't. I'll have the witness stand down, and we are going to go on with the case.

MR. PHILBECK: Your Honor, the consequential fact is whether . . . Mr. Mackey sold drugs to Mr. Manning.

THE COURT: Was this man present?

MR. PHILBECK: No, sir. . . . Mr. Manning testified as to what he thinks he saw. He gave a report some three and a half hours later . . . to the sheriff as to what he saw. He was also handling other cases within . . . that period of time. How do we know he has the information correct? How do you know he really saw Mr. Mackey? He testified that he wasn't really that familiar with Mr. Mackey before.

THE COURT: I just want to interrupt you just a minute. That is no [sic] consequential fact that's been mentioned yet. Now, they are all propositions that you are perfectly capable of submitting to the jury in a closing argument or elicit from testimony from people that were present[,] either in direct- or cross-examination, as you've done very well this morning. But insofar as this witness is concerned, I need to know the consequential fact that's going to aid the jury in the determination of this case.

MR. PHILBECK: And that's it, Your Honor. Standards. It's not a Raleigh thing, as Mr. Norton says. It's a universal standard and were they being met because those standards are to help ensure that the person that sells the drugs is actually the person who is charged, and that's a fact of consequence.

THE COURT: Well, Mr. Philbeck, the Court is going to find that the testimony that you have said that you want to elicit from this witness, I'm going to find that that testimony is irrelevant.

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert witness testimony as follows:

> If scientific, technical or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702(a) (1999) (emphasis added).

Defendant argues that the seven-part standard for admission of expert evidence derived from *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282-83, *disc. rev. denied*, 327 N.C. 639, 399 S.E.2d 127 (1990), applies in the instant case: (1) the witness' qualifications include knowledge, skill, experience, training, or education; (2) the testimony must be helpful to the jury; (3) the scientific technique upon which the opinion is based must be established and recognized; (4) the evidence must be relevant; (5) the evidence must pass the Rule 403 balancing test; (6) the evidence may be in the form of an opinion but may not state a legal conclusion; and (7) expert testimony regarding the credibility of a witness is not admissible.

We note at the outset that subsection (7) above specifically provides that testimony regarding the credibility of a witness is not admissible. See *id.* at 663, 394 S.E.2d at 283. Nonetheless, defendant contends that Johnson should have been allowed to testify for that very purpose.

This Court has previously summarized the Rules of Evidence governing admission of expert testimony as follows:

> "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Evangelista*, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987). In applying the rule, the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion. Further, under Rule 403 even relevant evidence may properly be excluded by the trial court if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury. Whether to exclude expert testimony for this reason also rests within the sound discretion of the trial court, which will be reversed only for an abuse of discretion.

State v. Anderson, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (citations omitted), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988); *accord State v. Harden*, 344 N.C. 542, 556, 476 S.E.2d 658, 665 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997). We have also stated that the " 'essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies.' " *State v. Tyler*, 346 N.C. 187, 204, 485 S.E.2d 599, 608, *cert. denied*, 522 U.S.

1001, 139 L. Ed. 2d 411 (1997) (*quoting State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973)).

Applying the foregoing principles to the present case, we agree with the majority opinion of the Court of Appeals that the trial court properly excluded the expert testimony proffered by defendant. The roles of Manning and the Sheriff require no expert explanation. The jury was perfectly capable of interpreting the State's evidence about the actions of defendant and the undercover officer. The Court of Appeals correctly determined that the jury had the ability, on its own, to assess the evidence, and that the trial court, therefore, did not abuse its discretion in excluding the testimony of Johnson. *Mackey*, 137 N.C. App. at 737, 530 S.E.2d at 309. Moreover, the expert's testimony would not have assisted the jury and might have confused the issues and resulted in a trial within a trial. As the Court of Appeals majority correctly stated:

> The only purpose for admitting the proposed testimony was to challenge the undercover procedures used by Manning in obtaining the drugs from the defendant. However, the record already contained evidence that Manning used the drugs from the buys and evidence regarding the procedures used in the undercover drug operation. The jury had the ability, on its own, to assess Manning's credibility given this evidence.

Id.

In the instant case, defendant was charged with several violations of N.C.G.S. § 90-95(a)(1), which makes it unlawful for any person to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." N.C.G.S. § 90-95(a)(1) (1999). The essential elements of N.C.G.S. § 90-95(a)(1) were established by the State's proof of the following facts: Defendant asked Manning if he wanted to purchase drugs. Thereafter, defendant sold two pieces of rock-like substance to Manning for forty dollars. Later that evening, defendant sold Manning five pieces of rock-like substance in exchange for one hundred dollars. The substances obtained from each transaction were later determined to be crack cocaine, a controlled substance.

Defendant intended to have Johnson testify regarding the standards of an undercover operation and proper investigative techniques. Defendant did not, however, intend to elicit testimony from the proposed expert witness addressing either material elements of the

offenses charged or a material defense. Based on the above facts, the proposed testimony is irrelevant. Pursuant to Rule 702, no expert testimony as to the credibility of Manning would assist the trier of fact to understand the evidence or to determine a fact in issue. Moreover, "[t]his Court has repeatedly held that N.C.G.S. § 8C-1, Rule 608 and N.C.G.S. § 8C-1, Rule 405(a), when read together, forbid an expert's opinion testimony as to the credibility of a witness." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 843 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995); *see State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986).

The fact at issue in the instant case was whether defendant violated N.C.G.S. § 90-95(a)(1). None of the proposed expert testimony would have been directed at the proof of this relevant fact. Moreover, no expert opinion on drug investigation standards was needed to show that a sale of cocaine took place. Rather, the proposed testimony would have shifted the focus of the trial from defendant's activities and sale of drugs to an irrelevant investigatory process which would potentially confuse the issues to the jury. We note that the trial court pointed out that Manning was permitted to testify, not as an expert, but because he observed the cocaine transactions that led to the arrest of defendant. Therefore, the trial judge properly recognized that defendant's challenge to the supposed deficiencies of the techniques used by Manning did not relate to any consequential fact in this case.

Assuming *arguendo* that the expert testimony is the sort permitted under Rule 702, the trial judge properly exercised his discretion. As we stated in *Anderson*, "the trial court is afforded wide discretion" in determining the admissibility of expert testimony and "will be reversed only for an abuse of that discretion." *Anderson*, 322 N.C. at 28, 366 S.E.2d at 463. No abuse of that discretion took place in this case. The trial court's decision was justified on the grounds that the testimony would not be helpful to the jury's understanding; it was irrelevant; it had insufficient probative value on the facts to be proved; and it violated the rule prohibiting expert testimony on a witness' credibility. Accordingly, this assignment of error is overruled.

[2] In defendant's second assignment of error, he contends the Court of Appeals erred in finding no error as to the trial court's refusal of defendant's offer of proof of the testimony of Johnson. We disagree.

We have recognized that

> in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evident 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*. . . . [T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Simpson, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (emphasis added); *accord State v. Hamilton*, 351 N.C. 14, 19, 519 S.E.2d 514, 518 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 783 (2000). Although it is always the better practice to excuse the jury and complete the record in open court through the words of the proposed witness, this Court has specifically stated that "there may be instances where a witness need not be called and questioned in order to preserve appellate review of excluded evidence." *Simpson*, 314 N.C. at 370, 372, 334 S.E.2d at 60, 61; *see State v. Chapman*, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978). We have also stated that "while the trial court denied full offer of proof, it allowed defense counsel to articulate what defendant's showing would have been by identifying witnesses and presenting a detailed forecast of evidence for the record." *State v. White*, 349 N.C. 535, 567, 508 S.E.2d 253, 273 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

In the instant case, the trial court did give defense counsel several opportunities to describe the content of the proposed testimony at issue. The following dialogue took place during the trial:

> MR. PHILBECK: Okay. Your Honor, respectfully, could I make the request that you hear from Major Johnson himself, just a brief synopsis of what he would testify by way of his offer of proof just to make sure that we have exactly what he's going to testify to on the record? If you deny it, Your Honor, that's fine. I just want to get it on the record that I—
>
> THE COURT: Yes, I understand that. I have asked you to state—I assume that you know what your witness is going to say on the stand. Now, I don't want to—you know, to waste my time sitting here listening to the procedures in Raleigh. I'm not going to do that.
>
> MR. PHILBECK: It's statewide procedures—

THE COURT: Or statewide procedures—Now, if he's going to get up here and say that he waited too long, three and a half hours is too long, before he delivered the dope to the sheriff that's irrelevant.

MR. PHILBECK: That's part of what he would say, Your Honor.

THE COURT: Well, now, what is the other part? I've asked you to tell me what he's going to say.

MR. PHILBECK: This control mechanism. This whole case—

THE COURT: Oh, the control mechanism.

MR. PHILBECK: Yes, sir. This whole case revolves from the State the credibility of Mr. Manning.

THE COURT: What aspects of the control mechanism?

MR. PHILBECK: Whether—how the drugs, you know, one theory is that and there's some evidence that Mr. Manning was sharing some of the drugs or some drugs, however he received them, at some point in time from other drug dealers in this area. He denied that. The procedures that control this are put in place to prevent that from happening. I think the jury should hear that.

THE COURT: Mr. Philbeck, the Court is going to find that that would not assist the jury in any finding of fact. If the jury determine[s], finds as fact, that the undercover agent did in fact share controlled substances, which they have ample evidence before them to find if they wish to find that, then how is—I think by their own common sense they know that that's improper and would destroy the credibility of the undercover agent, and to have somebody to come in and testify to that, they don't need that. It's not going to be able to assist them in anything. They already know that's wrong.

We hold that this dialogue, along with the previously noted dialogue, is sufficient to establish the "essential content or substance" of the witness' testimony, *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60, as well as its obvious irrelevance. Assuming *arguendo* that an offer of proof should have been allowed, we hold there is no reasonable possibility that the trial court's ruling affected the result at trial, and any error in this regard was harmless pursuant to N.C.G.S. § 15A-1443(a). This assignment of error is overruled.

We conclude that defendant received a fair trial, free from prejudicial error. For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

DURHAM COUNTY NO. 97CVS00687

L'TANYA D. DAVIS, EXECUTRIX OF ESTATE OF KENNETH A. DAVIS, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS

and

DURHAM COUNTY NO. 97CVS00714

L'TANYA DURANTE DAVIS, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS

and

DURHAM COUNTY NO. 97CVS00713

E. ANN CHRISTIAN, AS GUARDIAN AD LITEM FOR LEONARD AARON DAVIS, II, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS

and

DURHAM COUNTY NO. 97CVS02051

ROBERTA E. JOHNSON, AS ADMINISTRATRIX OF THE ESTATE OF THELMA P. BITTING, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS

No. 206A00

(Filed 6 October 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 267, 528 S.E.2d 56 (2000), affirming orders for summary judgment entered 2 July 1998 and 8 July 1998 and reversing orders for summary judgment entered 9 July 1998 by Johnson (E. Lynn), J., in Superior Court, Durham County. Heard in the Supreme Court 11 September 2000.

McDaniel, Anderson & Stephenson, L.L.P., by William E. Anderson and John M. Kirby, for third-party plaintiff-appellants.

Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey, for third-party defendant-appellee Rea Construction Company; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr., and Deanna Davis Anderson, for third-party defendant-appellee Protection Services, Inc.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY ELLIOTT

No. 179A00

(Filed 6 October 2000)

Evidence— general intent crimes—prior assault—admissibility to show intent

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that evidence of a prior incident in which defendant hit the female victim's face was admissible in this prosecution for the general intent crimes of assault inflicting serious injury and assault on a female to show defendant's intent with respect to the present assault on the female victim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 282, 528 S.E.2d 32 (2000), finding error in a judgment entered 22 October 1998 by Stephens (Donald W.), J., in Superior Court, Durham County, and ordering a new trial. Heard in the Supreme Court 13 September 2000.

Michael F. Easley, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State-appellant.

Kevin P. Bradley for defendant-appellee.

PER CURIAM.

For the reasons stated in Judge Lewis's dissenting opinion, we reverse the opinion of the Court of Appeals.

REVERSED.

GLENN I. HODGE, JR. v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND NORRIS TOLSON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 170A00

(Filed 6 October 2000)

Public Officers and Employees— reinstatement—chief internal auditor—internal auditor—not similar positions

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that plaintiff's current position of internal auditor with the DOT does not constitute reinstatement to a position similar to that of Chief Internal Auditor which he formerly held even though plaintiff's pay grade is the same.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 247, 528 S.E.2d 22 (2000), reversing and remanding an order for summary judgment entered 12 February 1999 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 13 September 2000.

Broughton, Wilkins & Sugg, P.A., by Randolph Palmer Sugg, for plaintiff-appellant.

Michael F. Easley, Attorney General, by Robert O. Crawford, III, Special Deputy Attorney General, and Sarah Ann Lannom and Tina A. Krasner, Assistant Attorneys General, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Walker, the decision of the Court of Appeals is reversed.

REVERSED.

D. MICHAEL HYDE, AND WIFE, DINA M. HYDE v. CHESNEY GLEN HOMEOWNERS ASSOCIATION, INC.

No. 24PA00

(Filed 6 October 2000)

Deeds— restrictive covenants—architectural review committee—above-ground pool—unreasonable denial

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that a subdivision architectural review committee unreasonably withheld approval of plaintiffs' application for permission to construct an above-ground swimming pool where it failed to give plaintiffs notice of valid reasons why the application was denied.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 605, 529 S.E.2d 499 (2000), affirming a judgment entered 15 September 1998 and orders signed 15 January 1999 by Morgan (Michael R.), J., in District Court, Wake County. Heard in the Supreme Court 14 September 2000.

Levine & Stewart, by Michael D. Levine, for plaintiff-appellants.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Henry W. Jones, Jr., and Hope Derby Carmichael, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in Judge Hunter's dissenting opinion.

REVERSED.

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

GREEN v. DIXON

[352 N.C. 666 (2000)]

PHYLENCIA GREEN AND HUSBAND, ROY GREEN, PLAINTIFFS V. ESAU ROOSEVELT DIXON AND J.M.X., INCORPORATED, DEFENDANTS AND THIRD-PARTY PLAINTIFFS V. ANTOINETTE PADILLA TOLER, STATE OF NORTH CAROLINA *EX REL* NCDOT, REA CONSTRUCTION COMPANY, AND PROTECTION SERVICES, INC., THIRD-PARTY DEFENDANTS

No. 207A00

(Filed 6 October 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 305, 528 S.E.2d 51 (2000), affirming in part and reversing and remanding in part an order for summary judgment signed 24 November 1998 by Hobgood, J., in Superior Court, Vance County. Calendared for argument in the Supreme Court 11 September 2000; determined on the briefs without oral argument.

McDaniel, Anderson & Stephenson, L.L.P., by John M. Kirby and William E. Anderson, for third-party plaintiff-appellants.

Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey, for third-party defendant-appellee Rea Construction Company; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr., and Deanna Davis Anderson, for third-party defendant-appellee Protection Services, Inc.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. BLANCHE KISER TAYLOR MOORE

No. 556A90-3

(Filed 6 October 2000)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the 11 February 1998 "Memorandum Opinion and Order" of Wood, J., in Superior Court, Forsyth County, denying defendant's motion for appropriate relief. Heard in the Supreme Court 18 April 2000.

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

William W. Taylor, III; Blair G. Brown; Norman L. Eisen; Cynthia Adcock for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

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

LIONEL LEWIS, EMPLOYEE v. CRAVEN REGIONAL MEDICAL CENTER, EMPLOYER, VIRGINIA INSURANCE RECIPROCAL, CARRIER

No. 462PA99

(Filed 6 October 2000)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a split decision of the Court of Appeals, 134 N.C. App. 438, 518 S.E.2d. 1 (1999), reversing and remanding an opinion and award entered by the North Carolina Industrial Commission on 23 June 1998. Heard in the Supreme Court 11 September 2000.

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

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by James R. Sugg, Scott C. Hart, and Jill Quattlebaum Byrum, for defendant-appellees.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. LAMONT CLAXTON UNDERWOOD

No. 579PA99

(Filed 6 October 2000)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, 134 N.C. App. 533, 518 S.E.2d. 231 (1999), finding no error in judgments entered by Ferrell, J., on 25 July 1997 in Superior Court, Watauga County. Heard in the Supreme Court 11 September 2000.

Michael F. Easley, Attorney General, by Ronald M. Marquette, Special Deputy Attorney General, for the State.

David Bingham and Thomas M. King for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

MARK D. MYERS v. TOWN OF PLYMOUTH

No. 17PA00

(Filed 6 October 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 135 N.C. App. 707, 522 S.E.2d 122 (1999), reversing in part and affirming in part an order for summary judgment entered by Duke, J., on 4 November 1998 in Superior Court, Washington County. Heard in the Supreme Court 14 September 2000.

The Brough Law Firm, by Michael B. Brough, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Patricia L. Holland and M. Robin Davis; and Rodman, Holscher, Francisco & Peck, by David C. Francisco, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

NORTHFIELD DEVELOPMENT COMPANY, INC. v. THE CITY OF BURLINGTON, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA

No. 63A00

(Filed 6 October 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 136 N.C. App. 272, 523 S.E.2d 743 (2000), affirming and modifying in part and reversing and remanding in part an order entered 13 October 1999 and an order and judgment entered 13 October 1999 by Allen (J.B., Jr.), J., in Superior Court, Alamance County. On 4 May 2000, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 14 September 2000.

Smith, James, Rowlett & Cohen, LLP, by J. David James, for plaintiff-appellant and -appellee.

Faison & Gillespie, by Reginald B. Gillespie, Jr., for defendant-appellant and -appellee.

Jordan Price Wall Gray Jones & Carlton, PLLC, by F. Frank Gray and Emily W. Eisele, on behalf of the North Carolina Manufactured Housing Institute, amicus curiae.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petitions for discretionary review as to additional issues were improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

BLUE v. CANELA

No. 376P00

Case below: 139 N.C.App. 191

Petition by defendants and unnamed intervenor (Atlantic Indemnity Co.) for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

CHRISTENBURY SURGERY CTR. v.
N.C. DEP'T OF HEALTH & HUMAN SERVS.

No. 305PA00

Case below: 138 N.C.App. 309

Petition by respondent for discretionary review pursuant to G.S. 7A-31 allowed 5 October 2000.

CONDELLONE v. CONDELLONE

No. 344P98-2

Case below: 137 N.C.App. 547

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

DALTON v. CAMP

No. 495PA99-2

Case below: 138 N.C.App. 201

Petition by defendants (Camp and Millennium Communication Concepts, Inc.) for discretionary review pursuant to G.S. 7A-31: Issue I denied; Issues II and III allowed 5 October 2000. Justice Freeman recused.

ELWOOD v. HEILIG-MEYERS FURN. CO.

No. 314PA00

Case below: 138 N.C.App. 710

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 October 2000.

ENNIS v. FISH

No. 368P00

Case below: 139 N.C.App. 206

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

HAMLET HMA, INC. v. RICHMOND COUNTY

No. 340P00

Case below: 138 N.C.App. 415

Motions (filed by Richmond Memorial Hospital and Firsthealth of the Carolinas, Inc.) to dismiss the appeal for lack of substantial constitutional question allowed 5 October 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed 5 October 2000. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000. Conditional petition by defendant (Firsthealth of the Carolinas, Inc.) for discretionary review pursuant to G.S. 7A-31 dismissed 5 October 2000. Conditional Petition by defendants (Richmond County, Robinette, Garner, Lamm, McCaskill, McNeill, Watkins and Firsthealth of the Carolinas, Inc.) for discretionary review pursuant to G.S. 7A-31 dismissed 5 October 2000.

HERRING v. WINSTON-SALEM/FORSYTH
COUNTY BD. OF EDUC.

No. 303P00

Case below: 137 N.C.App. 680

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

HUNTER v. PERQUIMANS COUNTY BD. OF EDUC.

No. 415P00

Case below: 139 N.C.App. 352

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

IN RE APPEAL OF CORBETT

No. 363PA00

Case below: 138 N.C.App. 534

Petition by respondent (Pender County Board of Equalization and Review) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 2000.

IN RE BIDDIX

No. 330P00

Case below: 138 N.C.App. 500

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

IN RE VOIGHT

No. 315P00

Case below: 138 N.C.App. 542

Petition by petitioner (Guilford County) for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000. Petition by petitioner (Guilford County) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000. Petition by petitioner (Guilford County) for remedial writ denied 5 October 2000.

KEMP v. KEMP

No. 262P00

Case below: 138 N.C.App. 167

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000. Petition by plaintiff for writ of certiorari to review the order of the North Carolina Court of Appeals denied 5 October 2000.

LANGDON v. N.C. DEP'T OF TRANSP.

No. 338P00

Case below: 138 N.C.App. 553

Petition by plaintiff pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 5 October 2000.

LEVASSEUR v. LOWERY

No. 370A00

Case below: 139 N.C.App. 235

Petition by intervenor for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 October 2000.

LITTLE v. BARSON FIN. SERVS.

No. 348P00

Case below: 138 N.C.App. 700

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000. Conditional petition by defendants (Brice) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 5 October 2000.

MORRIS v. CARTER

No. 412P00

Case below: 139 N.C.App. 450

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

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

No. 383P00

Case below: 139 N.C.App. 178

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

N.C. STATE BAR v. HARRIS

No. 464PA00

Case below: 137 N.C.App. 207

Motion by plaintiff for temporary stay allowed 5 October 2000.

PURSER v. HEATHERLIN PROPS.

No. 341P00

Case below: 137 N.C.App. 332

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

REECE v. FORGA

No. 392P00

Case below: 138 N.C.App. 703

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

ROBBLEE v. BUDD SERVS., INC.

No. 186P00

Case below: 136 N.C.App. 793

Petition by plaintiff (Juliette Perry Shipley) for discretionary review pursuant to G.S. 7A-31 denied 31 August 2000.

STATE v. ALLEN

No. 70A86-7

Case below: Halifax County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Halifax County, denied 5 October 2000. Motion by defendant to defer consideration of petition for writ of certiorari denied 5 October 2000.

STATE v. BALDWIN

No. 126PA97-2

Case below: 139 N.C.App. 65

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 October 2000. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. BRANCH

No. 249P00

Case below: 138 N.C.App. 167

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. BROWN

No. 389P00

Case below: 139 N.C.App. 207

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. BURR

No. 179A93-4

Case below: Alamance County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Alamance County, denied 5 October 2000.

STATE v. COPLEN

No. 336P00

Case below: 138 N.C.App. 48

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. COVINGTON

No. 360P00

Case below: 138 N.C.App. 688

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. DALTON

No. 390P00

Case below: 134 N.C.App. 499

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. DIEHL

No. 195A00

Case below: 137 N.C.App. 541

Petition by Attorney General for writ of supersedeas and motion for temporary stay allowed 5 October 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 October 2000.

STATE v. DOISEY

No. 356P00

Case below: 138 N.C.App. 620

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. FAIRCLOTH

No. 418A00

Case below: 139 N.C.App. 451

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. GREEN

No. 399P00

Case below: 139 N.C.App. 451

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. GUARINO

No. 285A00

Case below: 138 N.C.App. 328

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 October 2000.

STATE v. HATCHER

No. 350P00

Case below: Robeson County Superior Court

Motion by pro se defendant to recuse Emergency Judge Jerry Cash Martin denied 28 August 2000.

STATE v. HOLDEN

No. 460A91-3

Case below: Duplin County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Duplin County, denied 5 October 2000.

STATE v. HOLLARS

No. 377P00

Case below: 134 N.C.App. 734

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. ISOM

No. 325P00

Case below: 136 N.C.App. 232

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. JACKSON

No. 427PA00

Case below: 139 N.C.App. 721

Motion by Attorney General for temporary stay allowed 27 September 2000. Petition by Attorney General for writ of supersedeas allowed 5 October 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 October 2000. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. LANCASTER

No. 181PA00

Case below: 137 N.C.App. 37

Petition by defendant for discretionary review pursuant to G.S. 7A-31: Issues 1-6 denied; Issue 7 allowed 5 October 2000 for the limited purpose to remand to North Carolina Court of Appeals for (1) amendment of the record to include issue 7 and review of the issue by that Court or (2) if there is clearly error with respect to issue 7 for further remand to the superior court for correction of the error. Motion by defendant for appropriate relief dismissed 5 October 2000.

STATE v. LATHAN

No. 308P00

Case below: 138 N.C.App. 234

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. McALLISTER

No. 288A00

Case below: 138 N.C.App. 252

Motion by Attorney General to dismiss the appeal for lack of substantial question allowed 5 October 2000.

STATE v. McMILLIAN

No. 380P00

Case below: 139 N.C.App. 207

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. MOORE

No. 417P00

Case below: 111 N.C.App. 931

Motion by defendant pro se to withdraw without prejudice petition for writ of certiorari allowed 5 October 2000. Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed as moot 5 October 2000. Justice Orr recused.

STATE v. ROSS

No. 369P00

Case below: 139 N.C.App. 452

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. ROUSE

No. 364P00

Case below: 139 N.C.App. 208

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 October 2000.

STATE v. SAFRIT

No. 411P00

Case below: 139 N.C.App. 452

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. SMITH

No. 321PA00

Case below: 138 N.C.App. 605

Petition by Attorney General for writ of supersedeas allowed 5 October 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 October 2000.

STATE v. TAYLOR

No. 357P00

Case below: 138 N.C.App. 711

Petition by defendant (Zachary Taylor) for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STATE v. WHITE

No. 353P00

Case below: 138 N.C.App. 711

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

STEG v. STEG

No. 354PA00

Case below: COAP00-497

Petition by defendant for writ of supersedeas allowed 24 August 2000. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 24 August 2000.

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

No. 379P00

Case below: 139 N.C.App. 196

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

SUN SUITES HOLDINGS, LLC v. BOARD OF ALDERMEN OF TOWN OF GARNER

No. 394P00

Case below: 139 N.C.App. 269

Motion for temporary stay allowed, ex mero motu, 28 August 2000.

TRIANGLE PARK CHIROPRACTIC v. BATTAGLIA

No. 395P00

Case below: 139 N.C.App. 201

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 2000.

YANCEY v. LEA

No. 366A00

Case below: 139 N.C.App. 76

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 October 2000.

APPENDIXES

PRESENTATION OF
JUSTICE JOHN WEBB
PORTRAIT

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
THE PRELITIGATION FARM
NUISANCE MEDIATION PROGRAM

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
STATEWIDE MEDIATED
SETTLEMENT CONFERENCES IN
SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
PROCEDURES IN EQUITABLE
DISTRIBUTION AND OTHER
FAMILY FINANCIAL CASES

CREATION OF THE ALTERNATIVE
DISPUTE RESOLUTION COMMITTEE

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 JUDICIAL DISTRICT GRIEVANCE COMMITTEES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATION OF THE JUDICIAL DISTRICT BARS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PRACTICAL TRAINING OF LAW STUDENTS

AMENDMENT TO THE RULES OF PROFESSIONAL CONDUCT

Presentation of the Portrait

of

JOHN WEBB

Associate Justice
Supreme Court of North Carolina
1986 - 1998

March 29, 2001

OPENING REMARKS

and

RECOGNITION OF ROBERT L. McMILLAN

BY

CHIEF JUSTICE I. BEVERLY LAKE, JR.

Chief Justice I. Beverly Lake, Jr. made the following opening remarks:

> I want to welcome each of you here for this special session of the Court to honor our former colleague, Associate Justice John Webb. Justice Webb was a most distinguished member of this Court for twelve years and during that time, he made lasting friendships built upon deep respect and admiration for a brilliant legal mind, a kind gentle soul, and a die-hard Tar Heel fan. We have missed his presence on the Bench and in Conference and are please to welcome him back today.

Chief Justice Lake welcomed official and personal guests of the Court. The Chief Justice then recognized the Webb family, Justice Webb's brother, portrait artist, Archie Webb, and Robert L. McMillan, who would make the presentation address to the Court.

PRESENTATION ADDRESS

BY

ROBERT L. McMILLAN

Sometime ago perhaps the highest honor of my life came my way when retired Justice John Webb of the North Carolina Supreme Court asked me to make remarks at the presentation of his portrait to the Court.

My acquaintance with Justice Webb has been intimate for about 70 years. As court decisions measure time our acquaintance with one another extends back to a point at which "the memory of man runneth not to the contrary."

This man proved his mettle to me long ago. He was fifteen, and I was eighteen. The two of us and his first cousin, Charles F. Lambeth, who is present today, traveled for eight and one half days paddling down the Lumber River (sometimes poetically called "Lumbee") to Georgetown, South Carolina, from Maxton. The three of us were in a homemade juniper two-man boat with the most primitive equipment imaginable. (Nothing from L. L. Bean or Abercrombie & Fitch). One paddler would be in the stern. The other would be in a bow. The third person resting between turns of paddling would be sitting on the bait box in the middle. Our supplies were stashed in the bottom of the boat in the sloshing water.

It would be hard to conceive of a more intimate experience or to conceive of an experience that would more severely test nerves, tensions and dispositions than this saga. Yet, we had a glorious time! It was truly a rite of passage.

He "pulled his oar." His gripes were accompanied by smiles and with good humor.

Since I was the oldest of the three, his mother admonished me to take care to see that "John must not get wet since he has severe problems with asthma." She was comforted by my assurance that she need not worry since there was very little possibility of his getting wet. (I can't believe that I said that or that she believed it).

Upon awaking the morning following the first night we were caught by a deluge that can only be described as a "frog strangler." Future Supreme Court Justice Webb was lying spread-eagle on his back covered only by a thin cotton blanket, with his mouth wide open and the rain pouring in. We shook him awake and invited him

to join us in a delicious breakfast of cold sardines and cheese. He has ever since assured me that his asthma was cured forever.

The saga of Justice Webb's life is not that of a person who rose from humble beginnings to great heights. Rather, it is the story of a man who, with a distinguished heritage on his mother's side and on his father's side, has risen to fulfill and live up to the great heights that destiny foretold.

Justice Webb's father was William Devin Webb, a tobacconist and businessman with deep roots in Granville county, with a long and distinguished lineage. Among his family members was his maternal uncle, the former Chief Justice of this Court, William A. Devin.

Justice Webb's mother, Ella Johnson Webb, a person dear to my heart and memory, was from a family with deep roots in Davidson and Scotland Counties. Her distinguished parents were Archibald Johnson, longtime editor of *Charity and Children*, and Flora McNeil Johnson. One of his maternal aunts was Miss Lois Johnson, first Dean of Women at Wake Forest University. A maternal uncle was Gerald Johnson, distinguished journalist and writer.

Justice Webb was nurtured and grew to manhood in a loving home with his parents and his sister, Flora Plyler, and his brother, Archibald Johnson Webb, the artist who painted the portrait being presented today.

He has matured and grown from this elevated plan from level to ever-higher level; the practice of law; service on the Superior Court Bench; a position on the North Carolina Court of Appeals; and finally a seat on our State's highest court.

Justice Webb was born in Nash County at a time when his father was on the Rocky Mount tobacco market. For a while he lived in Oxford and in Greenville. For most of his youth, however, he called Wilson home, as he has done throughout his professional career.

He graduated from Charles L. Coon High School after participating in school athletics, at the same time making an outstanding academic record. Following his graduation and while still only seventeen years of age, he volunteered for service in the United States Navy, serving for the duration of World War II.

Following his discharge from the Navy, he enrolled in the University of North Carolina at Chapel Hill, where he was inducted into Phi Beta Kappa. Thereafter he enrolled in the law school at Columbia University in New York City. Upon his graduation from Columbia

he practiced law in New York City for a short while before returning to Wilson. He and the late Russell Kirby practiced together and were joined by a bright, young farm boy—turned lawyer by the name of James Baxter Hunt, Jr. Not only were the three of them fellow workers, they were also good friends. The affection that the three of them held for one another continued until Mr. Kirby's death. The warm regard that the other two share continues.

It would be amiss for anyone commenting on the life of Justice John Webb to fail to mention his keen interest in all phases of athletics. He played on the teams of Charles L. Coon High School in Wilson. He is an unabashed booster of the athletic programs of UNC Chapel Hill. Yet, he knows more about sports in general than anyone I know. He can relate tales of the teams of State, Duke, Wake Forest and even the old "Big Five" when Davidson was a member with Stan Yoder and Teeny Lafferty starring.

If you want to know the year of Mickey Mantle's best average, ask Justice Webb. Those interested in the lineup of Wallace Wade's first Rose Bowl team at Duke which went into the Rose Bowl unbeaten, untied and unscored upon, may ask Judge Webb.

Look to him if you would like to learn how long Lou Little coached at Columbia and when Side Luckman and Paul Governali played.

Was Crowell Little better than Jim Lalanne? Was Justice better than both of them? How many dunks did Vince Carter make in this year's NBA All Star Game? Ask Justice Webb.

John Webb is a devout man. Since childhood he has been a faithful member of the First Baptist Church in Wilson. He as served that church on its Board of Deacons, and for all of his adult life he has taught the Men's Bible Class. He continues in this role even today. He also serves as a Trustee for the Baptist State Convention.

Throughout his life he has been an ardent student over the broad spectrum of history, religion and the law.

Never have I known a man better informed than Justice Webb about the history of the State and Nation. His interest in, admiration for and knowledge of the life and times of Sir Winston Churchill surpass the bounds of imagination. To hear him discuss the contributions this great man made toward the salvation of western civilization will bring thrills of emotion to the most stoic. One cannot remain blase' in his presence when the subject is Churchill.

Paramount in his life is his love of family: his wife Carolyn, his daughter Caroline and her husband, his grandchildren and his son Will, with whom he is currently practicing law, his sister Flora Plyler, his brother Archibald and his extended family. His friends and family have always felt the warmth of his affection enveloping them.

These varied facets of this man have melded him into the eminent jurist that we know. His empathy for humanity was best demonstrated as he rode the Superior Court Circuit for many years. The friendships formed and the hosts of admirers developed speak volumes about this man's warmth and wisdom.

On the appellate levels in the Court of Appeals and on the Supreme Court, his sound scholarship was made manifest. His mastery of the English language and his legal acumen are apparent in his decisions.

In the conduct of his trials and in appellate decisions, he has demonstrated his awareness that "the letter of the law kills, but the spirit giveth life. "

As a lawyer and as a judge he has heeded the mandate of the prophet Amos, "That justice many run down like water and righteousness as a mighty stream." In the conduct of his life he has always, as admonished by the prophet Micah, "done justly, loved mercy and walked humbly with his God."

To know him as a citizen is to admire him.

To know him as a Judge is to respect him.

To know him as a person is to love him.

He is genteel—as soft as lamb's wool and as strong as steel!

The touchstones of the life of Justice Webb are duty, honor and integrity. What a glorious heritage he provides for his children, grandchildren, family and the people of this state!

Today the people of North Carolina Honor him by the presentation of his portrait that will be on permanent display in the Supreme Court. More significantly, by his lifetime commitment to the blessings of liberty and justice under the law, he has honored the people of this great state and nation.

ACCEPTANCE OF JUSTICE WEBB'S PORTRAIT

BY

CHIEF JUSTICE LAKE

We certainly thank you very much Mr. McMillan for that wonderful tribute. We appreciate it very much.

I would like to call upon the grandchildren of Justice Webb, David, Martha and Patricia, to unveil the portrait.

On behalf of the Supreme Court, we are very pleased and honored to accept this beautiful portrait to add to our permanent collection. It will be mounted very quickly and makes a very fine addition to our collection.

We thank the subject again and the artist for the wonderful portrait and certainly all of you for being here with us today.

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

WHEREAS, section 7A-38.3 of the North Carolina General Statutes establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to the bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to implement section 7A-38.3 by adopting rules and standards concerning said program,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e), Rules Implementing the Prelitigation Farm Nuisance Mediation Program are adopted to read as in the following pages. These Rules shall be effective on the 1st day of September, 2000.

Adopted by the Court in conference the 12th day of July, 2000. The Appellate Division Reporter shall publish the Rules Implementing the Prelitigation Farm Nuisance Program in their entirety at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION.

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. EXEMPTION FROM G.S. § 7A-38.1.

A dispute mediated pursuant to G.S. § 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. § 7A-38.1.

RULE 3. SELECTION OF MEDIATOR.

A. Time Period for Selection. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. Selection of Certified Mediator by Agreement. The Clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate farm nuisance disputes in the judicial district encompassing the county in which the request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. Nomination of Non-Certified Mediator by Agreement. The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. Court Appointment of Mediator. If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator and the senior resident superior court judge shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator.

E. Mediator Information Directory. To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

RULE 4. THE PRELITIGATION FARM MEDIATION.

A. When Mediation is to be Completed. The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. Extensions. A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. Where the Conference is to be Held. Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of Parties, Attorneys and Other Participants. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. Sanctions for Failure to Attend. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. Authority of Mediator.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose.

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4

shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

RULE 6. COMPENSATION OF THE MEDIATOR.

A. By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

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 ~~$100.00~~ $125.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of ~~$100.00~~ $125.00, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. Postponement Fee. 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 (7) business 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 6.B.

E.~~D~~. Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. 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.

DRC Comments to Rule 6

DRC Comment to Rule 6.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 6.D.

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to post-

ponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 6.E.

If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 6.F.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 6.E. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 7. WAIVER OF MEDIATION.

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party who requested mediation shall file the waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. Contents of Certification. Following the conclusion of mediation or the receipt of a waiver of mediation signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation was held, the certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. Deadline for Filing Mediator's Certification. The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF PRELITIGATION FARM NUISANCE DISPUTES.

Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

RULE 10. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of September, 2000.

Adopted by the Court in conference the 12th day of July, 2000. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

RULE 1. INITIATING MEDIATED SETTLEMENT CONFERENCES

A. PURPOSE OF MANDATORY SETTLEMENT CONFERENCES

Pursuant to G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. § 7A-37.1, Arb. Rule 1(b)].

B. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Timing of the Order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.B.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) **Content of Order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed

mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an A.O.C. form.

(4) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) **Motion to Dispense With Mediated Settlement Conference.** A party may move the Senior Resident Superior Court Judge, to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) **Motion to Authorize the Use of Other Settlement Procedures.** A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE

(1) **Order by Local Rule.** In judicial districts in which a system of scheduling orders or scheduling conferences

is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Scheduling Orders or Notices**. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling Conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.~~A.~~B.** The provisions of Rule 1.B(4), (5) and (6) shall apply to Rule 1~~.B.~~ C. except for the time limitations set out therein.

(5) **Deadline for Completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated

settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.~~B.~~ C. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) Selection of Mediator. The parties may select and nominate, and the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.C.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an A.O.C. form.

B. NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR. The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and

opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an A.O.C. form.

C. **APPOINTMENT OF MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an A.O.C. form. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Superior Court Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified non-attorney mediator, and if so, the Senior Resident Superior Court Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Superior Court Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in local rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

D. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Senior

Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.~~A.~~B.(1) shall state a deadline for completion of the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any

party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES.

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what

terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance Company Representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or

claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. **FINALIZING AGREEMENT.** If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

E. **RELATED CASES.** Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted

against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision which provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, the Senior Resident Superior Court Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to

and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the Conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.

(4) **Reporting Results of Conference.** The mediator shall report to the court on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(5) **Scheduling and Holding the Conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is 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 $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $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.

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, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

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 (7) business 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.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.E.

Though MSC Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and

court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000.

or

(ii) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and

(b) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B. (1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following: (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator:

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the US District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Court; upon the recommendation of the Dispute Resolution Commission and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. § 7A-38.1, implementing mediated settlement conferences in that district.

RULE 11. DEFINITIONS

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution. Commission.

RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

WHEREAS, section 7A-38.4 of the North Carolina General Statutes establishes a pilot program in district court to provide for settlement procedures in equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4(c) provides for this Court to implement section 7A-38.4 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4(c), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of September, 2000.

Adopted by the Court in conference the 12th day of July, 2000. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, as amended through this action, at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. § 7A-38.4, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. § 7A-37.1, Arb. Rule 1(b)].

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party in an equitable distribution, child support, alimony, or post-separation support action, shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. § 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by G.S. § 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable

distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from the program.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral; and

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial

settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have submitted the action to arbitration or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a media-

tor certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where

mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who request appointments in said district.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL.

The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have executed final documents. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person an appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court upon the recommendation of the Dispute Resolution Commission, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.~~1(l),~~ .4 (k) which states:

~~Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.~~

~~No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.~~

Evidence of statements made and conduct occurring in a settlement proceeding conducted pursuant to this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No such settlement shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement procedure pursuant to this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in a civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference

(4) **Reporting Results of Conference.** The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the conference, whether or not an agreement was reached by the parties. If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case. If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

(5) **Scheduling and Holding the Conference.** The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) **Informational Brochure.** Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission

explaining the mediated settlement conference process and the operations of the Commission.

RULE 7. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment.

C. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7. B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be a practitioner member of the Academy of Family Mediators; or

2. Be certified as a Superior Court mediator prior to December 31, 1998, and have family law or family mediation experience and be recommended by a regular District Court Judge in the applicant's district who has familiarity with the applicant's competence and qualifications in the area of family law or family mediation; or

3. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as follows:

(a) as a licensed attorney and/or judge of the General Court of Justice for at least four years; or

(b) as a licensed psychologist, licensed family counselor, licensed pastoral counselor or other licensed mental health professional for at least four years; or

(c) as a mediator having mediated in a community center or other supervised setting at least 5 cases each year for four years after first having completed a 20 hour mediation training program; or

(d) as a certified Superior Court mediator having mediated at least 10 cases in the past two years which may include family mediations, cases in state or federal courts or cases before state or federal administrative agencies; or

(e) as a certified public accountant for at least four years.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission.

C. Be a member in good standing of the State Bar of one of the United States or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties three mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is a practitioner member of the Academy of Family Mediators, or who is an A.O.C. mediator.

~~To be certified pursuant to these rules within six months of the adoption of these rules,~~ During the period of the pilot program, a person may satisfy the observation requirements of this section by satisfactorily demonstrating that he/she has served as mediator with divorcing parties having custody or family financial disputes in at least five (5) cases or for fifty (50) hours.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Agree to be placed on at least one district's mediator appointment list and accept appointments, unless the mediator has a conflict of interest which would justify disqualification as mediator.

Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child

development and interpersonal relations at any time prior to that recertification.)

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to these rules shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections.

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Knowledge of communication and information gathering skills.

(4) Standards of conduct for mediators.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and postseparation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Academy of Family Mediators may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an AFM approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the AFM approved training or in some other acceptable course.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of the procedure requested unless the Court finds that the parties did not agree upon the procedure to be utilized, the neutral to conduct it and the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a

settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for autho-

rization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by § G.S. 7A- 38.~~1(l)~~ .4.(k) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the parties' case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) Report of Evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. Settlement Judge. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge.

B. Conducting the Conference. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. Confidential Nature of the Conference. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

CREATION OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

The Supreme Court finds that there is a need in North Carolina for a single forum to provide for ongoing coordination and policy direction for the court-sponsored dispute resolution programs in the state. That is the conclusion of a Task Force on Dispute Resolution appointed by Chief Justice Henry Frye. The Supreme Court under its authority to oversee the operation of the courts and to adopt rules of practice and procedure for the courts that are supplemental to the acts of the General Assembly, adopts the following rule to address the need for such a single forum.

1. There is hereby created the Alternative Dispute Resolution Committee of the North Carolina State Judicial Council. The Committee shall consist of twenty-four members, appointed by the Chief Justice as follows:

- An associate justice of the Supreme Court of North Carolina
- A judge of the North Carolina Court of Appeals, recommended by the Chief Judge of that court
- Two superior court judges, serving staggered terms
- Two district court judges, serving staggered terms
- The Chair of the Dispute Resolution Commission or his designee from among the Commission's members
- Seven attorneys licensed to practice in NC, at least two of whom should be neutrals, recommended by the President of the NC Bar Association, serving staggered terms
- A custody mediator
- A trial court administrator
- A person active in the work of community settlement centers, who shall not be an attorney
- Two professors knowledgeable about dispute resolution, serving staggered terms
- The Director of the Administrative Office of the Courts or his designee
- Two citizens interested in dispute resolution programs, who would not be eligible for appointment in any other category, serving staggered terms

- Two members of the Judicial Council

2. The Chief Justice shall designate a person to serve as chair, and may designate a person to serve as vice-chair or co-chair. Except for ex-officio members (AOC Director, DRC Chair, and Council members), all terms are for four years. No person may serve for more than two successive full terms. The fact that a person serves on the Dispute Resolution Commission or in any other official capacity in an activity related to a dispute resolution program does not disqualify that person from serving on the Committee if the person is otherwise qualified to serve.

3. The Committee shall have the following duties:

- To provide ongoing coordination and policy direction for court-sponsored dispute resolution programs in the state
- To provide a forum for the consideration of issues affecting the future direction of the court-sponsored dispute resolution movement within the North Carolina court system
- To recommend to the Judicial Council guidelines for the appropriate form of dispute resolution to be used as a case management tool in cases heard in the General Court of Justice
- To monitor the effectiveness of dispute resolution programs and report its findings to the State Judicial Council
- To provide a forum for the resolution of inter-program issues that arise among the various programs sponsored by the court system
- To serve as a clearing-house for rules that affect dispute resolution programs before they are submitted to the Supreme Court for review and adoption

4. The Committee may establish subcommittees as necessary.

5. The State Judicial Council may delegate other duties to the Committee and the State Judicial Council may also establish supplemental procedures and policies to regulate the work of the Committee.

6. The Committee may establish liaisons with any groups interested in court-sponsored dispute resolution programs, such as the Fourth Circuit mediation program, the Industrial Commission's mediation program, the Office of Administrative Hearing's mediation program, and the Mediation Network of North Carolina.

Adopted by the Court in conference the 13th day of July, 2000. The Appellate Division Reporter shall publish this order at the earliest practicable date.

Freeman, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 20, 2000.

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):

27 N.C.A.C. 1B, Section .0100 Discipline and Disability of Attorneys

Rule .0112 Investigations: Initial Determination

(j) If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.

If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.

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 20, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of December, 2000.

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 20th day of December, 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 20th day of December, 2000.

s/Franklin Freeman, Jr.
Franklin Freeman, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

The following amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 20, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing judicial district bar grievance committees, as particularly set forth in 27 N.C.A.C. 1B, Section .0200, be amended as follows (additions underlined, additions interlined):

27 N.C.A.C. 1B, Section .0200 Rules Governing Judicial District Grievance Committees

Rule .0202 Jurisdiction & Authority of District Grievance Committees

. . .

(e) Authority of District Grievance Committees—The district grievance committee shall have authority to

. . .

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the Revised Rules of Professional Conduct. The district grievance committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to **the Lawyer Assistance Program pursuant to Rule .0112(j) or to** a program of law office management training approved by the State Bar;

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 20, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of December, 2000.

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 20th day of December, 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 20th day of December, 2000.

s/Franklin Freeman, Jr.
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 July 21, 2000.

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):

27 N.C.A.C. 1B, Section .0100 Discipline and Disability of Attorneys

Rule .0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty

. . .

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar in accordance with Rule .0112(i) of this subchapter.

(12) in its discretion, to refer grievances primarily attributable to the respondent's substance abuse or mental health problem to the Lawyer Assistance Program in accordance with Rule .0112(j) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of December, 2000.

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 20th day of December, 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 20th day of December, 2000.

s/Franklin Freeman, Jr.
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 20, 2000.

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 judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .0900, be amended as follows (Rules .0902 and .0903 are entirely new provisions):

27 N.C.A.C. Chapter 1A

Section .0900 Organization of the Judicial District Bars

. . .

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar. The judicial district bar shall notify the North Carolina State Bar of its election to assess an annual membership fee each year at least thirty days prior to mailing to its members the first invoice therefor, specifying the amount of the annual membership fee, the date after which payment will be delinquent, and the amount of any late fee for delinquent payment.

(b) Accounting to State Bar. No later than thirty days after the end of the judicial district bar's fiscal year, the judicial district bar shall provide the North Carolina State Bar with an accounting of the annual membership fees it collected during such judicial district bar's fiscal year.

(c) Delinquency Date. The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) Late Fee. Each judicial district bar may impose, but shall not be required, to impose a late fee of any amount not to exceed thirty dollars ($30.00) for non-payment of the annual membership fee on or before the stated delinquency date.

(e) Members Subject to Assessment. Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

(f) Hardship Waivers. A judicial district bar may not grant any waiver from the obligation to pay the judicial district bar's annual membership fee or any late fee unless the lawyer requesting the waiver is granted a waiver of the lawyer's annual membership fee to the North Carolina State Bar for the comparable period.

(g) Reporting Delinquent Members to State Bar. Twelve months after the date of the first invoice for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

.0903 Fiscal Period

To avoid conflict with the assessment of the membership fees for the North Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year.

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 20, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of December, 2000.

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 20th day of December, 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 20th day of December, 2000.

s/Franklin Freeman, Jr.
Franklin Freeman, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 19, 2001.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Sections .1500 and .1600, be amended as follows (additions are underlined):

27 N.C.A.C. 1D

Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

. . .

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. Subject to the limitations set forth in Rule .1611 of this subchapter, credit may also be given for continuing legal education activities on CD-ROM and on a computer website accessed via the Internet.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer website or CD-ROM. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) Except as provided in Rule .1611 of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

. . .

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

. . .

.1602 General Course Approval

. . .

(i) In-House CLE and Self-Study - No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(b)(9) of this subchapter or as provided in Rule .1611 of this subchapter.

. . .

.1611 Accreditation of Computer-Based CLE

(a) Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(b) Any credit hours carried-over from one calendar year to another pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(c) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail or a website bulletin board, with the presenter and/or other participants.

(d) The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in

the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning continuing legal education were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 19, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of February, 2001.

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 1st day of March, 2001.

s/I Beverly Lake, Jr.
I. Beverly Lake, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 1st day of March, 2001.

s/G. K. Butterfield, Jr.
G. K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 27, 2001.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Sections .1501 and .1602, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D .1501 and .1602

.1501 Purpose and Definitions

Purpose

...

(b) Definitions

...

(3) "Administrative Committee" shall mean the Administrative Committee of the North Carolina State Bar.

[renumbering the remaining subparagraphs]

...

(11) ~~"Membership and Fees Committee" shall mean the Membership and Fees Committee of the North Carolina State Bar~~.

[renumbering the remaining subparagraphs]

...

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the Revised Rules of Professional Conduct; b) the professional obligations of the attorney to the client, the court, the public, and other lawyers; and c) the effects of substance abuse, chemical dependency, or debilitating mental condition on a lawyer's professional respon-

sibilities. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

. . .

.1602 General Course Approval

. . .

(c) Professional Responsibility Courses on Substance Abuse, ~~and~~ Chemical Dependency and Debilitating Mental Conditions—Accredited professional responsibility courses on substance abuse, ~~and~~ chemical dependency and debilitating mental conditions shall concentrate on the relationship between substance abuse, chemical dependency, debilitating mental conditions and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of substance abuse, ~~and~~ chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations.

. . .

(l) Nonlegal Educational Activities—A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1602(e), (h)-(j) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. Except as noted in the preceding sentence or in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning continuing legal education were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 27, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of May, 2001.

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 7th day of June, 2001.

s/I Beverly Lake, Jr.
I Beverly Lake, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 7th day of June, 2001.

s/G. K. Butterfield, Jr.
G. K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PRACTICAL TRAINING OF LAW STUDENTS

The following amendments to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopt-

ed by the Council of the North Carolina State Bar at its quarterly meeting on April 27, 2001.

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 practical training of law students, as particularly set forth in 27 N.C.A.C. 1C, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C Section .0200

Rules Governing Practical Training of Law Students

.0201 Purpose

~~The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and~~ The following rules are adopted to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, ~~the following rules are adopted~~.

.0202 ~~General~~ Definitions

~~Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:~~

The following definitions shall apply to the terms used in this section:

(1) Legal aid clinic—~~An established or proposed~~ A department, division, program or course in a law school, approved by the Council of the North Carolina State Bar, which operates under the supervision an active member of the State Bar of ~~at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this state and conducted regularly and systematically to~~ and renders legal services to indigent persons.

(2) Indigent persons—~~A person~~ Persons who are financially unable to ~~employ~~ pay for the legal services of an attorney as determined by a standard ~~of indigency~~ established by a judge of the General Court of Justice, a legal services corporation, or the legal aid clinic providing representation.

~~(3) Legal aid – Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.~~

(3) Legal intern – A law student who is certified to provide supervised representation to clients under the provisions of the rules of this Subchapter.

~~(4) Supervising attorney – Supervising attorney means sole practitioner, one or more attorneys sharing offices but not partners, or one or more attorneys practicing together in a partnership or in a professional organization.~~

(4) Legal services corporation – A nonprofit North Carolina corporation organized exclusively to provide representation to indigent persons.

(5) Supervising attorney – An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter and who supervises one or more legal interns.

.0203 Eligibility

~~In order to~~ To engage in activities permitted by these rules, a law student must satisfy the following requirements:

(1) be ~~duly~~ enrolled in a law school approved by the Council of the North Carolina State Bar;

(2) ~~be a student regularly enrolled and in good standing in a law school who has satisfactorily~~ have completed ~~the equivalent of~~ at least three semesters of the requirements for a ~~first~~ professional degree in law (J.D. or its equivalent);

(3) be certified in writing by ~~the dean~~ a representative of his or her law school, authorized by the dean of the law school to provide such certification, ~~on forms provided by the North Carolina State Bar~~, as being of good character with requisite legal ability and training to perform as a legal intern~~. Certification may be denied or, if granted, withdrawn by the dean without a hearing or any showing of cause and for any reason~~;

(4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;

(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal ~~aid bureau~~, services corporation, law school, public defender agency, or the

state from paying compensation to the ~~eligible~~ law student, ~~nor shall it prevent any agency from making such charges for its services as it may otherwise properly require~~ or charging or collecting a fee for legal services performed by such law student;

(6) certify in writing that he or she has read and is familiar with the North Carolina Revised Rules of Professional Conduct and the opinions interpretive thereof.

.0204 ~~Form and Duration of~~ Certification as Legal Intern

Upon receipt of the written materials required by Rule .0203(3) and (6) and Rule .0205(6), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;

(2) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or

(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

~~(a) A certification of a student by the law school dean~~

~~(1) shall be filed with the secretary of the North Carolina State Bar in the office of the North Carolina State Bar in~~

~~Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first bar examination following the students graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he or she is admitted to the Bar;~~

~~(2) may be withdrawn by the dean at any time without a hearing and without any showing of cause and shall be withdrawn by the dean if the student ceases to be duly enrolled as a student prior to graduation, by mailing a notice to that effect to the secretary of the North Carolina State Bar at the office of the North Carolina State Bar in Raleigh, to the supervising attorney, and to the student;~~

~~(3) may be withdrawn by any resident superior court judge or judge holding court in any judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's dean, and to the secretary of the North Carolina State Bar at the office of the North Carolina State Bar in Raleigh.~~

~~(b) Forms to be used for certification and withdrawal of certification shall be adopted by the council.~~

.0205 Supervision

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar ~~and before supervising the activities specified in Rule .0206 of this subchapter shall have~~ who ~~actively~~ practiced law as a full-time occupation for at least two years;

(2) supervise no more than five ~~students~~ legal interns concurrently, unless such attorney is a full-time member of a law school's faculty or staff whose primary responsibility is supervising ~~students~~ legal interns in a ~~clinical program~~ legal aid clinic;

(3) assume personal professional responsibility for any work undertaken by ~~the student~~ a legal intern while under his or her supervision;

(4) assist and counsel with ~~the student~~ a legal intern in the activities ~~mentioned~~ permitted by ~~in~~ these rules and review such

activities with ~~such student~~ the legal intern, all to the extent required for the proper practical training of the ~~student~~ legal intern and the protection of the client;

(5) read, approve and personally sign any pleadings or other papers prepared by ~~such student~~ a legal intern prior to the filing thereof, and read and approve any documents ~~which shall be~~ prepared by ~~such student~~ a legal intern for ~~execution by any person or persons not a member or members of the North Carolina State Bar~~ a client or third party prior to the ~~submission thereof for~~ execution thereof;

(6) ~~as to any of the activities specified by Rule .0206 of this subchapter~~ prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar

~~(A) file with the secretary of the North Carolina State Bar in Raleigh, before commencing supervision of any student~~, a signed notice ~~in writing stating the name of such student~~, setting forth the period ~~or periods~~ during which ~~he or she~~ supervising attorney expects to supervise the activities of ~~such student~~ an identified legal intern, and acknowledging that he or she the supervising attorney will adequately supervise ~~such student~~ the legal intern in accordance with these rules;

(7) notify the ~~secretary of the~~ North Carolina State Bar ~~in the office of the North Carolina State Bar in Raleigh~~ in writing promptly whenever ~~his or her~~ the supervision of ~~such student shall~~ a legal intern ceases.

.0206 Activities

(a) A properly certified ~~student~~ legal intern may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a ~~student~~ legal intern may give advice to a client on legal matters provided that the ~~student~~ legal intern gives a clear prior explanation to the client that the ~~student~~ legal intern is not an attorney and ~~provided that~~ the supervising attorney has given the ~~student~~ legal intern permission to render legal advice in the subject area involved.

(c) A legal intern may represent an indigent person, or the state in criminal prosecutions, in any proceeding before a federal, state or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the legal intern.

~~(c) Without being physically accompanied by the supervising attorney, a student may represent indigent persons or the state in the following hearings or proceedings:~~

~~(1) administrative hearings and proceedings before federal, state, and local administrative bodies;~~

~~(2) civil litigation before courts or magistrates, provided the case is one which could be assigned to a magistrate under G.S. 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate;~~

~~(3) in any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute or rule of court.~~

~~(d) Without being physically accompanied by the supervising attorney, a student may represent the state in the prosecution of all misdemeanors with the consent of the district attorney.~~

~~(e) When physically accompanied by the supervising lawyer who has read, approved and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the court, a student may represent indigent clients or the state in the following hearings or proceedings, provided, however, the approval of the presiding judge is first secured:~~

~~(1) all juvenile proceedings;~~

~~(2) the presentation of a brief and oral argument in any civil or criminal matter in the district or superior court;~~

~~(3) all misdemeanor cases;~~

~~(4) preliminary hearings in all criminal cases;~~

~~(5) all post-conviction proceedings;~~

~~(6) all civil discovery.~~

~~(f) A student may accompany the supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding judge.~~

~~(g)~~ (d) In all cases under this rule in which a ~~student~~ legal intern makes an appearance ~~in court or before an administrative~~ before a tribunal or agency on behalf of a client, the ~~student~~ legal intern shall have the written consent in advance of the client ~~and the supervising attorney~~. The client shall be given a clear explanation, prior to the giving of his or her consent, that the ~~student~~ legal intern is not an attorney. This consent shall be filed with the ~~court~~ tribunal and made a part of the record in the case.

~~(h)~~ (e) In all cases under this rule in which a ~~student~~ legal intern is permitted to make an appearance ~~in court or~~ before ~~an administrative agency on behalf of a client~~ a tribunal or agency, subject to any limitations imposed by the tribunal, the ~~student~~ legal intern may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

~~(i) Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless the student is under the direct and physical supervision of the supervising attorney.~~

.0207 Use of Student's Name

(a) A ~~student's~~ legal intern's name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the ~~student~~ legal intern has worked with or under the direction of the supervising attorney, provided the ~~student~~ legal intern is clearly identified as a ~~student~~ legal intern certified under these rules, and provided further that the ~~student~~ legal intern shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the letterhead of the supervising attorney's ~~s~~, legal aid clinic, or district attorney's office ~~letterhead which relate to the student's supervised~~

~~work~~, provided there appears below ~~his or her~~ the legal intern's signature a clear identification that ~~he or she~~ the legal intern is certified under these rules. An appropriate designation is ~~such as~~ "Certified ~~Law Student~~ Legal Intern under the Supervision of [supervising attorney]."

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney, legal aid clinic, or district attorney's office;

(2) on a business card bearing the name of a supervising attorney, legal aid clinic, or district attorney's office; or

(3) on a business card identifying the ~~student~~ legal intern as certified under these rules.

~~**.0208 Miscellaneous**~~

~~(a) Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of these rules.~~

~~(b) These rules are subject to amendment, modification, revision, supplementation, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.~~

~~**.0209 Dean's Certificate**~~

~~IN RE:~~

~~APPLICATION OF~~

~~CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROGRAM PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR~~

~~TO: THE NORTH CAROLINA STATE BAR:~~

~~The undersigned certifies as follows:~~

~~1. Name and address of person signing this certificate~~

2. Name and address of law school and official connection with same

_____

_____

3. _____ is duly enrolled in a law school approved by the Council of the North Carolina State Bar and is in good standing in said law school and has satisfactorily completed the equivalent of three semesters of the requirements for a first professional degree in law (J.D. or its equivalent).

4. _____ is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules Governing Practical Training of Law Students.

Seal (of school)

_____, Dean

_____ Name of School

_____, dean of _____ Law School being first duly sworn on oath deposes and says that he or she has read the foregoing certificate and knows the contents thereof; that the statements contained therein are true of his or her own knowledge, except as to those matters stated upon information and belief, and, as to those, he or she believes them to be true.

Sworn to and subscribed before me this _____ day of _____, 10_____ _____ Notary Public

My commission expires

.0210 Withdrawal of Dean's Certificate

IN RE: APPLICATION OF

_____

_____

_____

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

~~TO: THE NORTH CAROLINA STATE BAR:~~

~~The undersigned, having previously certified to the Council of the North Carolina State Bar as to the eligibility of the above named individual to participate in the Practical Training of Law Students Program promulgated by the North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify the North Carolina State Bar that _____ is no longer eligible to participate in said program.~~

~~Seal (of school)~~

~~_____~~

~~Dean~~

~~_____~~

~~Name of School~~

~~_____, dean of _____ Law School being first duly sworn on oath deposes and says that he or she has read the foregoing certificate and knows the contents thereof; that the statements contained therein are true of his or her own knowledge, except as to those matters stated upon information and belief and, as to those, he or she believes them to be true.~~

~~Sworn to and subscribed before me this the _____ day of _____, 19___~~

~~My commission expires~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning Rules Governing the Practical Training of Law Students were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 27, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of May, 2001.

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 7th day of June, 2001.

s/ Beverly Lake, Jr.
I Beverly Lake, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 7th day of June, 2001.

s/G. K. Butterfield, Jr.
G. K. Butterfield, Jr.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

The following amendment 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 April 27, 2001.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Revised Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, regarding professional independence be amended as follows (additions underlined, deletions interlined):

27 N.C.A.C 2 Revised Rules of Professional Conduct

Rule 5.4, Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

. . .

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement.

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 Revised Rules of Professional Conduct 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 27, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of May, 2001.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment 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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of May, 2000.

s/I Beverly Lake, Jr.
I Beverly Lake, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 7th day of May, 2001.

s/G. K. Butterfield, Jr.
G. K. Butterfield, Jr.
For the Court

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Preservation of issues—constitutional issue—failure to raise at trial—Although defendant contends an improper jury selection procedure in his capital sentencing proceeding violated his constitutional right to a fair and impartial jury, defendant did not raise this constitutional issue at trial, and therefore, it was not preserved for appellate review under N.C. R. App. P. 10(b)(1). **State v. Lawrence, 1.**

Preservation of issues—constitutional issue—failure to raise at trial—Although defendant contends the trial court violated his constitutional rights to present evidence and to confront witnesses against him in a capital sentencing proceeding by not allowing defendant's expert witness to give his opinion as to defendant's state of mind at the time of the homicide, defendant did not raise this constitutional issue at trial, and therefore, it was not preserved for appellate review under N.C. R. App. P. 10(b)(1). **State v. Lawrence, 1.**

Preservation of issues—constitutional issue—failure to raise in a motion or in trial court—The trial court did not violate one defendant's Confrontation Clause rights in a capital trial by admitting evidence of a police report regarding seizure of that defendant's luggage by the police a week prior to the murders. **State v. Golphin, 364.**

Preservation of issues—constitutional issues—jury selection—The defendant in a capital first-degree murder prosecution did not object at trial and preserve for appeal the question of whether the jury selection procedure prescribed in N.C.G.S. § 15A-1214(d) through (f) is unconstitutional since it allows a prosecutor a greater number of prospective jurors from which to choose than it allows defendant. **State v. Hyde, 37.**

Preservation of issues—constitutionality of short-form indictment—Although defendant did not challenge the constitutionality of the short-form

APPEAL AND ERROR—Continued

indictment used to charge him with first-degree murder at trial, this issue is properly preserved because a challenge to an indictment alleged to be invalid on its face that could deprive the trial court of jurisdiction may be made at any time. **State v. Lawrence, 1.**

Preservation of issues—failure to object—Although one defendant contends the trial court erred in a capital sentencing proceeding by denying his motion to suppress two letters seized by prison officials, defendant did not preserve this issue for appeal since he did not object when the letters were introduced, and he cannot rely on his pretrial motion to suppress. **State v. Golphin, 364.**

Preservation of issues—failure to object—The trial court did not violate one defendant's rights during a capital sentencing proceeding by refusing to give a peremptory instruction for the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance concerning the age of defendant at the time of the crime, because defendant failed to preserve this issue. **State v. Golphin, 364.**

Preservation of issues—failure to object—failure to argue plain error—Although one defendant claims the trial court erred during a capital sentencing proceeding by allowing the State to cross-examine an expert regarding his potential bias, defendant did not preserve this issue. **State v. Golphin, 364.**

Preservation of issues—no argument in brief—issue waived—Although defendant alleges the trial court committed plain error in a capital sentencing proceeding by its jury instruction defining "mitigating circumstance," he has waived this argument. **State v. Cummings, 600.**

Preservation of issues—no offer of proof—The trial court did not err in a capital sentencing proceeding by limiting testimony from defendant's expert witness on direct examination concerning whether the expert was court-appointed because defendant did not make an offer of proof developing the witness' response to the pertinent questioning, and thus, defendant has failed to preserve this issue under N.C.G.S. § 8C-1, Rule 103(a)(2). **State v. Lawrence, 1.**

Preservation of issues—objection when witness called—no objection when evidence introduced—A defendant in a capital first-degree murder prosecution did not preserve for appellate review evidentiary issues where he objected when the witnesses were called; the trial judge removed the jury, considered the forecast of evidence and the legal arguments, and found the evidence admissible; and defendant did not object when the testimony was subsequently introduced before the jury. The arguments preceding the calling of the witnesses were tantamount to motions in limine and defendant must make an objection at the time the evidence is actually introduced to preserve the question of admissibility for appeal. **State v. Thibodeaux, 570.**

Preservation of issues—offer of proof—Although defendant contends the trial court erred in a capital trial by limiting an officer's testimony on cross-examination and excluding testimony that the victim was on lockup at a correctional unit for profanity and disrespect, defendant has failed to preserve this issue for appellate review under N.C.G.S. § 8C-1, Rule 103(a)(2) because an offer of proof was necessary since the substance of the excluded testimony was not necessarily apparent from the context of the question asked. **State v. Braxton, 158.**

CONSTITUTIONAL LAW—Continued

sistance of counsel when it denied defendant's repeated motions for a continuance under N.C.G.S. § 15A-952(g) in his capital sentencing proceeding since it is unreasonable to expect that any attorney could be adequately prepared in thirty-four days to conduct a bifurcated capital trial for this complex case involving incidents in multiple locations over a two-day period with numerous witnesses. **State v. Rogers, 119.**

Presence at capital trial—bench conferences—A first-degree murder defendant's right to be present at his capital trial was not violated by bench conferences where defendant was represented by counsel at each conference, defendant was present in the courtroom, and defendant failed to demonstrate that the challenged bench conferences implicated defendant's confrontation rights or that his presence would have had a reasonably substantial relation to his opportunity to defend. **State v. Blakeney, 287.**

Presence at capital trial—post-trial evidentiary findings—A first-degree murder defendant's right to be present at his trial was not violated where the transcript did not indicate whether defendant was present at a post-trial proceeding at which the trial court made findings of fact and conclusions of law supporting oral evidentiary rulings made during trial. Assuming that defendant was not present, there was no prejudicial error because any objections to the findings and conclusions will be considered on appeal as fully as if defendant had specifically objected at the time they were entered; the judge's findings appear to be his own considered determinations based upon evidence presented during the suppression hearing at trial, although he confirmed his findings with the prosecutor and an SBI agent; and the findings are supported by competent evidence. **State v. Blakeney, 287.**

Right of confrontation—expert report—basis of opinion—The trial court did not violate one defendant's right of confrontation during a capital sentencing proceeding based on the theory that defendant was not given an opportunity to cross-examine an expert regarding the substance of the expert's report. **State v. Golphin, 364.**

Right of confrontation—nontestifying codefendant's statements—capital sentencing proceeding—no plain error—The trial court did not violate defendant's right of confrontation in a capital sentencing proceeding by admitting a nontestifying codefendant's statements that defendant shot the victims. **State v. Lemons, 87.**

Right to be present at all stages—administrative matters—The trial court did not violate defendants' right to be present at every stage of their capital trial by directing the clerk of court to meet privately with jurors about transportation and logistical matters. **State v. Golphin, 364.**

Right to be present at all stages—out-of-court discussions—special venire—The trial court did not violate defendants' right to be present at all stages of their capital trial when it ruled the jury would be drawn from a special venire. **State v. Golphin, 364.**

Right to be present at all stages—preliminary qualifications of prospective jurors—The trial court did not err by excusing several prospective jurors outside of defendant's presence in a capital sentencing proceeding. **State v. Cummings, 600.**

CRIMINAL LAW—Continued

Defendant's argument—quoting secular sources—relevancy—The trial court did not err in a capital sentencing proceeding by prohibiting defense counsel from quoting from secular sources during his closing argument, because the trial court afforded counsel ample opportunity to argue using ideas and quotes from secular sources and properly prohibited counsel from arguing the facts of other cases since those facts are not pertinent to any evidence in this case and are, thus, improper for jury consideration. **State v. Braxton, 158.**

Denial of complete transcript—narrative form—"substantial equivalent"—Although the trial court did not comply with the requirements of N.C.G.S. § 7A-450 to provide defendant with a complete transcript of his capital sentencing proceeding since a mechanical malfunction resulted in the elimination of a portion of one detective's testimony and all of a special agent's testimony, defendant is not entitled to any relief as a result of this omission. **State v. Lawrence, 1.**

Guilty pleas—required inquiry—There was no plain error in a capital prosecution for first-degree murder and other crimes in the acceptance of defendant's guilty pleas where the court examined defendant strictly in accordance with statutory requirements. **State v. Smith, 531.**

Instructions—character of victim—The trial court did not err in a capital sentencing proceeding by refusing a requested instruction regarding the character of the victim where the instruction was requested to foreclose excessive use of a brother's victim-impact statement in the prosecutor's closing argument. The court stated that it would reconsider the request if such excessive argument occurred and defendant did not object nor repeat the request for the instruction. **State v. Smith, 531.**

Joinder—common scheme—same transaction—The trial court did not abuse its discretion in a capital trial by denying one defendant's pretrial motion to sever the cases and by overruling his objections to improper joinder. **State v. Golphin, 364.**

Joinder—confession of codefendant—The trial court did not err by joining the capital trials of two defendants for first-degree murder, arson, and conspiracy where defendant Brewington argued that joinder was improper and severance necessary due to prejudice from the introduction of his codefendant's confession, but, as stated elsewhere in the opinion, the admission of the confession did not prejudice defendant. **State v. Brewington, 489.**

Jury request to review testimony—denial by court—exercise of discretion—The trial court did not commit prejudicial error in defendant's capital sentencing proceeding by failing to exercise its discretion under N.C.G.S. § 15A-1233, based on its denial of the jury's request to see the transcript of a witness's testimony and the instruction to the jury that its duty was to recall the evidence as it was presented. **State v. Lawrence, 1.**

Prosecutor's argument—advocate for State and victim—The trial court did not commit prejudicial error by failing to intervene ex mero motu during the prosecutor's closing arguments in a capital trial, based on the prosecutor arguing he spoke for the State and for the victim. **State v. Braxton, 158.**

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prosecutor's closing arguments stating that the defense expert was hired and paid by defendant for his favorable diagnosis and that the expert had testified only for defendants. **State v. Cummings, 600.**

Prosecutor's argument—future dangerousness of defendant—Although defendant contends the prosecutor injected his personal beliefs to the jury during closing arguments of a capital sentencing proceeding by stating that the future dangerousness of defendant was very relevant, it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of defendant. **State v. Cummings, 600.**

Prosecutor's argument—general deterrent effect of death penalty—Although defendant contends the prosecutor improperly appealed to the jury's emotions during closing arguments of a capital sentencing proceeding when he argued the death penalty was the only deterrent for defendant that would sufficiently protect prison guards, prisoners, and anyone defendant would encounter if he escaped, the prosecutor may urge the jury to sentence a particular defendant to death to specifically deter that defendant from engaging in future murders. **State v. Cummings, 600.**

Prosecutor's argument—grand jury indictment—There was no plain error in a capital sentencing proceeding in the prosecutor's argument concerning a changed date on the grand jury indictment. The argument was proper to refute defendant's attack on the procedure used in charging defendant and the instruction that being charged or indicted was not evidence of guilt was sufficient to eliminate any confusion or false impression the jury might have had. **State v. Steen, 227.**

Prosecutor's argument—incivility—There was no prejudicial error in a capital sentencing hearing in the prosecutor's treatment of a prospective juror, defense counsel, and defendant's psychological expert where the prosecutor tested the line between zealous advocacy and incivility but her manner and the interjection of arguably irrelevant matters were benign, if overblown. **State v. Smith, 531.**

Prosecutor's argument—misstatement of defense expert's testimony—Even though the prosecutor's closing argument in a capital sentencing proceeding with regard to an aspect of the defense expert's testimony stating that the expert acknowledged that defendant would not have called him as a witness if he had not given a favorable diagnosis may have been incorrect, defendant did not challenge the prosecutor's recapitulation of the testimony and correct this misstatement at trial; the trial court's instruction cured the inaccuracy; and the inaccuracy was slight and did not infect the trial with unfairness. **State v. Cummings, 600.**

Prosecutor's argument—parole—defendant's future dangerousness—The trial court did not commit plain error in a capital sentencing proceeding by allowing the State to interject the issues of parole and defendant's future dangerousness during opening statements, cross-examination of defendant, and cross-examination of two witnesses. **State v. Cummings, 600.**

Prosecutor's argument—parole eligibility—The prosecutor did not improperly interject parole eligibility into the jury's consideration during closing argu-

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Corroboration—self-defense claim—no right in advance of testimony of a witness—The trial court did not err by initially excluding evidence that an inmate told defendant that he had given a knife to the victim, and that the same inmate also told another inmate that he had given a knife to the victim, because there is no right to corroboration evidence of a self-defense claim in advance of the testimony of a witness. **State v. Braxton, 158.**

Cross-examination—following attempt to withdraw testimony—The trial court did not err in a capital trial by permitting the prosecutor to cross-examine the defense expert, after defendant attempted to withdraw the expert as a witness when the trial court sustained the prosecutor's objection to the expert's testimony regarding defendant's alleged "prison psychosis." **State v. Braxton, 158.**

Cross-examination—statements underlying psychological diagnosis—There was no error in a capital sentencing proceeding where the prosecutor asked defendant's psychological expert a number of questions about a prior robbery that occurred a year before the murder to which defendant pled guilty where the questioning was apparently directed at discrediting the diagnosis by showing that statements from defendant which formed a partial basis for the diagnosis were untruthful and unreliable. **State v. Smith, 531.**

Defendant's prior statement—recross-examination—The trial court did not abuse its discretion in allowing the State to conduct recross-examination of defendant concerning defendant's statement that he was so drunk that he did not remember shooting and killing his uncle in 1966, and his statement that he had no memory of the killing of the victim in this case. **State v. Cummings, 600.**

Defendant's prison records—cross-examination—The trial court did not commit plain error by allowing the State to cross-examine a witness with documents in defendant's prison records. **State v. Cummings, 600.**

Demonstration—pepper spray—The trial court did not unfairly prejudice one defendant's defense in a capital trial by allowing the State during its presentation of rebuttal evidence to demonstrate the effects of pepper spray. **State v. Golphin, 364.**

Duplicative testimony—availability of weapons in prison—The trial court properly exercised its discretion under N.C.G.S. § 8C-1, Rule 611(a) in a capital trial when it excluded testimony from defendant and two other witnesses regarding the general availability of weapons at the correctional center to assist defendant's claim of self-defense for a murder committed in prison because any further testimony would have been duplicative. **State v. Braxton, 158.**

Expert testimony—court-appointed—cross-examination—expert fees—The trial court did not err in a capital sentencing proceeding by allowing the State to cross-examine defendant's expert witness concerning fees charged by the witness. **State v. Lawrence, 1.**

Expert testimony—cross-examination—expert fees—The trial court did not abuse its discretion by allowing the State to cross-examine a defense witness concerning his fees. **State v. Cummings, 600.**

Expert testimony—offer of proof—report in evidence—The trial court did not improperly refuse to allow defendant to make an offer of proof of the pro-

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posed testimony of an expert witness during a capital sentencing proceeding. **State v. Braxton, 158.**

Expert testimony—relevance—usefulness to jury—The trial court did not err in a cocaine prosecution by excluding the testimony of a defense expert on drug investigative procedures as irrelevant. The roles of the undercover officer and the Sheriff in this case require no expert explanation; the jury was perfectly capable of interpreting the State's evidence. **State v. Mackey, 650.**

Expert testimony—voir dire—basis of opinion—The trial court did not err by allowing the State, without objection from defendant, to conduct a voir dire of a defense witness regarding the basis of his opinions prior to the witness being qualified as an expert in a capital sentencing proceeding. **State v. Cummings, 600.**

Expert witness—cross-examination—another expert's report—The trial court did not violate one defendant's rights during a capital sentencing proceeding by allowing the State to cross-examine his codefendant's expert witness with a report prepared by another expert witness. **State v. Golphin, 364.**

Flight—evidence sufficient—There was sufficient evidence in a first-degree murder prosecution to warrant an instruction on flight. **State v. Blakeney, 287.**

General intent crimes—prior assault—admissibility to show intent—The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that evidence of a prior incident in which defendant hit the female victim's face was admissible in this prosecution for the general intent crimes of assault inflicting serious injury and assault on a female to show defendant's intent with respect to the present assault on the female victim. **State v. Elliott, 663.**

Hearsay—initially allowed—subsequently excluded—The trial court did not commit prejudicial error in a capital trial by allowing testimony of an inmate, stating that an anonymous inmate asked defendant why he killed the victim, because the trial court's initial overruling of defendant's objection to this hearsay testimony was subsequently corrected, and the inadmissible hearsay was properly excluded by the trial court. **State v. Braxton, 158.**

Hearsay—no prejudicial error—Even if the trial court erred in a capital sentencing proceeding by admitting the hearsay testimony of the victim's mother and grandmother stating that the victim said he had been placed on lockup at a correctional center as a result of a back injury that prevented him from working, this error was not prejudicial. **State v. Braxton, 158.**

Hearsay—not testifying to any statements—motive—The trial court did not commit prejudicial error in a capital trial by allowing testimony of an inmate about the victim's $17.00 debt owed to defendant because the statement did not constitute hearsay since the inmate did not testify to any statements made by the victim, and the testimony was relevant to establish a possible motive for the murder. **State v. Braxton, 158.**

Hearsay—not truth of matter asserted—subsequent conduct—The trial court did not commit prejudicial error in a capital trial by allowing testimony of an inmate's statement to defendant shortly before the murder that the victim was

EVIDENCE—Continued

in the shower, because the statement was not hearsay since it was not offered to prove the truth of any matter asserted, but instead to explain the subsequent conduct of defendant in walking toward the shower area. **State v. Braxton, 158.**

Hearsay—police report—not truth of matter asserted—subsequent actions—The trial court did not err in a capital trial by admitting evidence of a police robbery report regarding seizure of one defendant's luggage by the police a week prior to the murders since the report was admissible for the non-hearsay purpose to help explain subsequent actions taken by the officer. **State v. Golphin, 364.**

Hearsay—state of mind exception—The trial court did not commit prejudicial error in a capital trial by allowing a statement from one inmate to another inmate that he was going to approach defendant about straightening out the victim's debt, because the statement was not hearsay since it was admissible under N.C.G.S. § 8C-1, Rule 803(3) as evidence of that inmate's then-existing intent to engage in a future act. **State v. Braxton, 158.**

Lay opinion—shorthand statements of fact—The testimony of several officers in a capital trial about the victim's screams during the murder, the appearance of the crime scene, and defendant's behavior and demeanor immediately following the murder, did not amount to improper lay opinion under N.C.G.S. § 8C-1, Rule 701 because the testimony of these witnesses was admissible as shorthand statements of fact. **State v. Braxton, 158.**

Murdered wife's testimony of prior assault by husband—hearsay—admissible—The trial court did not err in a capital first-degree murder prosecution by admitting the victim's testimony from a domestic violence protective order hearing regarding an assault upon her by defendant. **State v. Thibodeaux, 570.**

Offer of proof—not necessary—dialogue with court—There was no prejudicial error in a cocaine prosecution in the trial court's refusal of defendant's offer of proof where the dialogue of defense counsel and the court was sufficient to establish the essential content or substance of the witness's testimony. **State v. Mackey, 650.**

Photographs—crime scene—The trial court did not abuse its discretion in a first-degree murder prosecution by admitting photographs and a videotape of the victim and the crime scene. **State v. Blakeney, 287.**

Photographs—homicide victim and crime scene—The trial court did not err in a first-degree murder prosecution by admitting fifty-one photographs of the crime scene, the victim, and the autopsy. Although numerous, the photographs were unique in subject matter and in detail and were relevant and probative in that they corroborated defendant's confession and illustrated the medical examiner's testimony. **State v. Hyde, 37.**

Photographs—prior crime scene and victim—capital sentencing—The trial court did not err in a capital sentencing proceeding by allowing the introduction of photographs of the victims and the scene of a prior murder and arson where the photographs were used to illustrate the testimony of a fire department member who had investigated the prior crimes and whose testimony was offered in support of the previous violent felony aggravating circumstance. **State v. Smith, 531.**

EVIDENCE—Continued

Prior convictions—defendant—cross-examination—The trial court did not err in a capital trial by allowing the prosecutor to cross-examine defendant about the details of his prior convictions because defendant's testimony on direct examination tended to minimize the seriousness of his criminal involvement, and the prosecutor did not improperly ask defendant about tangential circumstances of the crimes. **State v. Braxton, 158.**

Prior convictions—defense witness—cross-examination—The trial court did not err in a capital trial by allowing the prosecutor to cross-examine a defense witness about the details of his prior convictions because even if the questions exceeded the proper scope of inquiry under N.C.G.S. § 8C-1, Rule 609(a), any error was not prejudicial since the questions were asked of a defense witness and not the defendant. **State v. Braxton, 158.**

Prior crimes—lack of remorse—officer's testimony—The trial court did not commit plain error in a capital sentencing proceeding by allowing an officer to testify about defendant's demeanor and alleged lack of remorse during a prior investigation resulting in defendant's two prior convictions for murder, because: (1) the testimony was based on the officer's personal observation; and (2) the officer's opinion that defendant demonstrated no remorse for his previous crimes is competent, relevant evidence of defendant's mental condition. **State v. Braxton, 158.**

Prior crimes or acts—motive—The trial court did not violate one defendant's rights by admitting his grandfather's testimony, offered by his codefendant, concerning the seizure of defendant's luggage by the police at a bus station a week prior to the murders because the testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) to prove defendant's motive. **State v. Golphin, 364.**

Prison infractions—character—no plain error—Even if the prosecutor's questions about a defense witness's prison infractions, including stabbing someone with a pen, disobeying an order, three separate occasions for fighting, and provoking a fight, exceeded the permissible scope of impeachment under N.C.G.S. § 8C-1, Rule 608(b), defendant failed to object during this testimony and admission of this testimony did not rise to the level of plain error. **State v. Braxton, 158.**

Prison infractions—character—untruthfulness—The trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 608(b) in a capital trial by allowing the prosecutor to cross-examine defendant with respect to his prison infractions for weapon possessions, provoking an assault, disobeying an order and fighting, and making a verbal threat, because the record reveals the purpose of the prosecutor's inquiry was to show defendant's character for untruthfulness. **State v. Braxton, 158.**

Relevancy—screams, crime scene, and demeanor—state of mind—intent to kill—The trial court did not abuse its discretion in a capital trial by admitting the testimony of several officers about the victim's screams during the murder, the appearance of the crime scene, and defendant's behavior and demeanor immediately following the murder, because the testimony was relevant under N.C.G.S. § 8C-1, Rule 402 to negate defendant's claim of self-defense, as well as to establish his state of mind and intent to kill. **State v. Braxton, 158.**

JURY—Continued

Selection—capital trial—questions and answers in Spanish—The trial court did not err by denying a motion for a mistrial during jury selection for a capital sentencing proceeding where the prosecutor asked a prospective juror two questions in Spanish, the juror responded in Spanish, and subsequent responses in English revealed that the juror's inability to understand English made him unqualified to serve as a juror under N.C.G.S. § 9-3. Any arguable error in not ordering the minimal dialogue in Spanish to be translated for the record was without prejudicial effect, given the wholly proper excusal. **State v. Smith, 531.**

Selection—capital trial—questions concerning death penalty—The prosecutor's repeated questioning about whether prospective jurors could be part of the "legal machinery" that could sentence defendant to the death penalty was not an impermissible attempt to "stake out" the jurors and did not dilute individual jurors' sense of responsibility for their sentencing decision. **State v. Braxton, 158.**

Selection—capital trial—randomness—use of old noncomputer method—There was no error in the jury selection procedure for a capital sentencing proceeding where the prosecutor informed the court shortly before jury selection began that there was some question as to the statutory compliance of a new computerized system of summoning prospective jurors and the court ordered the clerk to call jurors by the old method, which satisfied the random selection requirement of N.C.G.S. § 15A-1214(a). **State v. Smith, 531.**

Selection—capital trial—rehabilitation—The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's motion for rehabilitation of each juror challenged for cause where the court stated that further questions would be allowed on a juror-by-juror basis if there was some equivocation in the responses. **State v. Steen, 227.**

Selection—capital trial—rehabilitation—The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by refusing to allow defense counsel to rehabilitate jurors where defendant failed to show that any questioning on his part would have produced different answers. **State v. Blakeney, 287.**

Selection—capital trial—representation of African-American citizens—The trial court did not err in a capital first-degree murder prosecution by denying defendant's written and oral motions to dismiss the jury venire based on an alleged underrepresentation of African-American citizens where defendant's contention was that affirmative efforts should have been made to ensure that the jury venire was racially proportionate rather than that the selection process involved systematic exclusion, with the argument based upon the venire that actually reported for service rather than the venire summoned. **State v. Blakeney, 287.**

Selection—capital trial—subdividing into panels—The trial court did not err in a capital trial by subdividing the jury venire into panels of twenty-five people from which prospective jurors were called for individual voir dire. **State v. Braxton, 158.**

JURY—Continued

Selection—capital trial—use of panels—The trial court did not violate its duty to ensure jury selection was conducted in a random manner when it used panels. **State v. Golphin, 364.**

Selection—criminal record check—Batson challenge—The prosecutor's challenge to an African-American prospective juror for a capital sentencing proceeding does not appear to have been motivated by purposeful discrimination where a prospective juror stated on her questionnaire that she had no criminal history but a criminal history check by the State revealed that she had been charged and convicted of writing a check on a closed account. Defendant's desire to plumb whether this juror had been treated disparately by being singled out for a criminal record check must be addressed through a Batson challenge because defendant did not request disclosure of whether checks were run on other prospective jurors under the statutes governing discovery. **State v. Smith, 531.**

Selection—criminal record checks of prospective jurors—equal access—There was no error in a capital sentencing proceeding where defendant contended that he did not have equal access to the criminal records of prospective jurors following the prosecutor's challenge to a juror whose questionnaire falsely indicated that she had never been charged with a crime. **State v. Smith, 531.**

Selection—excusals prior to trial—The trial court did not err in a first-degree murder prosecution by excusing, deferring, or disqualifying several prospective jurors prior to defendant's case being called for trial. Assuming that the court failed to comply with N.C.G.S. § 9-6(a) strictly, defendant is not entitled to a new trial absent a showing of corrupt intent, discrimination or irregularities which affected the actions of the jurors actually drawn and summoned. Finally, defendant had no right to be present during the preliminary qualification of prospective jurors since the jurors were excused before defendant's trial began. **State v. Hyde, 37.**

Selection—oath—The trial court did not err by not requiring prospective jurors to swear to tell the truth during jury voir dire. The jurors were properly sworn pursuant to N.C.G.S. § 9-14, an oath of truthfulness is not statutorily mandated, and defendant did not request the oath nor object to its absence during voir dire. **State v. Hyde, 37.**

Selection—procedure—The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution in the procedure followed for calling replacement jurors following excusals. Defendant specifically requested or consented to any deviation from the prescribed statutory procedure and concedes on appeal that the court's jury selection method did not disadvantage or prejudice him. **State v. Hyde, 37.**

Selection—sequestration—The trial court did not abuse its discretion by refusing to sequester the jury pool during jury selection for a first-degree murder prosecution where defendant noted that one prospective juror stated that he would give a witness less credibility since he knew the witness that another had stated that defense counsel had "misrepresented" her former son-in-law. **State v. Hyde, 37.**

SENTENCING—Continued

sentencing proceeding by submitting both the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, and the N.C.G.S. § 15A-2000(e)(8) circumstance that the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties. **State v. Golphin, 364.**

Capital—aggravating circumstances—committed during course of felony—part of a course of violent conduct—separate evidence—The trial court did not err in a capital sentencing proceeding by submitting to the jury as aggravating circumstances N.C.G.S. § 15A-2000(e)(5), that the murder was committed during the course of a felony (burglary), and N.C.G.S. § 15A-2000(e)(11), that the murder was part of a course of violent conduct, because each aggravating circumstance was based on separate evidence not required to prove the other. **State v. Lawrence, 1.**

Capital—aggravating circumstances—committed during course of felony—sufficiency of evidence—Although defendant contends the trial court erred in his capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during the course of a felony based on the evidence being insufficient to support the burglary charge, the Supreme Court has already determined that the evidence supported the submission of burglary. **State v. Lawrence, 1.**

Capital—aggravating circumstances—especially heinous, atrocious, or cruel—The trial court did not err during a capital sentencing proceeding by submitting as to one defendant the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder of a State trooper was especially heinous, atrocious, or cruel. **State v. Golphin, 364.**

Capital—aggravating circumstances—especially heinous, atrocious, or cruel—accomplice not at scene—The trial court did not err during a capital sentencing proceeding by submitting the especially heinous, atrocious, or cruel aggravating circumstance where defendant was not present when the murders were committed. Even though he was not present, he was personally involved in planning the details of the murders, took deliberate steps to enable the murders to proceed according to his instructions, and does not dispute that the manner in which the victims were murdered was sufficient to support the circumstance. N.C.G.S. § 15A-2000(e)(9). **State v. Brewington, 489.**

Capital—aggravating circumstances—flight—course of conduct—no plain error—The trial court did not commit plain error during a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the capital felony was committed while defendant was engaged in or in flight after committing a robbery, and the N.C.G.S. § 15A-2000 (e)(11) circumstance that the murder was committed as part of a course of conduct involving other violent crimes. **State v. Golphin, 364.**

Capital—aggravating circumstances—murder during course of felony—disjunctive instructions—The trial court did not err during a capital sentencing proceeding by giving disjunctive instructions on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed in the course of a felony based on either an armed robbery in which a car was taken or a robbery in which a trooper's weapon was taken. **State v. Golphin, 364.**

SENTENCING—Continued

Capital—aggravating circumstances--not the same evidence—There was no error in a capital sentencing proceeding where defendant advanced arguments concerning aggravating circumstances which allegedly relied upon the same evidence. Although some evidence overlapped by virtue of how and where the crimes occurred, the first three aggravating circumstances involve separate, distinct victims and the fourth is course of conduct, which is a separate circumstance from the crimes that comprise the series. **State v. Smith, 531.**

Capital—aggravating circumstances--prior capital felony conviction—The trial court did not err in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(2) aggravating circumstance concerning defendant having been previously convicted of another capital felony, which was based on defendant's 1966 conviction of first-degree murder upon a plea of guilty. **State v. Cummings, 600.**

Capital—death penalty not disproportionate—The trial court did not err by imposing the death penalty for first-degree murder because: (1) defendant was convicted under both the felony murder rule and premeditation and deliberation; (2) the victim was killed in his own home during the nighttime; (3) defendant repeatedly shot the victim in front of the victim's two small children; and (4) the jury found the aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) and § 15A-2000(e)(11), either of which our Supreme Court has held to be sufficient to support a sentence of death. **State v. Lawrence, 1.**

Capital—death penalty not disproportionate—A death sentence was proportionate where defendant killed a defenseless victim in his home and was convicted of both felony murder and premeditated and deliberate murder. This case is more similar to cases where death was found proportionate than to those where it was found disproportionate or to those in which juries have consistently recommended life imprisonment. **State v. Hyde, 37.**

Capital—death penalty not disproportionate—The trial court did not err by imposing the death penalty in a first-degree murder case because: (1) defendant was convicted of premeditated and deliberated murder; (2) the jury found aggravators pertaining to two previous capital felonies and five previous violent felonies; and (3) the facts show defendant repeatedly stabbed a totally defenseless man in the prison shower for money owed him. **State v. Braxton, 158.**

Capital—death penalty not disproportionate—A sentence of death for a first-degree murder was not disproportionate where defendant was convicted of a premeditated and deliberate murder committed in the victim's home, the jury found the especially heinous, atrocious or cruel aggravating circumstance, and the case was more similar to cases in which the sentence of death was found proportionate than to those in which it was found disproportionate. Based upon the entire record, the sentence was not excessive or disproportionate. **State v. Steen, 227.**

Capital—death penalty not disproportionate—A sentence of death for a first-degree murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the record supports the aggravating circumstances found by the jury; and the sentence was not disproportionate. **State v. Blakeney, 287.**

SENTENCING—Continued

Capital—death penalty not disproportionate—The trial court did not err by imposing two sentences of death for each defendant for the murders of two law enforcement officers. **State v. Golphin, 364.**

Capital—death penalty not disproportionate—A death sentence for a first-degree murder was not imposed under the influence of passion, prejudice, or any other factor, the evidence supported the aggravating circumstances found by the jury, and the sentence was not disproportionate. Defendant was convicted of two counts of murder, the jury found three aggravating circumstances, and the jury found the especially heinous, atrocious, or cruel aggravating circumstance. **State v. Brewington, 489.**

Capital—death penalty not disproportionate—A sentence of death was not disproportionate where defendant raped his victim, stabbed her more than sixty times, and set fire to her apartment. The evidence amply supported the aggravating circumstances found by the jury, and the case was more similar to cases in which the death penalty was found proportionate than to those where it was found disproportionate. **State v. Smith, 531.**

Capital—death penalty not disproportionate—A sentence of death was not disproportionate where the record supports the aggravating circumstance found by the jury, there is nothing to suggest that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case was more similar to cases in which the death penalty was found proportionate than to those where it was found disproportionate. Defendant was convicted based upon premeditation and deliberation, the jury found the especially heinous, atrocious or cruel aggravating circumstance, the crime was brutal and there is evidence that the victim was conscious and suffered as she died, and defendant showed no apologetic or ameliorative conduct. **State v. Thibodeaux, 570.**

Capital—death penalty not disproportionate—The trial court did not err by imposing the death sentence where defendant was convicted under the theory of premeditation and deliberation, the murder was committed in this victim's home, and defendant had prior convictions of a capital felony and other crimes. **State v. Cummings, 600.**

Capital—Enmund/Tison instruction inapplicable—The trial court did not commit plain error during a capital sentencing proceeding by failing to instruct the jury according to the Enmund/Tison instruction that there was evidence one defendant did not participate in the murder of the deputy, because this instruction does not apply to a defendant who has been found guilty of first-degree murder based on premeditation and deliberation. **State v. Golphin, 364.**

Capital—evidence—scene of prior crime—The trial court did not abuse its discretion in a first-degree murder sentencing proceeding by admitting testimony from the victim of a prior armed robbery and photographs of the crime scene showing blood. **State v. Blakeney, 287.**

Capital—failure to submit mitigating circumstance—capacity to appreciate criminality or conform conduct—The trial court did not err in a capital sentencing proceeding by failing to submit the mitigating circumstance under N.C.G.S. § 15A-2000(f)(6) that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. **State v. Braxton, 158.**

SENTENCING—Continued

Capital—failure to submit mitigating circumstance—mental or emotional disturbance—The trial court did not err in a capital sentencing proceeding by failing to submit the mitigating circumstance under N.C.G.S. § 15A-2000(f)(2) that the murder was committed while defendant was under the influence of mental or emotional disturbance. **State v. Braxton, 158.**

Capital—hearsay—Rules of Evidence inapplicable—The trial court did not violate one defendant's rights during a capital sentencing proceeding by allowing one expert's report into evidence for purposes of cross-examining another expert. **State v. Golphin, 364.**

Capital—instructions—meaning of life imprisonment—The trial court did not err in a capital sentencing proceeding by its instruction that the jury should determine its sentencing recommendation as though life imprisonment without parole means imprisonment for life without parole in the state's prison. **State v. Lawrence, 1.**

Capital—instructions—mitigating circumstances—neutral phrasing—The trial court did not err in a capital sentencing proceeding by giving an instruction on mitigating circumstances with a neutral, conditional phrase beginning with "whether," rather than the declarative contention requested by defendant, to which jurors could have indicated their agreement with a "yes" or "no." **State v. Steen, 227.**

Capital—instructions—mitigating circumstances—unanimity—A trial court's instruction in a capital sentencing proceeding requiring unanimity in finding mitigating circumstances was merely a lapsus linguae. **State v. Steen, 227.**

Capital—instructions—nonstatutory mitigating circumstance—circumstance found—no plain error—There was no plain error in a capital sentencing proceeding where defendant contended that the court's instruction on a nonstatutory mitigating circumstance was confusing, but at least one juror found the circumstance to exist and to have value. **State v. Steen, 227.**

Capital—instructions—parole—pattern jury instructions—Although the better practice would be to charge the jury using the precise language found in N.C.G.S. § 15A-2002, the trial court did not err in a capital sentencing proceeding by reading from the pattern jury instructions on parole eligibility. **State v. Steen, 227.**

Capital—instructions—result of unanimous recommendation—The trial court did not err in a capital sentencing proceeding by granting the State's motion to prohibit defendant from arguing to the jury that the failure to agree on punishment would result in life imprisonment and then instructing the jury that the defendant would be sentenced to death if they unanimously recommended death and sentenced to life if they unanimously recommended life. The instruction was in accord with N.C.G.S. § 15A-2002 and it has been held that it is improper for a trial court to inform the jury of the effect of its failure to reach a unanimous verdict. **State v. Blakeney, 287.**

Capital—instructions—statutory and nonstatutory mitigating circumstances—The trial court did not err in a capital sentencing proceeding in its instructions on capital and noncapital mitigating circumstances where the instructions were consistent with the pattern jury instructions. Although defend-

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ant argued that repeating the nonstatutory instruction nineteen times could lead a reasonable juror to apply that instruction to both nonstatutory and statutory mitigating circumstances, the number of times a jury is instructed on nonstatutory mitigating circumstances necessarily parallels the number of nonstatutory circumstances requested and submitted. **State v. Steen, 227.**

Capital—instructions—weight to be given mitigating circumstances—The trial court did not err in a capital sentencing proceeding by denying defendant's requested instruction that statutory mitigating circumstances have value or in the instructions given on the distinction between statutory and nonstatutory mitigating circumstances. **State v. Hyde, 37.**

Capital—International Covenant on Civil and Political Rights—A defendant's treatment in a capital prosecution did not violate provisions of the International Covenant on Civil and Political Rights concerning cruel or degrading treatment or punishment, or arbitrary deprivation of life. **State v. Smith, 531.**

Capital—joinder—The trial court did not abuse its discretion in a capital sentencing proceeding by joining defendants' cases for sentencing and by denying a motion to sever. **State v. Golphin, 364.**

Capital—mitigating and aggravating circumstances—no significant history of criminal activity—prior conviction involving violence—both submitted—The trial court did not err during a capital sentencing proceeding by submitting the no significant history of criminal activity mitigating circumstance, N.C.G.S. § 15A-2000(f)(1), after having submitted the aggravating circumstance that defendant had a prior felony conviction involving violence, N.C.G.S. § 15A-2000(e)(3). **State v. Blakeney, 287.**

Capital—mitigating circumstances—age of defendant—The trial court did not err during a capital sentencing proceeding by not submitting the statutory mitigating circumstance of defendant's age at the time of the offense, N.C.G.S. § 15A-2000(f)(7), where defendant argues that he presented substantial evidence that his psychological maturity was that of a child even though his chronological age at the time of the murders was 33, there was evidence that defendant appeared to be fairly well adjusted in society, and he had sufficient intelligence to attend community college and establish a good work history. The North Carolina Supreme Court will not conclude that a trial court erred by failing to submit this mitigator where evidence of emotional immaturity is counterbalanced by other factors. **State v. Brewington, 489.**

Capital—mitigating circumstances—childhood difficulties, caring relationship with sister, psychological trauma—The trial court did not err in a capital sentencing proceeding by excluding evidence from defendant's younger sister concerning defendant's childhood difficulties, his caring relationship with his younger sister, and the psychological trauma caused by his biracial background. **State v. Braxton, 158.**

Capital—mitigating circumstances—childhood psychological abuse and self-hatred—The trial court did not abuse its discretion in a capital sentencing proceeding by restricting testimony from defendant's mother concerning defendant's childhood psychological abuse and self-hatred as a result of being biracial, because the trial court merely restricted the testimony to the witness' personal observations. **State v. Braxton, 158.**

SENTENCING—Continued

Capital—mitigating circumstances—codefendant in another killing receiving life—The trial court did not err in a capital sentencing proceeding by refusing to submit the mitigating circumstance that a codefendant in another killing did not receive a sentence of death or by excluding copies of the codefendant's judgment and commitments. The information was elicited from a witness on cross-examination, and this case is within the rule that an accomplice receiving a lesser sentence is not an extenuating circumstance. **State v. Smith, 531.**

Capital—mitigating circumstances—defendant's age—The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance of defendant's age, N.C.G.S. § 15A-2000(f)(7), where defendant had suffered a head injury which caused organic brain damage, borderline mental retardation, and severe memory impairment; he was 26 at the time of the murder; he was gainfully employed and able to perform his job duties proficiently; he functioned adequately in society; and there was substantial evidence that he had the mental capacity to premeditate and plan his crime. **State v. Steen, 227.**

Capital—mitigating circumstances—defendant's age—mitigating value—The trial court did not commit plain error in a capital sentencing proceeding by failing to instruct the jury that the statutory mitigating circumstance of age has mitigating value because the trial court's instructions properly distinguished between statutory and nonstatutory mitigating circumstances, and informed the jurors of their duty under the law. **State v. Braxton, 158.**

Capital—mitigating circumstances—instructions—burden of proof—no plain error—Although defendant contends the trial court committed plain error in a capital sentencing proceeding by its jury instruction describing defendant's burden of proof as to the existence of any mitigating circumstances, the instruction given has previously been held to be proper. **State v. Cummings, 600.**

Capital—mitigating circumstances—instructions—impaired capacity—no plain error—The trial court did not commit plain error in a capital sentencing proceeding by its submission of the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance, concerning defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. **State v. Cummings, 600.**

Capital—mitigating circumstances—instructions—mental or emotional disturbance—no plain error—Although defendant contends the trial court improperly worded its instruction on the (f)(2) mental or emotional disturbance mitigator in a capital sentencing proceeding by allegedly "lumping together" three disorders, the trial court did not commit plain error in its jury instruction for the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance. **State v. Cummings, 600.**

Capital—mitigating circumstances—instructions—plain error standard—Although defendant contends the trial court's N.C.G.S. § 15A-2000(f)(2) jury instruction in a capital sentencing proceeding should be reviewed under the constitutional error standard set forth in N.C.G.S. § 15A-1443(b), claims of improper wording of mitigating circumstance instructions which were not objected to at trial are reviewed under the plain error standard. **State v. Cummings, 600.**

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Capital—mitigating circumstances—instructions—substantially similar to Pattern Jury Instructions—A defendant in a capital sentencing proceeding could not show that the trial court's instruction prejudiced him where defendant requested the pattern jury instruction on the mitigating circumstance of no significant history of prior criminal activity, the court gave an instruction which was not precisely identical to the pattern jury instruction but was substantially so, and the jury found the circumstance. N.C.G.S. § 15A-2000(f)(1). **State v. Brewington, 489.**

Capital—mitigating circumstances—mental or emotional disturbance—catchall—The jury's sentencing decision in a capital trial was not unconstitutionally arbitrary based on its failure to find the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(9) catchall mitigating circumstance. **State v. Cummings, 600.**

Capital—mitigating circumstances—mental or emotional disturbance—impaired capacity—peremptory instructions—The trial court did not err during a capital sentencing proceeding by denying defendant's request for peremptory instructions on the mitigating circumstances of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and impaired capacity to appreciate the criminality of conduct, N.C.G.S. § 15A-2000(f)(6). Defendant's evidence of the statutory circumstances was controverted and, even though the court determined that there was sufficient evidence to warrant a peremptory instruction on the nonstatutory mitigating circumstances that defendant's brain injury affected his ability to function on a daily basis and affected his personality, the focus of the mitigating circumstances differed. **State v. Steen, 227.**

Capital—mitigating circumstances—no significant history of criminal activity—The trial court did not err in a capital sentencing proceeding by submitting the statutory mitigating circumstance that defendant had no significant history of criminal activity, N.C.G.S. § 15A-2000(f)(1), where defendant had a conviction for robbery with a dangerous weapon and a history of drug abuse. **State v. Blakeney, 287.**

Capital—mitigating circumstances—peremptory instructions—controverted evidence—The trial court did not err in a capital sentencing proceeding by denying defendant's request for peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) mental or emotional disturbance statutory mitigating circumstance. **State v. Cummings, 600.**

Capital—mitigating circumstances—peremptory instructions—jury free to reject—The sentences of death were not imposed in an arbitrary and capricious manner based on the jury's rejection of the N.C.G.S. § 15A-2000 (f)(2) mental or emotional disturbance mitigating circumstance, even though a peremptory instruction was given. **State v. Golphin, 364.**

Capital—mitigating circumstances—remorse—Any error in excluding a psychologist's direct testimony from a capital sentencing hearing was harmless beyond a reasonable doubt where defendant contended that mitigating evidence of remorse was excluded but failed to make an offer of proof, other evidence of defendant's remorse was before the jury, and defendant did not request and the jury thus did not find this circumstance under the catchall mitigating circumstance. **State v. Smith, 531.**

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Capital—nonstatutory mitigating circumstances—failure to find—Although defendant contends the jury's sentencing decision was unconstitutionally arbitrary based on the jury's failure to find sixteen of the nonstatutory mitigating circumstances that were submitted, the Supreme Court has consistently upheld the constitutionality of a jury rejecting a nonstatutory mitigating circumstance if none of the jurors find facts supporting the circumstance or if none of the jurors deem the circumstance to have mitigating value. **State v. Cummings, 600.**

Capital—nonstatutory mitigating circumstances—instructions—The trial court did not err during a capital sentencing proceeding by its instruction that allows the jury to reject a nonstatutory mitigating circumstance if it finds the circumstance to be without mitigating value. **State v. Golphin, 364.**

Capital—nonstatutory mitigating circumstances—jury free to reject—Although defendant contends the trial court erred in a capital sentencing proceeding by instructing the jury that it could reject proffered nonstatutory mitigating circumstances on the ground that the circumstances had no mitigating value, this argument has previously been rejected. **State v. Cummings, 600.**

Capital—nonstatutory mitigating circumstances—not submitted—There was no prejudicial error in a capital sentencing proceeding where the court erroneously refused to submit a proposed nonstatutory mitigating circumstance that was supported by defendant's statements to authorities and which a reasonable juror could find to have mitigating value, but defendant's statement was read to the jury, the evidence underlying the circumstance was fully argued to the jury by defense counsel, the catchall mitigating circumstance was argued to the jury, and the error did not preclude any juror from considering and giving weight to any evidence underlying the proposed circumstance. **State v. Blakeney, 287.**

Capital—nonstatutory mitigating circumstances—peremptory instructions—controverted evidence—The trial court did not err in a capital sentencing proceeding by denying defendant's request for peremptory instructions on the two nonstatutory mitigating circumstances that defendant is subject to being easily influenced by others and that defendant is subject to being victimized and/or harassed by others based on his low intelligence. **State v. Cummings, 600.**

Capital—nonstatutory mitigating circumstances—relatively minor participation—subsumed by statutory circumstances—The trial court did not err in a capital sentencing proceeding by not submitting defendant's requested nonstatutory mitigating circumstances concerning the fact that he was not present when the killing was done where the court submitted the statutory mitigating circumstance that defendant was an accomplice or accessory and his participation was relatively minor. The court's instruction regarding that mitigator specifically referred to defendant's indirect participation three times and it fully encompassed and more accurately stated the concepts defendant wanted the jury to consider; moreover, any juror who found it to exist was required to give it mitigating value because it was a statutory circumstance. **State v. Brewington, 489.**

Capital—nonstatutory mitigating circumstances—subsumption—The trial court did not err in a capital sentencing proceeding by refusing to submit defend-

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ant's requested seven nonstatutory mitigating circumstances separately. **State v. Cummings, 600.**

Capital—note confiscated from courtroom—racial motivation—especially heinous, atrocious, or cruel circumstance—The trial court did not err during a capital sentencing proceeding by admitting evidence of a note that one defendant drafted while sitting in the courtroom during the jury selection phase of the trial, which was confiscated by an officer when defendant was leaving the courtroom because references in the note are evidence that the murders were racially motivated and could be considered by the jury in determining if the murders were especially heinous, atrocious, or cruel. **State v. Golphin, 364.**

Capital—parole—instructions on changes in the law—The trial court did not err in a capital sentencing proceeding by refusing to instruct jurors on changes in the law regarding parole. The jury was repeatedly and clearly instructed that defendant would either receive a sentence of death or life imprisonment without parole. **State v. Steen, 227.**

Capital—peremptory instructions—nonstatutory mitigating circumstances—controverted evidence—The trial court did not violate one defendant's rights during a capital sentencing proceeding by refusing to give peremptory instructions for the nonstatutory mitigating circumstances that he was subjected to parental neglect, his mother forced him to lie about being abused, he did not receive appropriate counseling, and he was abandoned by his father. **State v. Golphin, 364.**

Capital—peremptory instructions—nonstatutory mitigating circumstances—jurors free to reject—The trial court did not err in a capital sentencing proceeding by its peremptory instruction to the jury concerning uncontroverted nonstatutory mitigating circumstances because jurors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value. **State v. Lawrence, 1.**

Capital—peremptory instructions—statutory mitigating circumstances—ability to appreciate criminality—controverted evidence—The trial court did not violate one defendant's rights during a capital sentencing proceeding by refusing to give a peremptory instruction for the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance concerning his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. **State v. Golphin, 364.**

Capital—peremptory instructions—statutory mitigating circumstances—age—controverted evidence—The trial court did not violate one defendant's rights during a capital sentencing proceeding by failing to give a peremptory instruction for the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance concerning the age of defendant at the time of the crime. **State v. Golphin, 364.**

Capital—prosecutor's argument—escape—The trial court did not abuse its discretion in a capital sentencing proceeding by denying a mistrial after giving a curative instruction to the prosecutor's argument that defendant might escape from prison. Defendant failed to show that the curative instruction was insufficient to erase any potential prejudice. **State v. Steen, 227.**

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