NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
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7BC	FRANK R. BROWN	Tarboro
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4B	CHARLES H. HENRY	Jacksonville
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	W. ALLEN COBB, JR.	Wilmington
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8B	JERRY BRASWELL	Goldsboro
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9	ROBERT H. HOBGOOD	Louisburg
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10	DONALD W. STEPHENS	Raleigh
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	James Clifford Spencer, Jr.	Burlington
15B	Wade Barber	Chapel Hill
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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.[2]	High Point
	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
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19B	Russell G. Walker, Jr.	Asheboro
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21	Judson D. DeRamus, Jr.	Winston-Salem
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23	Michael E. Helms	North Wilkesboro
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	MARCUS L. JOHNSON	Charlotte
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29	ZORO J. GUICE, JR.	Rutherfordton
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	ROBERT W. KIRBY	Cherryville
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JOHN B. LEWIS, JR.	Farmville
DONALD L. SMITH[13]	Raleigh

1. Appointed and sworn in 29 December 2001.
2. Retired 31 January 2002.
3. Appointed and sworn in 26 February 2002 to fill vacancy left by Howard R. Greeson, Jr. who resigned 31 January 2002.
4. Appointed and sworn in 29 January 2002 to replace William H. Helms who retired 31 July 2001.
5. Retired 30 September 2001.
6. Appointed and sworn in 17 December 2001.
7. Retired 1 February 2002.
8. Resigned 30 September 2001.
9. Appointed and sworn in 17 December 2001.
10. Appointed and sworn in 29 October 2001.
11. Resigned 25 September 2001.
12. Appointed and sworn in 1 February 2002.
13. Currently assigned to Court of Appeals.

DISTRICT COURT DIVISION

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1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
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	STEVEN J. BRYANT	Bryson City
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ROBERT K. KEIGER	Winston-Salem
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DONALD W. OVERBY	Raleigh

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	RUSSELL SHERRILL III	Raleigh
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HARLEY B. GASTON, JR.	Gastonia
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 30 November 2001.
2. Appointed and sworn in 1 February 2002.
3. Deceased 21 November 2001.
4. Appointed and sworn in 25 January 2002 to replace Robert L. Anderson who died 21 November 2001.
5. Appointed Chief Judge effective 16 November 2001 to replace Anna Mills Wagner who resigned 16 November 2001.
6. Appointed and sworn in 28 January 2002 to fill vacancy left by Anna M. Wagoner who resigned 16 November 2001.
7. Appointed to Superior Court 24 January 2002.
8. Appointed and sworn in 21 September 2001 to replace Jack E. Klass who retired 30 June 2001.
9. Appointed Chief Judge effective 1 October 2001 to replace William G. Jones who retired 3 September 2001.
10. Appointed and sworn in 11 December 2001.
11. Appointed and sworn in 28 November 2001.
12. Appointed and sworn in 27 August 2001.
13. Appointed and sworn in 1 July 2001.
14. Appointed and sworn in 25 January 2002.

ATTORNEY GENERAL OF NORTH CAROLINA

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ROY COOPER

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JULIA S. WHITE

Deputy Chief of Staff
KRISTI J. HYMAN

Director of Administrative Services
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RULES OF CIVIL PROCEDURE CITED

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CONSTITUTION OF UNITED STATES CITED

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Ingrid Lynne Shore Wakefield ..... Charlotte
Gerald L. Walden, Jr. ..... Durham
Larry E. Warren ..... Benson
James Yancey Washington ..... Oxford
Dena White Waters ..... Garner
Alexander F. Watson ..... Rock Hill, South Carolina
Kary Church Watson ..... Charlotte
Jennifer Weaver ..... Durham
Jeffrey D. Webb ..... Charlotte
Amy Craig Whitehurst ..... Raleigh
Lee Albert Whitehurst, MD ..... Raleigh
Elise Morgan Whitley ..... Winston-Salem
Arlene M. Wiegner ..... Greensboro
Roy Wijewickrama ..... Waynesville
Joyce T. Williams ..... Sanford
Pamela Newell Williams ..... Raleigh
Wade Max Williams ..... Cary
Christopher Gordon Willis ..... Fayetteville
Carol S. Wolff ..... Wilmington
Candice Sylvette Wooten ..... Winston-Salem
Anna Cotten Wright ..... Charlotte
Wayne Randolph Wright ..... Roanoke Rapids
Jason Ora Wunsch ..... Fuquay
Stephanie Leonard Yarbrough ..... Winston-Salem
Alie Elizabeth Yates ..... Purlear
Courtauld McBryde Young ..... Charlotte
James B. Young, Jr. ..... Charlotte
Lori Sue Zwar ..... Pittsboro

Given over my hand and seal of the Board of Law Examiners this the 11th day of September, 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 24th day of August, 2001 and said person has been issued a license certificate.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

James Michael Harrington ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 12th day of September, 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 7th day of September, 2001 and said persons have been issued license certificates.

FEBRUARY 2001 NORTH CAROLINA BAR EXAMINATION

Catherine Zamaroni Bailey ..... Whispering Pines
James Larry Biggers, Jr. ..... Charlotte
Dawn Deneen Ducoste ..... Cary
David Ray Hamm ..... Virginia Beach, Virginia
Donald Dale Howard ..... Monterey, California
Albert Chen-Huei Hwang ..... Durham
Warren E. Johnson ..... Matthews
Timothy D. Smith ..... Charlotte
Laura Jill Stahr ..... Kernersville
Teresa Miller Thomas ..... Rock Hill, South Carolina
Clinton W. Vranian ..... Winston-Salem

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Alexandra Chrysanthe Akas ..... Grosse Pointe Woods, Minnesota
Joseph Eric Altman ..... Rockingham
David Deem Amsbary ..... Raleigh
Fabian Christopher Bartolozzi ..... Raleigh
John Stewart Byrd, II ..... Wilson
Bradford Elliott Chatigny ..... Raleigh
Andrea Christina Chomakos ..... Charlotte
Kelly A. Clarke ..... Sanford
Adriana Consuelos Corder ..... Greenville
Andrea M. Crace ..... Jacksonville
Alexander Clay Dale ..... Durham
Lauren Olivia Dickerson ..... Hillsborough
Matthew Peter Doyle ..... Wilmington
Joshua Thomas Elliott ..... Cary
Ian Andrew Erickson ..... Chapel Hill
Peter Robert Glasgow ..... Chapel Hill

Mark Lee Hearp ..... Reidsville
John Randolph Hemphill ..... Winston-Salem
Richard B. Johnson ..... Mt. Laurel, New Jersey
Andrew Kaplan ..... Charlotte
Christine W. Kennedy ..... Raleigh
Shelagh Rebecca Kenney ..... Nashville, Tennessee
Ray Martin Kline ..... Durham
Hunter Stuart Labovitz ..... Washington, District of Columbia
John Allan Lamerdin ..... Chapel Hill
Annick Isabelle Lenoir-Peek ..... Jacksonville
Jennifer Louise Little ..... Greensboro
Natalie G. Lontchar ..... Charlotte
Donnie E. Martin ..... Charlotte
Gina Elizabeth McCauley ..... Durham
Chad A. McGowan ..... Charlotte
Paula Kathleen McGrann ..... Raleigh
Martha H. McIntosh ..... Sanford, Florida
John P. McNeill ..... Morrisville
Mitchell A. Meyers ..... Hollywood, Florida
Colleen E. Moore ..... Cary
Kimberly L. Moore ..... Jamestown
Robert A. Muckenfuss ..... Charlotte
Cary Nadelman ..... Charlotte
Richard John Oelhafen, Jr. ..... Charlotte
James McDonald Roberts, Jr. ..... Greenville
Fenita T. Morris Shepard ..... Raleigh
Corey Lee Sherrill ..... Chapel Hill
Belinda Keller Sukeena ..... Willow Spring
Jeffrey A. Summerlin ..... Chapel Hill
Deborah Marie Throm ..... Fremont, California
Olufemi Ayodeji Tokunboh ..... Charlotte
Karonnie Rashone Truzy ..... Winston-Salem
Alissa Anne Watts ..... Durham
Joseph Glenn White ..... Charlotte
Kris Vincent Williams ..... Kinston
Joshua J. Yablonski ..... Charlotte
Rebecca April Young ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 14th day of September, 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 14th day of September, 2001 and said person has been issued a license certificate.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Christopher Robert Barron ..... Alexandria, Virginia

Given over my hand and seal of the Board of Law Examiners this the 26th day of September, 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 21st day of September, 2001 and said person has been issued a license certificate.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Catherine K. Kunkel ..... Springfield, Virginia

Given over my hand and seal of the Board of Law Examiners this the 27th day of September, 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 28th day of September, 2001 and said persons have been issued license certificates.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Kerstin Walker Sutton ..... Durham
Christopher Chance Wright ..... Tabor City
David Coffey ..... Chapel Hill
Christina Ann Humphrey ..... Charlotte
Andrew Wyatt Davis ..... Lawsonville
John B. South, Jr. ..... Boone
Jeffrey G. Glaser ..... Research Triangle Park

Given over my hand and seal of the Board of Law Examiners this the 3rd day of October, 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 were admitted to the North Carolina Bar by comity as of the 28th day of September, 2001 and said persons have been issued license certificates.

COMITY APPLICANTS

Ronald Lee Hofer ..... Applied from the State of Michigan
Jennifer Ann Porter ..... Applied from the State of Virginia
Tracy Ellen Calder ..... Applied from the State of New York
Stephen Anthony Calogero ..... Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners this the 3rd day of October, 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 5th day of October, 2001 and said person has been issued a license certificate.

FEBRUARY 2001 NORTH CAROLINA BAR EXAMINATION

Ernest Allen Mills ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 10th day of October, 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 24th day of August, 2001 and said person has been issued a license certificate.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Kevin Joseph Strickland ..... Cerro Gordo

Given over my hand and seal of the Board of Law Examiners this the 11th day of October, 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 19th day of October 2001, and said persons have been issued a certificate of this Board:

John Burton LaRue ..... Applied from the State of Indiana
Jerri Ulrica Dunston ..... Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 24th day of October, 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 by the Board of Law Examiners on the 26th day of October, 2001, and said person has been issued a certificate of this Board:

Kimberly R. Wilson ..... Applied from the State of West Virginia

Given over my hand and seal of the Board of Law Examiners this the 26th day of October, 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 30th day of November 2001, and said persons have been issued certificates of this Board:

W. Christopher Shea ..... Applied from the State of Virginia
Camille Michel Davidson ..... Applied from the District of Columbia
Ana M. Flynn ..... Applied from the State of Illinois
John Vincent Ivsan ..... Applied from the State of Ohio
Brian K. Oppeneer ..... Applied from the State of Wisconsin
Susan Lamadrid Sellers ..... Applied from the State of West Virginia
Brian Craig Dempster ..... Applied from the State of West Virginia
Michael Lawrence Smith ..... Applied from the State of Michigan
Kirk Randal Crowder ..... Applied from the State of Missouri
Thomas Harlan Schram ..... Applied from the State of Michigan
Franklin Brawner Greer ..... Applied from the State of Virginia
Michael Joseph Madigan ..... Applied from the State of Illinois
William S. Durr ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 3rd day of December, 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 16th day of November, 2001 and said person has been issued a license certificate.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Lee Chole Lipscomb ..... Chapel Hil

Given over my hand and seal of the Board of Law Examiners this the 3rd day of December, 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 7th day of December, 2001 and said persons have been issued license certificates.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Penny Kim Bell ..... Dunn
Anthony M. Brannon ..... Apex
Stanley Scott Carpenter ..... Durham
Christine Ann Carson ..... Winston-Salem
Laurie Dearman Clark ..... Greensboro
Julius Floyd, II ..... Charlotte
Melinda E. Fox ..... Charlotte
Thomas D. Horan, Jr. ..... Chapel Hill
Cull Jordan, III ..... Monroe
Candace M. Morton ..... Greensboro
Betsy Barnacascel Pittman ..... San Francisco, California
Harold C. Staley, Jr. ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 7th day of December, 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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of December 2001, and said persons have been issued certificates of this Board:

Lynn C. Bruce ..... Applied from the State of New York
Mary B. McCord ..... Applied from the District of Columbia
Eleanor Broderick Bibb ..... Applied from the State of Texas
Katherine Jane Allen ..... Applied from the State of Oklahoma
David Benjamin Rich III ..... Applied from the State of Virginia
Matthew F. Fussa ..... Applied from the State of Pennsylvania
Kimberly Richardson Belongia ..... Applied from the State of Virginia
Richard Joseph Colgan ..... Applied from the State of Virginia
Janice Ann Quatman ..... Applied from the State of Ohio
R. Van Graham ..... Applied from the States of Texas and Wyoming
Richard P. Vitek ..... Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 14th day of December, 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 by the Board of Law Examiners on the 11th day of January 2002, and said person has been issued a certificate of this Board:

James Matthew Kernan ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 14th day of December, 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 25th day of January, 2002 and said person has been issued a license certificate.

JULY 2000 NORTH CAROLINA BAR EXAMINATION

John S. Chinuntdet ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 14th day of February, 2002.

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 25th day of January 2002, and said persons have been issued certificates of this Board:

Rachel Lea Hunter .....Applied from the State of Pennsylvania
Andrew Alexander Roppel .....Applied from the State of Virginia
William A. Frasco, Jr. .....Applied from the State of Massachussets

Given over my hand and seal of the Board of Law Examiners this the 14th day of February, 2002.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. PHILLIP ANTWAN DAVIS

No. 109A98

(Filed 21 December 2000)

1. Constitutional Law— right to be present at trial—capital sentencing—communications from jury

The trial court in a capital sentencing proceeding did not violate defendant's constitutional rights to be present at his trial in its handling of a note from the jury inquiring about the result of an inability to agree and a note from one juror asking to be removed. Defendant was present when the proceeding took place, the court promptly and adequately summarized the jury's question and the note from the juror, and the court heard from counsel and responded in open court to each of the communications.

2. Constitutional Law— effective assistance of counsel—capital sentencing—notes from jury—disclosure of content

A first-degree murder defendant was not deprived of his constitutional rights to effective assistance of counsel at his capital sentencing hearing by the court's refusal to disclose the exact content of a note from the jury inquiring into the result of an inability to reach a decision and a note from a juror asking to be replaced. The fair and accurate disclosure of the content of the note was sufficient to render counsel the full opportunity to rep-

resent defendant and defense counsel had the opportunity to object to the proposed instruction on replacing a juror.

3. Criminal Law— capital sentencing—notes from jury—ex parte communications

The trial court's handling of notes from the jury in a capital sentencing proceeding did not violate N.C.G.S. § 15A-1234(a)(1) or a canon of the Code of Judicial conduct regarding ex parte communications.

4. Evidence— capital sentencing—defendant's character—admissible

The trial court did not err in a capital sentencing proceeding by admitting testimony regarding defendant's temperament, a fight with his girlfriend at work, an alleged statement by defendant that he smoked marijuana, and a high school homework assignment that showed defendant's knowledge of drugs.

5. Evidence— capital sentencing—statement by a child to an officer

There was no plain error in a capital sentencing proceeding in the admission of testimony that a foster child in the victim's home had told an officer that the person who shot the victim had pointed a gun at her.

6. Sentencing— capital—aggravating circumstance—especially heinous, atrocious, or cruel—victim's good character

The trial court did not err in a capital sentencing proceeding by admitting evidence of the good character of one of the victims. Evidence that defendant had murdered a blood relative who had opened her home to him, offered him a stable environment, and been especially caring, patient, and loving supported the aggravating circumstance that the killing was especially heinous, atrocious, or cruel and did not "go too far" within the meaning of *State v. Reeves*, 337 N.C. 700.

7. Evidence— cross-examination—character evidence

The trial court did not abuse its discretion in a capital sentencing proceeding by allowing prosecutors to cross-examine defense witnesses regarding defendant's bad character in rebuttal of defendant's evidence of good character.

8. Evidence— capital sentencing—cross-examination—hearsay

The trial court did not abuse its discretion and there was no plain error in a capital sentencing proceeding in permitting the

State on cross-examination to elicit testimony that the witness had been told by a teacher that the teacher had heard that defendant had been in trouble and had been aggressive towards another teacher. The evidence served to rebut evidence that defendant was not a behavior problem at school and there was no error so fundamental that justice could not have been done.

9. Evidence— capital sentencing—food eaten by defendant in jail

There was no plain error in a capital sentencing proceeding in the admission of testimony on cross-examination regarding the food defendant ate in jail, including numerous candy bars, soft drinks, and snacks.

10. Evidence— capital sentencing—defendant dangerous in future

There was no plain error in a capital sentencing proceeding in the admission of testimony that defendant could be dangerous in the future under certain circumstances and that prison inmates make and use knives while many prison employees are unarmed.

11. Evidence— capital sentencing—victim's good character

Evidence in a capital sentencing proceeding of the good character traits of the victim did not go too far for purposes of *State v. Reeves*, 337 N.C. 700, nor did it violate defendant's constitutional right to a fundamentally fair trial.

12. Evidence— capital sentencing—victim impact evidence

Limited victim impact evidence introduced in a capital sentencing proceeding did not go too far and was not so unduly prejudicial that it rendered the trial fundamentally unfair.

13. Evidence— capital sentencing—prosecutor's questions— no plain error—previously admitted

There was no error in a capital sentencing proceeding where defendant contended that the trial court erred by allowing the prosecutors to ask badgering and impertinent questions, but there was no plain error regarding many of the questions (the failure to object or to move to strike following a sustained objection limits review to plain error) and there was no error as to the remaining questions because defendant had previously injected

the evidence into the proceeding or allowed it to be admitted earlier without objection.

14. Evidence— capital sentencing—defendant's letters to his mother

There was no prejudicial error in a capital sentencing proceeding where the court excluded letters and cards written from defendant to his mother after his incarceration. Defendant was allowed to present evidence of remorse and a loving relationship with his mother and the letters would have offered substantially the same evidence. In any event, the letters were unreliable in that they were written by a defendant facing a capital sentencing proceeding to a likely witness in the proceeding.

15. Evidence— capital sentencing—positive impact by defendant

The trial court did not err in a capital sentencing proceeding by excluding testimony that defendant would make a positive impact on society in prison where the testimony was purely speculative and where the court admitted evidence that defendant was a leader to a young friend and had a positive impact on people on and off the football field.

16. Criminal Law— prosecutor's argument—capital sentencing—biblical

The prosecutor's biblical arguments in a capital sentencing proceeding were not so improper as to require intervention ex mero motu where the prosecutor counseled jurors that they should base their sentencing decision on the secular argument.

17. Criminal Law— prosecutor's argument—capital sentencing—jury as conscience of community

There was no prejudicial error in a capital sentencing proceeding in the prosecutor's argument that the jurors must not lend an ear to the community but may act as the voice and conscience of the community. Although defendant contended that the prosecution instructed the jury to disregard defense testimony, and the prosecutor's statement was not clear, any confusion was cured by the court's instruction on the jury's duty to consider mitigating circumstances.

18. Criminal Law— prosecutor's argument—capital sentencing—traveling outside the record

A prosecutor's argument in a capital sentencing proceeding was not so improper as to require intervention ex mero motu where defendant contended that the prosecutor traveled outside the evidentiary record.

19. Criminal Law— prosecutor's argument—capital sentencing—defendant's mannerisms

A prosecutor's comments about defendant's mannerisms in the courtroom during a capital sentencing proceeding did not constitute references to the defendant's constitutional right to remain silent.

20. Sentencing— capital—aggravating circumstance—murder during robbery—instruction--timing

There was no prejudicial error in a capital sentencing hearing in the trial court's instruction on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance (that the capital felony was committed while defendant was engaged in the commission of robbery) where the trial court failed to charge the jury with sufficient clarity that the State had the burden to show that the criminal conduct took place during the same transaction as the murder. However, all of the evidence tended to show that the murder and armed robbery were part of a continuous series of events, the trial court properly instructed the jury that it could find this aggravating circumstance if it determined that the armed robbery occurred during a continuous series of events surrounding the victim's death, and the issues and recommendation form asked whether the murder was committed by defendant while defendant was engaged in the commission of armed robbery; thus, the instructions and the issues and recommendation form, considered in light of the evidence, communicated to the jury that the murder had to occur while defendant was engaged in the commission of armed robbery. There is no reasonable likelihood that the jury applied the challenged instruction in a manner that violated the Constitution.

21. Sentencing— capital—aggravating circumstance—pecuniary gain—not required to be primary motive

The trial court did not err in a capital sentencing proceeding in its instruction on the pecuniary gain aggravating circumstance,

N.C.G.S. § 15A-2000(e)(6), by charging the jury that it did not have to find that the primary motive was financial gain.

22. Sentencing— capital—mitigating circumstance—no significant history of prior criminal activity—instructions

There was no plain error in a capital sentencing proceeding in the court's instruction on the mitigating circumstance of no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). Even if the instructions assumed that defendant engaged in prior criminal activity, overwhelming evidence was presented that defendant had engaged in the listed criminal activity and the trial court did not assume the jury's duty to determine whether defendant's history was significant.

23. Sentencing— capital—mitigating circumstances—peremptory instructions—evidence controverted

The trial court did not err in a capital sentencing proceeding by refusing to give peremptory instructions on four mitigating circumstances where the evidence of the circumstances was controverted.

24. Sentencing— capital—life imprisonment—instruction

The trial court in a capital sentencing proceeding did not err in its instructions by not using the phrase "life imprisonment without parole" rather than "life imprisonment" every time it referred to the alternative to death. The judge instructed the jury that a sentence of life imprisonment means a sentence of life without parole; nothing in N.C.G.S. § 15A-2002 requires the judge to state "life imprisonment without parole" every time he alludes to or mentions the alternative sentence.

25. Criminal Law— reference to "our" district attorney—not an expression of opinion by judge

The trial judge in a capital sentencing proceeding did not violate N.C.G.S. § 15A-1222, which prohibits the expression of an opinion by the judge on any question of fact to be decided by the jury, in referring to the district attorney's office and the district attorney with "our" and "your" during jury selection. Whether the prosecutor is "our" or "your" district attorney is not a question of fact to be decided by the jury.

26. Sentencing— capital—aggravating circumstances—pecuniary gain—murder during armed robbery—not double counted

The trial judge did not err in a capital sentencing proceeding by submitting both the pecuniary gain aggravating circumstance and the aggravating circumstance that the murder was committed while defendant was engaged in an armed robbery where both circumstances were supported by sufficient, independent evidence and the trial court properly instructed the jury that it could not use the same evidence as the basis for both circumstances.

27. Appeal and Error— prosecutor's statements—failure to object—no plain error analysis

The defendant in a capital sentencing proceeding waived appellate review of the prosecutor's statements during jury selection regarding the State's burden of proof by failing to object. Plain error analysis has been applied only to instructions to the jury and to evidentiary matters.

28. Constitutional Law— capital sentencing—right to testify—examination of defendant by court—right to cross-examination

The trial court in a capital sentencing proceeding did not impermissibly chill defendant's right to testify with its reference to cross-examination in its inquiry into whether defendant had discussed testifying with his lawyers.

29. Homicide— first-degree murder—short-form indictment

The short-form indictments used to charge defendant with first-degree murder were constitutional.

30. Discovery— capital sentencing—written statement and copies of notes by defense expert

The trial court did not err in a capital sentencing proceeding by ordering defendant's mental health expert to prepare a written report of his findings and to produce handwritten notes for the State's perusal pursuant to N.C.G.S. § 15A-905(b) where defendant was given access to the State's files.

31. Discovery— attorney-client privilege—self-incrimination—notes and report from defense expert

A trial court order in a capital sentencing proceeding requiring defendant's mental health expert to prepare a written report

of his findings and to produce for the State handwritten notes did not violate defendant's attorney-client privilege and privilege against self-incrimination. Nothing indicates that the expert examined or communicated with defendant in the course of seeking or giving legal advice and, even if the expert was an agent of defendant's attorneys, he clearly lost that privilege once he was placed on the witness stand. Moreover, the court is always at liberty to compel disclosure of privileged communications if necessary to a proper administration of justice.

32. Sentencing— capital—death sentence—not imposed arbitrarily

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

33. Sentencing— capital—death sentence—not disproportionate

A sentence of death was not disproportionate where defendant stole from the victim after being taken into her home; without adequate provocation, he furtively waited in her home for her to return so that he could shoot her; and, while she was attempting to call for help, he hacked her to death with a meat cleaver in the presence of her two foster children. The case is not substantially similar to any of the cases where the death penalty was found disproportionate, there is no question of the specific intent to kill, and the victim was killed in her own home.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Payne Ronald K., J., on 21 August 1997 in Superior Court, Buncombe County, following a plea of guilty of first-degree murder. On 24 September 1999, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment imposing a sentence of life imprisonment without parole following a second plea of guilty of first-degree murder. Heard in the Supreme Court 16 May 2000.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt and Danielle M. Carman, Assistant Appellate Defenders, for defendant-appellant.

FRYE, Chief Justice.

On 4 August 1997, defendant pled guilty to the first-degree murders of his aunt, Joyce Miller, and cousin, Caroline Miller. Following the entry and acceptance of the guilty plea, a capital sentencing proceeding was conducted pursuant to N.C.G.S. § 15A-2000. The jury recommended a sentence of death for the murder of Joyce Miller and life imprisonment without parole for the murder of Caroline Miller. In the Joyce Miller case, the jury found as aggravating circumstances that the murder was: (1) committed while engaged in the commission of armed robbery; (2) committed for pecuniary gain; (3) especially heinous, atrocious, or cruel; and (4) part of a course of conduct, including the commission of other crimes of violence against other persons. The jury also found fifteen of the fifty statutory and nonstatutory mitigating circumstances submitted to it. In the Caroline Miller case, the jury found as aggravating circumstances that the murder was: (1) committed while engaged in the commission of armed robbery; and (2) part of a course of conduct, including the commission of other crimes of violence against other persons. The jury also found eighteen of the fifty statutory and nonstatutory mitigating circumstances submitted to it.

On 21 August 1997, the trial judge, in accordance with the jury's recommendation, imposed a sentence of death for the first-degree murder conviction of Joyce Miller and a sentence of life imprisonment without parole for the first-degree murder conviction of Caroline Miller.

Defendant makes thirty-two arguments on appeal to this Court. For the reasons discussed herein, we reject each of these arguments and conclude that defendant's capital sentencing proceeding was free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's convictions and sentence of death.

The State's evidence in the capital sentencing proceeding tended to show the following facts and circumstances. Defendant, who was eighteen years old, was living in the home of his aunt, Joyce Miller (Miller), in Asheville, North Carolina. Also residing in Miller's home were Miller's seventeen-year-old daughter, Caroline Miller (Caroline), and two young foster children.

Approximately one week before the murders, Miller told her brother, Billy Davis that she was missing $800.00. Caroline believed that defendant had taken the money because he had recently pur-

chased clothing and a gold chain. Miller obtained a receipt for the clothes and returned them. Caroline was hiding the gold chain from defendant so that she and Miller could take it to a pawn shop. Several days before the murders, defendant stated to Caroline, "Well, if I don't get my chain, it's only going to hurt you in the long run."

On 24 May 1996, defendant shot and killed his cousin Caroline. On the same day, he killed Miller by shooting her and cutting her with a meat cleaver. Davis visited Miller's home in the evening and found Miller lying in a pool of blood. Niconda Briscoe, defendant's girlfriend, arrived at approximately the same time as Davis and called for emergency assistance.

A paramedic with the Buncombe County Emergency Medical Service arrived at the Miller residence at 7:32 p.m. He noted blood smeared on the outside of the door. He discovered severed fingers on the floor in the foyer and Miller's body in a large pool of blood. The two foster children were in the living room looking into the foyer. As the paramedic entered the living room to escort the children out, he observed Caroline in her bedroom on the bed. After checking her pulse, he determined that she, too, was dead.

Meanwhile, between 7:30 and 8:00 p.m., defendant attempted to cash a check in the amount of $360.00, bearing the name of Miller's former husband, at the Bi-Lo grocery store on Hendersonville Road. The manager refused to cash it, as she did not believe it was legitimate. According to the manager, defendant appeared to be "really calm."

At approximately 8:00 p.m., defendant went to Dillard's in the Asheville Mall and tried on clothing in the men's department. The sales receipt showed that defendant purchased six clothing items at 8:08 p.m. for $231.61 using a credit card in Miller's name. When questioned by the cashier, defendant told her that the credit card belonged to his aunt and that she knew he was using it. Two of the items defendant purchased were identical to the ones Miller had returned several days prior to the murders.

At 8:21 p.m., a driver for the Blue Bird Cab Company was dispatched to the Amoco station on Hendersonville Highway. A person matching defendant's description approached the driver and said, "It's me. I'll be with you in a couple minutes." He returned with two bags and asked the driver to take him to Pisgah View Apartments.

Defendant entered unit 29-D of Pisgah View Apartments; showed an acquaintance, Felicia Swinton, the clothes he had purchased; changed clothes; and left to attend a party in West Asheville. He spent approximately twenty minutes in Swinton's apartment and acted "normal."

Kendall Brown and Ryan Mills, friends of defendant's, heard that Miller and Caroline had been murdered and went to the party to pick up defendant. During the ride back to the Miller residence, defendant asked Brown if it "was . . . true about the murders" and said he "wanted to know what all had happened." When they arrived at the residence, defendant sat on the curb; started crying; and said, "Please don't let them take me."

Later that evening, Sergeant David Shroat took a statement from defendant at the Asheville Police Station. Defendant first told Sergeant Shroat that he did not know what had happened; then blamed others; and finally stated, "My life is over; I did it."

Defendant described the following series of events to the detectives. Earlier in the week, defendant found a gun in the closet and test-fired it in the back yard. At approximately 5:30 p.m. on 24 May 1996, he entered Caroline's bedroom with the gun in order to get his clothes. Caroline was lying on her bed. He went to the right side of the bed, pointed the gun at her, and fired twice. He then walked around to the other side of the bed and fired a third shot at her. After killing Caroline, defendant ate a sandwich and watched television. Miller arrived at the residence at approximately 7:00 p.m. with the two foster children. When defendant heard her entering, he hid behind the door. After she entered, defendant shot her in the back. He shot Miller only one time because he had "[n]o more bullets." Miller attempted to reach the telephone, but defendant pulled the cord from the receptacle. When she tried to leave the house, he took a meat cleaver from the kitchen and struck her with it ten or twelve times with his eyes closed as he stood on top of her in the foyer.

Immediately thereafter, defendant placed his clothes in a white plastic garbage bag along with the meat cleaver. He took two VCRs, one from Caroline's bedroom and one from Miller's, and put them in another plastic bag along with Miller's brown purse. He also took Miller's black purse. At approximately 7:15 p.m., he placed the two plastic bags on the front passenger floorboard of Miller's vehicle. Defendant then drove to the Asheville Mall, where he used Miller's credit cards to purchase clothing.

From the Asheville Mall, defendant drove to Oak Knoll Apartments and placed the two plastic bags in the Dumpster. He then drove to the Amoco station, where he threw the black purse and the gun into a wooded area behind the station. He told the taxi cab driver whom he had called that he would be there in a minute, returned to Miller's vehicle, and retrieved the shopping bags containing the clothing he had purchased at Dillard's.

Defendant left Miller's vehicle at the Amoco station and traveled in the taxi to Pisgah View Apartments, where he changed clothes. He then put the stolen credit cards and keys to Miller's vehicle in a garbage can near Swinton's apartment. Defendant drove around downtown Asheville with his friend Kelby Moore and smoked marijuana.

At 10:30 p.m., defendant arrived at the party in west Asheville. Defendant danced for a while at the party before Brown and Mills took him to Miller's residence. Upon completing his statement, defendant went to sleep under the table in the interview room.

The autopsy of Miller revealed that she had a single gunshot wound to the left side of the head, amputation of two fingers, and fifteen individual and clustered injuries consistent with being inflicted by a meat cleaver. The autopsy of Caroline revealed three separate gunshot wounds, one to the head with stippling around the entrance wound indicating a close range shot; one to the chest; and one to the arm.

Investigators found that Caroline's bedroom was in disarray and that a VCR and television were missing. A large amount of cash and some jewelry were discovered in a book bag in Caroline's room. In Miller's bedroom, drawers had been pulled out and items had been dumped on the bed. Investigators found an empty jewelry box, a checkbook, and a box of checks on the floor. A second VCR was missing from the entertainment center in Miller's bedroom. Miller's truck, a red Bravada, was also missing.

Police officers recovered two VCRs, jewelry, clothes, a bloody meat cleaver, and a brown purse containing Miller's bank cards from a Dumpster at the Oak Knoll Apartments. Additionally, they found Miller's credit cards in a trash bag near Pisgah View Apartments. Miller's Bravada truck, two gloves, a black purse, and a Colt .32 revolver with five spent casings in the cylinder were discovered near the Amoco station.

While defendant did not testify at the capital sentencing proceeding, several witnesses testified on his behalf. Defendant's evidence tended to show the following. Defendant's mother was a drug addict, habitual felon, and mental patient who could not care for him, and his father took no responsibility for him. Since his childhood, defendant alternated between the homes of friends and relatives because his mother was periodically incarcerated or incapacitated. Defendant was a good athlete, but his parents never attended his athletic or school events. When he was thirteen years old, defendant sustained a closed-head injury when he intervened in an argument between his mother and a drug addict, who hit defendant with a baseball bat.

In the summer of 1995, defendant moved in with Miller and Caroline and obtained a job at a Food Lion grocery store. He made the school football team and stopped working in September when football season began. Teammates described defendant as a leader and a hard worker. In December of 1995, defendant began working as a bag boy at a Bi-Lo grocery store where he was described as a good worker. Defendant's high school principal described him as a normal and well-behaved student. Defendant was "on track" to graduate from high school, was accepted into North Carolina A&T State University, and had passed an Air Force entrance test.

There was constant rivalry between defendant and Caroline to the extent that Caroline packed up defendant's belongings on more than one occasion. There was also tension between defendant and his aunt. On one occasion, Miller pointed a pistol at defendant and said that when she gave him an order, "she expected it to be done." Witnesses described defendant as remorseful and noted that he cried whenever he discussed the murders.

A clinical psychologist, Dr. Jerry Noble, testified as an expert witness. Dr. Noble performed a postarrest evaluation and determined that defendant's basic psychological, emotional, and nurturing needs had been neglected. Defendant had an IQ of only 78, but he never repeated a grade or had any special-education classes. According to Dr. Noble, defendant had four significant mental disorders on 24 May 1996: (1) borderline intellectual functioning, (2) borderline personality disorder, (3) cannabis abuse, and (4) acute stress disorder. The borderline personality disorder caused defendant to be emotionally unstable and impulsive and to have difficulties in interpersonal relationships. Dr. Noble described defendant as anxious, depressed,

immature, and prone to unravel during periods of stress. Defendant's conduct in eating a sandwich and watching television after he killed Caroline was consistent with acute stress disorder, disassociation, and derealization. According to Dr. Noble, defendant could not fully remember, did not understand, and was genuinely bewildered about Miller's death. Following the homicides, defendant exhibited suicidal thoughts, increased interest in religion, and signs of remorse. Dr. Noble opined that defendant was under the influence of a mental or emotional disturbance at the time of the murders and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

Defendant appeals to this Court as of right from the judgment imposing a sentence of death for the first-degree murder of Miller. Additionally, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the judgment imposing a life sentence without parole for the first-degree murder of Caroline.

I. CAPITAL SENTENCING PROCEEDING

[1] In his first argument, defendant contends that the trial court violated state and federal constitutional law during sentencing deliberations by responding improperly to: (1) the jury's question about the result of an inability to agree, and (2) a juror's letter indicating an inability to continue as a member of the jury. We cannot agree.

During deliberations, the jury sent a note to the court as follows: "Could we be furnished the last two paragraphs of Judge Payne's charge to the jury! re: Our final decision[?] On Issue (4) four[,] if we are 11 to one for death what happens[?]" Upon receiving the note, the court informed counsel that it had received a note from the jury and that the jury had a question "asking for 'what happens if there's a division on the fourth issue.' " Counsel for defendant asked the court to instruct the jury about what happens if the jury is unable to agree. The court denied the request, and defendant objected. Without ruling on the objection, the trial court called the jurors back into the courtroom and instructed them on Issue Four a second time.[1] Furthermore, the court instructed the jury as follows:

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1. Issue Four reads, in pertinent part, as follows: "Do you unanimously find, beyond a reasonable doubt, the aggravating circumstance or circumstances you've found is or are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?"

> Now, members of the jury, I would also instruct you that as to the other question that you have submitted to me, I would remind you that as jurors you've taken an oath, that you all have a duty to consult with one another and deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to reexamine your own views and change your opinion if it is erroneous, but none of you should surrender your honest conviction as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors for the mere purpose of returning a verdict.

The jury returned to deliberations, and the court called the jury back into the courtroom forty-five minutes later to release it for the evening.

The next morning, the court informed counsel that it had received a note from a juror asking to be replaced. In the note, the juror expressed that "while the mitigating factors do not offset the aggravating factors in one of the murders, I cannot with any peace of mind vote for the death penalty . . . . I feel unqualified to continue as a juror . . . ." The trial judge discussed with counsel the content of the note and his planned instructions in general terms, stating in part, "I received a written communication from one of the members of the jury through the sheriff this morning. . . . [T]he juror is indicating they're [sic] having some difficulty following the law and has asked that I place an alternate in."

Defense counsel requested that the court charge the jury pursuant to *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), regarding the jury's question on the previous day. The trial court refused to give defendant's requested jury instruction, denied defendant's motion for a mistrial, and instructed the jury regarding the juror's letter as follows:

> Folks, I've had a communication from one of your members indicating that they're [sic] having some difficulty in the matter, and it's asked that they [sic] be replaced. The law doesn't allow me to do that. Once the jury deliberations begin in the sentencing phase in this type of case, I'm not allowed to remove someone . . . . I must let the twelve jurors that begin the deliberations conclude the matter.

> Now, yesterday[,] one of the questions that I received was an inquiry as to what would happen in a certain numerical division. I will tell you that your inability to reach a unanimous verdict should not be your concern, but should simply be reported to the Court.

The jury returned a verdict of death less than one hour later.

Defendant contends that the trial court violated defendant's federal and state constitutional rights to presence and the effective assistance of counsel by refusing to disclose the full content of the notes, failing to let counsel see or read the notes, misrepresenting the content, and responding without eliciting and considering the informed positions of defendant and his counsel. We disagree.

In a capital case, a defendant must be present at every stage of the trial. N.C. Const. art. I, § 23; *State v. Locklear*, 349 N.C. 118, 135, 505 S.E.2d 277, 286 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). "When an ex parte communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties." *Rushen v. Spain*, 464 U.S. 114, 119, 78 L. Ed. 2d 267, 273 (1983). Upon receiving a message from a juror, the trial court should give counsel an opportunity to be heard and then answer the message in open court. *See Rogers v. United States*, 422 U.S. 35, 39, 45 L. Ed. 2d 1, 6 (1975).

In the case at hand, defendant was present when the proceeding in question took place. Furthermore, while the trial court did not read the notes verbatim to counsel, the court promptly and adequately summarized the jury's question and the note from the juror. The trial court informed counsel that the jury had a question about "what happens if there's a division on the fourth issue" and later informed defendant and counsel that there was a numerical division indicated in the note. Similarly, the trial court informed counsel that it had received a communication from a juror "indicating they're [sic] having some difficulty following the law and has asked that I place an alternate in." The trial court heard from counsel and responded in open court to each of the communications. As such, we find no violation of defendant's right to presence.

[2] Defendant also claims that his attorneys were deprived of their ability to make informed decisions about appropriate responses to the notes. Defendant contends that counsel, had they known the full

and true content of the notes, would have taken greater and more effective steps to protect defendant's rights.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). Defendant bears the burden of showing that his counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Id.* at 561-62, 324 S.E.2d at 248.

In the present case, it is clear from the record that counsel understood that the jury wanted to know what should happen if the jurors were unable to unanimously agree about Issue Four. Trial counsel immediately requested an instruction advising the jury of "the results of what happens if they're not able to agree." We do not agree that the failure to disclose the jury's precise numerical division precluded counsel from the full opportunity to defend defendant. The fair and accurate disclosure of the content of the note was sufficient to render counsel the full opportunity to effectively represent defendant. Likewise, the trial judge informed counsel of the substantive content of the juror's letter and stated, "I'm going to tell them that I can't replace a juror." As such, defense counsel had the opportunity to object to the proposed instruction. We conclude that the trial court's refusal to disclose the exact content of the communications did not deprive defendant of his constitutional right to effective assistance of counsel.

[3] Defendant also contends that the trial court's conduct violated N.C.G.S. § 15A-1234(a)(1) and the Code of Judicial Conduct. We disagree.

N.C.G.S. § 15A-1234(a)(1) provides in pertinent part: "After the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court . . . ." N.C.G.S. § 15A-1234(a)(1) (1999). Defendant failed to object to the procedure by which the inquiry was communicated to the trial judge and has thus waived this argument. N.C. R. App. P. 10(b)(1). In any event, we are not convinced that the statute precludes the trial court from receiving a written communication from the jury and responding to such in open court.

Defendant further argues that the trial court's actions violated Canon 3A(4) of the Code of Judicial Conduct, which in pertinent part provides: "A judge should accord to every person who is legally

interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Code of Judicial Conduct Canon 3A(4), 2000 Ann. R. N.C. 276. Having already determined that the trial court's actions were authorized by law, we find no merit in defendant's argument.

[4] In his second argument, defendant contends that the trial court erroneously admitted evidence of defendant's bad character during the State's case-in-chief. Defendant argues that the admitted evidence was irrelevant and inadmissible and that it violated his constitutional right to a fundamentally fair capital sentencing proceeding.

The rules of evidence do not apply in sentencing proceedings, N.C.G.S. § 8C-1, Rule 1101(b)(3) (1999), although they may be used as a guideline to reliability and relevance, *State v. Greene*, 351 N.C. 562, 568, 528 S.E.2d 575, 579, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 543, 2000 WL 1629376 (Dec. 4, 2000) (No. 00-6684). This Court has said that in a capital sentencing proceeding, "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." *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).

We hold that the trial court did not err in allowing the admission of testimony regarding defendant's temperament, a fight defendant had with his girlfriend at work, an alleged statement by defendant that he smoked marijuana, and a high school homework assignment that showed defendant's knowledge of drugs, as the testimony was competent, relevant evidence of defendant's character and did not violate his right to a fundamentally fair capital sentencing proceeding.

[5] In his third argument, defendant contends that the trial court erred by admitting a child's hearsay statement into evidence.

Officer Connie Searcy testified that Officer Michele Daugherty told her that Damion, a foster child in the victim's home, told Officer Daugherty that the person who shot the victims "pointed a gun at me, the man did. . . . Looked like a monster. He might kill somebody else."

The State cross-examined three other witnesses regarding whether defendant pointed a gun at the foster child. Defendant contends that this evidence and questioning violated settled rules of evidence as well as the United States and North Carolina Constitutions and that the violation constituted plain error.

A defendant waives any possible objection to testimony by failing to object to this testimony when it is first admitted. *See State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) (reference to the defendant's home as "Fort Apache" was not error when no objection was made to an earlier identical reference).

In the present case, defendant failed to object when the State questioned Officer Searcy regarding the gun-pointing incident. By failing to object to this testimony when it was first admitted, defendant waived any possible objection to its admission. Moreover, defendant failed to make an objection at trial on constitutional grounds. This failure to preserve the issue resulted in waiver. N.C. R. App. P. 10(b)(1); *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

Because defendant failed to object to the admission of this evidence, we review this issue for plain error. *State v. Carter*, 338 N.C. 569, 593, 451 S.E.2d 157, 170 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Plain error is " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). We find no such error in the admission of this evidence.

[6] In his fourth argument, defendant contends that the trial court erred by admitting evidence of Miller's good character during the State's case-in-chief, thereby violating the rules of evidence as well as the United States and North Carolina Constitutions. Specifically, defendant argues that the evidence was irrelevant and inflammatory. We disagree.

Evidence is relevant where it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). This Court has held that evidence that the victim was a good person, or "fleshing out the

humanity of the victim," is permissible "so long as it does not go too far." *State v. Reeves*, 337 N.C. 700, 723, 448 S.E.2d 802, 812 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995); *see also Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991) (victim-impact evidence may be admitted during a capital sentencing proceeding unless it "is so unduly prejudicial that it renders the trial fundamentally unfair").

In the instant case, the trial court denied defendant's pretrial motion to prohibit the State from "introducing or arguing victim impact evidence" and admitted evidence regarding Miller's good character during the State's case-in-chief. Specifically, the State presented evidence that Miller had prepared meals for defendant and other relatives, attended defendant's athletic events, and generally treated defendant well. The State also presented evidence that Miller appeared to have a close relationship with Caroline. The trial court admitted a photograph of Miller when she was alive and several photographs of her landscaped yard.

We note that the State submitted and the jury found as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Evidence that defendant had murdered a blood relative who had opened her home to him and offered him a stable environment tended to support this aggravating circumstance. The State's evidence further showed that the killing of Miller was especially heinous, atrocious, or cruel partially because she had been especially caring, patient, and loving to defendant.

After a careful review of the record, we conclude that the evidence was both relevant and admissible and did not go "too far" within the meaning set out in *Reeves*.

Defendant also challenges the admission of the evidence on constitutional grounds. However, defendant failed to make an objection at trial on constitutional grounds. This failure to preserve the issue results in waiver. N.C. R. App. P. 10(b)(1); *Jaynes*, 342 N.C. at 263, 464 S.E.2d at 457.

[7] In his fifth argument, defendant contends that the trial court erroneously allowed the prosecutors to cross-examine defense witnesses regarding defendant's bad character. We disagree.

A trial court "has broad discretion over the scope of cross examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998). The prosecution may offer evidence of a pertinent trait of a

defendant's character to rebut evidence of a pertinent trait of character when first offered by the defendant. *See Carter*, 338 N.C. at 598, 451 S.E.2d at 173.

In the present case, defendant introduced evidence on cross-examination that he was a good worker. Subsequently, defendant's first witness, his mother, was questioned about or testified on direct-examination as to the following: defendant worked at Food Lion and Bi-Lo, played football and basketball, had taken the SAT to try to get into college, had been admitted to college, took a test to gain admission into the Air Force, and had a girlfriend he took to the prom. Subsequent defense witnesses testified that defendant was polite, had a good attitude, was an overachiever, and behaved appropriately in school.

On cross-examination, the State elicited evidence from defendant's mother and other defense witnesses that defendant sold and used illegal drugs, had parties in hotel rooms, pushed his grandfather down, slapped his girlfriend, had been charged with and convicted of drug offenses, and violated jail rules.

We conclude that the trial court did not abuse its discretion in permitting this cross-examination that was offered in rebuttal of defendant's evidence of good character.

[8] In his sixth argument, defendant contends that the trial court erred by allowing the State to cross-examine a witness about defendant's conduct in Spanish class. Defendant argues that admission of this evidence violated settled evidence rules as well as the United States and North Carolina Constitutions. We disagree.

The rules of evidence do not apply to a sentencing hearing, N.C.G.S. § 8C-1, Rule 1101(b)(3), yet hearsay statements introduced therein must be relevant and bear indicia of reliability, *State v. Stephens*, 347 N.C. 352, 363, 493 S.E.2d 435, 442 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998).

In the present case, defendant filed a motion *in limine* to exclude evidence about an incident in his Spanish class, but the trial court deferred ruling on this motion.

On direct examination, Stephen Chandler, defendant's history teacher and football coach in 1995, testified for the defense that defendant never had a behavioral problem, always participated in class, came to practice on time, and was never a discipline problem.

On cross-examination, when the prosecutor asked Chandler about an incident in Spanish class, the trial court held a *voir dire*. Over objection, Chandler testified that another math teacher had told him that he heard defendant "had gotten in trouble" and had engaged in "aggressive" behavior towards his Spanish teacher. Defendant contends that these statements were double-hearsay since Chandler had no personal knowledge of the incident.

We conclude that the trial court did not abuse its discretion in permitting the cross-examination by the State that served to rebut defendant's evidence that defendant was not a behavior problem in school. Further, since defendant did not object to the admission of the statements on constitutional grounds, we review this issue for plain error. *See State v. Lemons*, 352 N.C. 87, 530 S.E.2d 542 (2000). After reviewing the record, we find no error so fundamental that justice could not have been done.

[9] In his seventh argument, defendant contends that the trial court erred by admitting evidence on cross-examination of the food defendant ate in jail, including numerous candy bars, soft drinks, and snacks.

We note that defendant did not object when the State first asked about the subject matter and that defendant did not move to strike any of the answers. This Court has held that "when, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *Hunt*, 325 N.C. at 196, 381 S.E.2d at 459. Defendant failed to object to earlier questions and answers related to the food he consumed while in jail; therefore, our review is limited to plain error. Although we strain to see the relevance of what defendant ate while in jail, we conclude that admission of the evidence did not constitute plain error.

[10] In his eighth argument, defendant contends that the trial court committed plain error by admitting evidence related to his future dangerousness, in violation of settled evidence rules and defendant's state and federal constitutional rights. We disagree.

Evidence of future dangerousness is not improper in a sentencing proceeding. *State v. Williams*, 350 N.C. 1, 28, 510 S.E.2d 626, 644, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). The prosecutor may "urge the jury to recommend death out of concern for the future dangerousness of the defendant." *Id.*

In the instant case, the State elicited testimony from defense witness Dr. Noble that defendant could be dangerous in the future under certain conditions. The State also elicited testimony that prison inmates make and use homemade knives and that many prison employees are unarmed.

We conclude that the trial court did not err in admitting evidence of defendant's future dangerousness. We note that defendant failed to object to Dr. Noble's testimony that defendant could "clearly be dangerous under certain conditions" in the future. Even assuming *arguendo* that it was error to admit such evidence, we do not conclude 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). Thus, the admission of the evidence relating to defendant's future dangerousness did not rise to the level of plain error. This assignment of error is rejected.

[11] In his ninth argument, defendant contends that the trial court violated evidence rules and defendant's state and federal constitutional rights by allowing the State to cross-examine witnesses about good character traits of victim Miller. We disagree.

"The trial court exercises broad discretion over the scope of cross-examination . . . ." *Locklear*, 349 N.C. at 156, 505 S.E.2d at 299. Evidence that the victim is a good person is permissible so long as it does not go "too far." *Reeves*, 337 N.C. at 723, 448 S.E.2d at 812.

In the instant case, defendant claims that the evidence elicited by the State went too far and was unduly prejudicial. The State elicited testimony on cross-examination that Miller was a "fine woman," gave defendant "a beautiful home," attended his athletic events, provided him with clothing and food, and cared for foster children.

Defendant failed to object to the above evidence of Miller's good character. In any event, we hold that the evidence of Miller's good character elicited by the State on cross-examination did not go too far for purposes of *Reeves*, nor did it violate defendant's constitutional right to a fundamentally fair sentencing hearing.

[12] In his tenth argument, defendant contends that the trial court erroneously admitted "victim impact" evidence and allowed the prosecutor to present such evidence throughout the capital sentencing proceeding. We disagree.

The Eighth Amendment to the United States Constitution does not bar a prosecutor from arguing "victim impact" evidence at the

sentencing phase of a capital trial. *Payne*, 501 U.S. at 825, 115 L. Ed. 2d at 735. The State should not be barred from demonstrating the loss to society and to the victim's family which resulted from the homicide. *Id.* However, the Fourteenth Amendment to the United States Constitution may provide a defendant relief where the "victim impact" evidence is "so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* Finally, in discussing the admissibility of character evidence of the victim, this Court has held that "the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far." *Reeves*, 337 N.C. at 723, 448 S.E.2d at 812.

In the present case, defendant filed a motion *in limine* to prohibit the State from "introducing or arguing victim impact evidence," including evidence of the survivors' "grief and trauma" at "any phase of" the sentencing hearing. The trial court denied the motion.

During jury selection and the sentencing proceeding, the prosecutor, over objection, introduced certain courtroom spectators as good friends or family members of Miller. Furthermore, Bobby Fortune, a witness for the State, testified that he "loved" Miller; "went together" with Miller for twenty-five years before, between, and after her marriages; and helped Miller landscape her backyard. The State elicited the following testimony from Fortune during direct-examination:

> Q. Mr. Fortune, tell the jury how Joyce Miller's death has impacted you.
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Overruled.
>
> A. Joyce Miller's death affected me where I can't think at times. The job I do, I need to think . . . and at times she gets on my mind so bad that I can't even work, or won't work. I just sit around the house mostly moping or staring or just daydreaming. It helps a lot sometimes if I got friends . . . but after they're gone and I'm there by myself, that's when it hurts the most. She is constantly staying on my mind night and day. I get up with her on my mind and go to bed with her on my mind.

We conclude that the evidence admitted regarding Fortune's close relationship with the victim did not go too far and was not "so unduly prejudicial that it render[ed] the trial fundamentally unfair."

Payne, 501 U.S. at 825, 115 L. Ed. 2d at 735. The limited "victim impact" evidence that was introduced at the capital sentencing proceeding was proper pursuant to *Payne* and *Reeves*. This assignment of error is rejected.

[13] In his eleventh argument, defendant contends that the trial court erred in allowing the prosecutors to ask impertinent and badgering questions. Defendant argues that the trial court violated the rules of evidence as well as the United States and North Carolina Constitutions, and committed plain error. We disagree.

Many of the questions and answers that defendant challenges either were admitted without objection or, if objected to and sustained, were not followed by a motion to strike. Defendant's failure to object or, in the alternative, move to strike following a sustained objection limits our review to plain error. *State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994). We find no plain error.

The remaining questions that defendant challenges were objected to and properly overruled because defendant had previously injected the evidence into the proceeding or allowed it to be admitted as evidence earlier with no objection. *See Hunt*, 325 N.C. at 196, 381 S.E.2d at 459. This assignment of error is without merit.

[14] In his twelfth argument, defendant contends that the trial court erred by excluding letters and cards that defendant wrote to his mother since his arrest while he was incarcerated. Defendant contends that the exclusion of the letters violated settled evidence rules as well as the United States and North Carolina Constitutions. We disagree.

Defendant relies on *State v. Jones*, 339 N.C. 114, 154, 451 S.E.2d 826, 847 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995), in which this Court stated:

> When evidence is relevant to a critical issue in the penalty phase of a capital trial, it must be admitted, evidentiary rules to the contrary under state law notwithstanding. *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979). The jury cannot be precluded from considering mitigating evidence relating to the defendant's character or record and the circumstances of the offense that the defendant offers as the basis for a sentence less than death.

In *Jones*, this Court held that the trial court erred by excluding the testimony of a witness who was prepared to say that the defendant

had communicated remorse for what he had done. However, this Court ultimately found that the exclusion of the evidence was harmless beyond a reasonable doubt because another witness had been allowed to read to the jury a letter the defendant had written in which the defendant expressed regret. Notably, while the rules of evidence do not apply in a sentencing proceeding, the trial judge still must determine the admissibility of evidence subject to general rules excluding evidence that is repetitive or unreliable. *State v. Simpson*, 341 N.C. 316, 350, 462 S.E.2d 191, 211 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996).

In the present case, defense counsel requested that defendant's mother be allowed to read the letters to the jury and proffered the exhibits as evidence tending to show defendant's remorse and relationship with his mother. The State objected. Defendant's mother was allowed to testify that she received the letters from defendant; that they were personal in nature; and that, in them, defendant expressed remorse for what he had done. The trial court ruled that the letters were inadmissible on grounds that they were cumulative of evidence already before the jury: "I'm going to find that the admission of the letters themselves to prove remorse or his relationship with his mother would be cumulative, that there's already been evidence produced for the jury to consider on those issues, and I'm going to exclude those letters."

When the trial court made its ruling, defendant had already presented evidence that he loved his mother. Moreover, several witnesses had testified that defendant constantly cried and expressed remorse about what he had done when they visited him during his incarceration. There was even evidence in the record that defendant frequently cried during the capital sentencing proceeding.

We conclude that the letters would have offered substantially the same evidence as the testimony of defendant's mother and other witnesses. Defendant was allowed to present to the jury evidence of remorse and of a loving relationship with his mother. In any event, the letters were unreliable in that they were written by a defendant facing a capital sentencing proceeding to a likely witness in the proceeding. As such, we hold that the trial court properly excluded the letters as cumulative and unreliable. Assuming *arguendo* that the trial court erred in excluding the letters from evidence, such error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1999); *Jones*, 339 N.C. at 154, 451 S.E.2d at 848. This argument is without merit.

[15] In his thirteenth argument, defendant contends that the trial court erred in excluding the testimony of Colin Wilmont that defendant would make a positive impact on society in prison, thereby violating the rules of evidence and the United States and North Carolina Constitutions. We disagree.

The admissibility of mitigating evidence during the sentencing phase is not constrained by the rules of evidence. N.C.G.S. § 8C-1, Rule 1101(b)(3). However, the trial judge must determine the admissibility of such evidence subject to general rules excluding evidence that is repetitive or unreliable, or lacks an adequate foundation. *Simpson*, 341 N.C. at 350, 462 S.E.2d at 211; *see also State v. Strickland*, 346 N.C. 443, 462, 488 S.E.2d 194, 205 (1997) (the trial court did not err in excluding testimony during a capital sentencing proceeding because of the "undependable nature of the evidence, its limited mitigating value, and its potential to distract the jury"), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998).

In the instant case, defendant proffered Wilmont, defendant's seventeen-year-old friend, to testify that defendant would have a positive impact by talking to and counseling young people who visited prison. Defendant contends that the evidence was relevant to mitigating circumstances including age and to the catchall, and to serve as a basis for a sentence less than death. Defendant also contends that this evidence was sufficient rebuttal to the State's evidence that defendant would not be useful to society in prison and would be a danger to unarmed civilians in prison.

We conclude, however, that this testimony by defendant's friend tending to suggest that defendant would have had a positive impact on young people visiting prison was purely speculative. As such, the trial court did not commit prejudicial error or abuse its discretion by excluding this evidence.

Assuming *arguendo* that the court's ruling was erroneous, the record shows that the trial court admitted evidence that defendant was "like a . . . leader" to Wilmont and had a positive impact on people on and off the football field. Thus, the jury had an opportunity to consider the positive influence defendant had on others for purposes of the catchall mitigating circumstance. As such, any error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b).

In his fourteenth argument, defendant assigns error to closing arguments made by the prosecution. Defendant argues that the

State's improper arguments violated rules of evidence as well as defendant's constitutional rights, and that the trial court's failure to intervene *ex mero motu* amounted to plain error.

[16] First, defendant contends that the prosecutor made improper biblical arguments. As a general rule, prosecutors have wide latitude in the scope of their argument "to argue the law, the facts, and reasonable inferences supported thereby." *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). Furthermore, this Court " 'has found biblical arguments to fall within permissible margins more often than not.' " *State v. Walls*, 342 N.C. 1, 61, 463 S.E.2d 738, 770 (1995) (quoting *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)), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). While this Court has disapproved of arguments that the Bible does not prohibit the death penalty, it has held that such arguments are not so improper as to require intervention *ex mero motu* by the trial court. *Williams*, 350 N.C. at 27, 510 S.E.2d at 643. "We caution all counsel that they should base their jury arguments solely upon the secular law and the facts." *Id.*

We have reviewed the prosecutor's argument in its entirety. A portion of the prosecutor's argument is as follows:

> Now, I'm going to close with some brief remarks from or about the Bible, and I'm going to be brief about that because I don't wish to offend . . . jurors . . . and because our Supreme Court doesn't want us to make biblical arguments. And we asked all of you if you could follow the laws of this case and the laws of man. I make any remarks in anticipation of these issues because we've had witnesses about this. In the Book of Matthew[,] we're told about when the Herodians . . . came to test Jesus about the powers of the government . . . . And he said, "Then render unto Caesar what is Caesar's, and unto God what is God's." And for the purposes of this trial, [defendant] is Caesar's and these are Caesar's laws. . . . [A]nd there's the story about the adulteress brought before Jesus by the crowd, and they were planning to stone her. And Jesus didn't say, "Don't stone her." He told them, "He who is without sin cast the first stone." And that, ladies and gentlemen, is the difference between justice and vengeance. . . . The jury swore an oath and you all promised that you wouldn't be biased, that you would hear the evidence, that you'd decide in accord-

ance with the law, and sitting as a body under those circumstances with those promises you are sinless and you may cast that stone, and cast it you must.

"Vengeance is mine," sayeth the Lord. "I will repay." God may wreak vengeance on [defendant] or God may have mercy on his soul after you do justice. It is not our prerogative to forgive [defendant] under these laws. God may have mercy on his soul or vengeance on his soul, because God can do what man cannot, and man cannot punish these crimes as they were, and man cannot protect any of his potential future victims.

Defendant objected at this point in the prosecutor's argument, but stated no grounds for his objection. The trial court sustained the objection as to the statement "future victims." Nothing in the record indicates that defendant specifically objected to the prosecutor's biblical references in his closing argument.

In the absence of objection, our " 'standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial.' " *Walls*, 342 N.C. at 48, 463 S.E.2d at 763 (quoting *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995)).

We disapprove of counsel's biblical references, especially in light of counsel's admission that this Court does not condone such arguments. However, we note that here, as in *Williams*, the prosecutor counseled the jurors that they should base their sentencing decision upon the secular law. Even if error, we do not conclude that the prosecutor's arguments were so improper as to require intervention by the trial court *ex mero motu*.

[17] Second, defendant contends that the prosecutor misstated the law. The prosecutor stated to the jury:

The Supreme Court says, in *State vs. Jones* that prosecutorial argument encouraging the jury to lend an ear to the community is not proper. However, encouraging the jury to act as the voice and conscience of the community is proper and is one of the very reasons for the establishment of the jury system. So regardless of all the people who would come before you and ask you to listen to the community about the defendant's life, that is not what the law says.

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: The law says—

COURT: Overruled.

[PROSECUTOR]: —you are the voice and the conscience of the community.

[DEFENSE COUNSEL]: Objection.

COURT: Overruled.

Defendant contends that this argument was an unconstitutional misstatement of capital sentencing law and that it communicated to the jury that, under North Carolina law as interpreted by this Court, the jury was not required to listen to, consider, or give effect to defendant's witnesses' sworn evidence about defendant's life. We disagree.

The State must not ask the jurors to " 'lend an ear to the community rather than a voice.' " *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985) (quoting *Prado v. Texas*, 626 S.W.2d 775, 776 (Tex. Crim. App. 1982)). Yet, it is not improper for the State to "remind the jurors that 'they are the voice and conscience of the community.' " *State v. McNeil*, 350 N.C. 657, 687-88, 518 S.E.2d 486, 505 (1999) (quoting *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

In the instant case, the prosecutor correctly stated that the jurors must not lend an ear to the community and that the jurors may act as the voice and conscience of the community. We are not convinced by defendant's contention that the prosecution instructed the jury to disregard the testimony of defense witnesses when it stated: "So regardless of all the people who would come before you and ask you to listen to the community about the defendant's life, that is not what the law says." Admittedly, this statement is unclear in light of the fact that no witness asked the jury to listen to the community. However, any confusion generated by the statement was cured when the trial court instructed the jury that "it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record or any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any

other mitigating circumstance arising from this evidence which you deem to have mitigating value." We find no prejudicial error in the prosecutor's argument.

[18] Third, defendant contends that the prosecutor traveled outside the evidentiary record and made arguments not supported by any evidence. Defendant did not object to this portion of the argument. When a defendant fails to object to the prosecutor's comments during closing arguments, "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). We have reviewed the prosecutor's argument, and we do not find it to be so grossly improper as to require intervention by the trial court *ex mero motu*.

[19] Fourth, and finally, defendant contends that the prosecutor violated his constitutional rights by commenting on defendant's silence. The following exchange occurred during the State's closing arguments:

> [PROSECUTOR]: Now, [defendant] sits here like this, and I know that it's hard for you to picture him doing what you know he did and what he's plead [sic] "guilty" to doing, and it's especially hard because he grows his hair out and then he tips his head down.
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Overruled.
>
> [PROSECUTOR]: And then he looks up and he looks pitiful and you can look at him. This is a huge, momentous decision you're going to make, and you shouldn't have to sneak a glance to see whether he's bawling or rolling his eyes or saying "did not" while a witness is testifying . . . .

Defendant contends that this argument was an indirect comment on defendant's decision not to testify at the hearing. Defendant argues that, by pointing out defendant's conduct in the courtroom, including sitting at the counsel table, bowing his head, crying, rolling his eyes, and muttering, the prosecutor called attention to what defendant did not do, namely, testify.

"[A]ny direct reference to defendant's failure to testify is error and requires curative measures be taken by the trial court." *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). Furthermore, the constitutional right of the accused to remain silent is violated by language that is "of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994) (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974)), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

Defendant's reliance on *State v. McLamb*, 235 N.C. 251, 257, 69 S.E.2d 537, 541 (1952), as support for his contention is misplaced. In *McLamb*, while the defendant did not testify, his wife and several men testified on his behalf. The prosecutor commented that the defendant was "hiding behind his wife's coat tail," an obvious reference to the defendant's failure to testify. *Id.* In contrast, in the instant case, the prosecutor's comments about defendant's mannerisms in the courtroom did not constitute references to defendant's constitutional right to remain silent. This argument is rejected.

[20] In defendant's fifteenth argument, he challenges the trial court's jury instructions regarding the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance. Defendant contends the trial court's instruction was erroneous as it failed to submit the essential timing element to the jury. We agree.

An aggravating circumstance that may be considered in a capital sentencing proceeding is that "[t]he capital felony was committed while the defendant was engaged . . . in the commission of . . . robbery." N.C.G.S. § 15A-2000(e)(5) (1999). This subsection "guides the jury's deliberation upon criminal conduct of the defendant which takes place 'while' or during the same transaction as the one in which the capital felony occurs." *State v. Goodman*, 298 N.C. 1, 24, 257 S.E.2d 569, 584 (1979).

In the instant case, during the charge conference, the State requested that the court use its proffered (e)(5) jury instruction instead of the pattern instruction. Defense counsel objected and asked the trial court to administer the pattern (e)(5) jury instruction. However, the trial court overruled the objection and used the State's requested (e)(5) instruction.

During the jury charge for the murder of Miller, the trial court gave the State's requested instructions as follows:

> [F]our aggravating circumstances . . . may be applicable to the case of Joyce Miller: First, "Was this murder committed by the defendant while the defendant was engaged in the commission of armed robbery?" . . . It is sufficient to support this aggravating circumstance that the defendant committed this murder while engaged in the commission of an armed robbery even if the armed robbery was committed after Joyce Miller was killed, so long as the armed robbery occurred during a continuous series of events surrounding Joyce Miller's death.
>
> Now, I charge that for you to find that the defendant committed this murder while engaged in the commission of the armed robbery, the State must prove seven things beyond a reasonable doubt. First, that the defendant took property from the person of Joyce Miller or in her presence. Second, that the defendant carried away the property. Third, that Joyce Miller did not voluntarily consent to the taking and carrying away of the property. Fourth, that the defendant knew that he was not entitled to the property. Fifth, that at the time of the taking the defendant intended to deprive Joyce Miller of its use permanently. Sixth, that the defendant had a firearm or other dangerous weapon in his possession at the time he obtained the property. . . . And seventh, that the defendant obtained the property by endangering or threatening the life of Joyce Miller with the firearm or other dangerous weapon.

During deliberations, the jury requested that the trial court reinstruct it on armed robbery. The trial court repeated the State's requested (e)(5) instruction in full. Defendant again objected. The jury subsequently found the (e)(5) circumstance to exist.

Defendant contends that the essence of the (e)(5) circumstance is that it provides for greater punishment when a capital felony is committed *while* a defendant is engaged in the commission of other dangerous felonies. Defendant further argues that the trial court failed to instruct the jury on this essential timing element.

In describing the State's burden, the trial court enumerated seven things the State was required to prove beyond a reasonable doubt in order to show that defendant committed the murder while engaged in the commission of armed robbery. The seven things comprised the elements of armed robbery and did not require a finding that the murder was committed *while* engaged in the commission of the armed robbery. The consequence of the trial court's instruction is that the

State was able to prove (e)(5) without proving that the murder occurred *while defendant was engaged in armed robbery.* N.C.G.S. § 15A-2000(e)(5).

Following the charge, the trial court compounded its error by stating, "So, I charge that if you find, from the evidence and beyond a reasonable doubt, that on or about May 24th, 1996 [the seven elements of armed robbery were satisfied] . . . you would find this aggravating circumstance and so indicate by writing 'yes' in the space after the aggravating circumstance . . . ."

We note that the pattern jury instruction on (e)(5) provides as follows:

> If you find from the evidence beyond a reasonable doubt that *when the defendant killed the victim* the defendant was . . . (set out the findings necessary for the felony . . .) you would find this aggravating circumstance[.]

N.C.P.I.—Crim. 150.10(5A) (1997) (emphasis added). The pattern jury instruction includes a timing element in that it requires the jury to "find from the evidence beyond a reasonable doubt that when the defendant killed the victim (the elements necessary to commit the felony)" were fulfilled. *Id.* In the instant case, the trial court's charge to the jury lacked the requisite timing element.

We conclude that the trial court failed to charge the jury with sufficient clarity that the State had the burden to show that the criminal conduct took place *while* or during the same transaction as the murder. Thus, the trial court erred in giving the instruction to the jury. We next address whether this error warrants a new capital sentencing proceeding.

A review of the record discloses that defendant indicated to the investigating officer that he killed Miller around 7:00 p.m. Defendant also indicated that he placed the stolen materials, including the VCR, into the Bravada truck and drove to the mall at approximately 7:15 p.m. For purposes of this aggravating circumstance, the jury was instructed to consider the taking of the keys to the Bravada, the Bravada itself, and one of the VCRs. The span of time between Miller's murder and the alleged armed robbery was at most thirty minutes. Thus, all of the evidence presented during the sentencing proceeding tended to show that the murder and alleged armed robbery were part of a continuous series of events.

Furthermore, the trial court properly instructed the jury that it could find this aggravating circumstance if it determined that the armed robbery occurred during a continuous series of events surrounding Miller's death. Finally, on the issues and recommendation form, this issue was stated as follows: "Was this murder committed by the Defendant while the Defendant was engaged in the commission of Armed Robbery?" Therefore, when the jurors marked "yes" on the form, they found that the murder was committed *while defendant was engaged in the commission of armed robbery.* Thus, the instructions and issues and recommendation form, when considered in light of the evidence in this case, communicated to the jury that the murder had to occur while defendant was engaged in the commission of armed robbery.

In light of the foregoing, we conclude that there is no reasonable likelihood that the jury applied the challenged instruction in a manner that violated the Constitution. *See State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 209, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Assuming *arguendo* that the error was of constitutional magnitude, such error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b).

Defendant makes a similar argument about the identical instructions the trial court gave regarding Caroline's murder. However, we need not address this argument since the jury recommended life imprisonment without parole for Caroline's death. This argument is rejected.

[21] In his sixteenth argument, defendant challenges the trial court's instructions on aggravating circumstance (e)(6), that the murder was committed for pecuniary gain. Defendant contends that the instructions given by the trial court allowed the jury to find the (e)(6) circumstance without making the necessary finding about defendant's motive in that the instructions did not require the jury to find that defendant murdered for the purpose of pecuniary gain. Defendant contends that the instructions were erroneous in law and violated his rights under the United States and North Carolina Constitutions. We disagree.

An aggravating circumstance that may be considered in capital sentencing is that "[t]he capital felony was committed for pecuniary gain." N.C.G.S. § 15A-2000(e)(6). "This aggravating circumstance considers defendant's motive and is appropriate where the impetus for the murder was the expectation of pecuniary gain." *State v.*

Moore, 335 N.C. 567, 610, 440 S.E.2d 797, 822, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). However, the jury may find this aggravating circumstance even where financial gain was not the defendant's primary motivation. *Id.*

In the instant case, during the charge conference, the trial court accepted the State's requested instruction on the (e)(6) aggravating circumstance, over defendant's objection. The instruction was given as follows:

> [T]he second aggravating circumstance that you may consider . . . is: "Was this murder committed for pecuniary gain?" A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained or intends to obtain money or other things that can be valued in money as a result of the death of the victim. In order to find that this murder was committed for pecuniary gain, you do not have to find that the primary motive of the defendant was financial gain. If you find, from the evidence beyond a reasonable doubt, that when the defendant killed the victim, that the defendant took personal property or other items belonging to Joyce Miller and that he intended or expected to obtain money or property or any other thing that can be valued in money, you would find this aggravating circumstance and would so indicate by having your foreperson write "yes" in the space . . . .

The jury subsequently found the (e)(6) circumstance to exist.

We conclude that the trial court properly instructed the jury that it must find that defendant murdered for the purpose of pecuniary gain in order to find the (e)(6) aggravating circumstance. Notably, the trial court began its instructions by setting out the issue for the jury: "Was this murder committed for pecuniary gain?" The trial court subsequently instructed the jury to find this circumstance if it found that, when defendant committed the murder, he had obtained or intended or expected to obtain money. More specifically, the trial court charged the jury that it must determine whether, "when defendant took the personal property belonging to Joyce Miller, he intended or expected to obtain money or property or any other thing . . . valued in money." On the recommendation form, the issue was stated, "Was this murder committed for pecuniary gain?"

We note that the instruction given by the trial court was remarkably similar to the pattern instruction. *See* N.C.P.I.—Crim. 150.10(6).

While defendant argues that the trial court erred in charging the jury that "[i]n order to find that this murder was committed for pecuniary gain, you do not have to find that the primary motive of the defendant was financial gain," we conclude that the instruction was correct as a matter of law. *See Moore*, 335 N.C. at 610, 440 S.E.2d at 822. Furthermore, by instructing the jury that it need not find that defendant's "*primary* motive" was financial gain, the trial court implicitly communicated that financial gain must have been a motive. This case is distinguishable from *State v. Bishop*, 343 N.C. 518, 472 S.E.2d 842 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997), in which the challenged instruction contained no language concerning the intent or motive of the defendant.

Having determined that the trial court's pecuniary gain instruction was not erroneous, we need not address defendant's argument that the instruction was unconstitutional.

[22] In his seventeenth argument, defendant contends that the trial court erred in instructing the jury on the mitigating circumstance found in N.C.G.S. § 15A-2000(f)(1). Defendant argues that the trial court's instruction violated his constitutional rights by peremptorily charging the jury that defendant had a history of prior criminal activity.

N.C.G.S. § 15A-2000(f)(1) provides that a mitigating circumstance in capital sentencing may be that "[t]he defendant has no significant history of prior criminal activity."

In the present case, the State introduced contested evidence of defendant's alleged prior criminal activity. The trial court instructed the jury regarding the (f)(1) mitigating circumstance as follows:

> First, consider whether the "defendant has no significant history of prior criminal activity" prior to the date of the murder. . . . You would find this mitigating circumstance if you find that the assault, drug offenses, use of illegal drugs and gambling or any other acts were not a significant history of prior criminal activity. . . . If none of you find this circumstance to exist, you would so indicate by having your foreperson write "no" [on the issues and recommendation form].

The jury did not find the (f)(1) circumstance to exist.

Defendant contends that the trial court's instruction improperly assumed that the State's evidence regarding alleged criminal conduct

by defendant was true. Therefore, according to defendant, the trial court deprived the jury of the opportunity to determine whether the essential elements of the alleged crimes had been met and whether such alleged criminal conduct constituted a significant history of prior criminal activity. Defendant cites the proposition that "the trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue." *State v. Cuthrell*, 235 N.C. 173, 174, 69 S.E.2d 233, 234 (1952).

Defendant failed to object to the instruction at trial, thereby failing to preserve this argument for appeal. N.C. R. App. P. 10(b)(2). Moreover, defendant failed to "distinctly" contend in his assignment of error that the alleged error constituted plain error. *Id.* Nonetheless, we have examined defendant's argument, and we find no plain error.

"In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 862, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

Assuming *arguendo* that the trial court's instructions assumed that defendant engaged in the prior criminal activity, overwhelming evidence was presented that defendant engaged in the criminal activity listed. Several witnesses testified regarding defendant's assault of his girlfriend. Defendant's witness, Dr. Noble, testified regarding defendant's drug abuse and drug dealing, and defendant's witness, Orren Daugherty, testified that defendant won money by gambling.

The trial court did not assume the jury's duty to determine whether defendant's history was significant. Rather, the trial court listed defendant's prior criminal activity, which was supported by the evidence, and asked that the jury determine the significance of this activity.

Admittedly, the pattern jury instructions require the jury to determine whether a defendant has engaged in any prior criminal conduct as well as the significance of any such conduct: "[Y]ou would find this mitigating circumstance if you find that (describe all defendant's prior criminal activity) and that this is not a significant history of prior criminal activity." N.C.P.I.—Crim. 150.10(1); *see also State v. Daniels*, 337 N.C. 243, 271, 446 S.E.2d 298, 316 (1994) (the trial court

properly instructed: "You would find this mitigating circumstance if you find that the defendant's prior criminal history is the conviction of driving while impaired, communicating threats, and simple assault, and that this was not a significant history of prior criminal activity"), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). However, we find no plain error in the instruction because the evidence of defendant's drug activity, assault, and gambling was overwhelming, and the jury was permitted to determine the significance of said conduct. This assignment of error is rejected.

[23] In his eighteenth argument, defendant contends that the trial court erred in refusing to give peremptory instructions about the existence of four mitigating circumstances. Defendant contends that he was entitled to peremptory instructions on the nonstatutory mitigating circumstance "[t]hat the Defendant never had any permanent or even long-term relationship with an appropriate male role model" and on three statutory mitigating circumstances: (f)(1), "[t]he Defendant has no significant history of prior criminal activity"; (f)(2), "[t]he murder was committed while the Defendant was under the influence of mental or emotional disturbance"; and (f)(6), "[t]he capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was impaired." We disagree.

"A defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontroverted evidence." *State v. White*, 349 N.C. 535, 568, 508 S.E.2d 253, 274 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). " 'Conversely, a defendant is not entitled to a peremptory instruction when the evidence supporting a mitigating circumstance is controverted.' " *Id.* (quoting *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)).

Defendant contends that the evidence was uncontroverted that he had no appropriate male role model in his life. However, there was evidence that defendant spent substantial time in the custody of his grandparents. Furthermore, there were male teachers and male coaches who testified on defendant's behalf and indicated extensive interactions with defendant during his life.

Defendant also contends that the evidence was uncontroverted that he had no significant history of prior criminal activity. However, the State presented evidence tending to show that defendant used and sold drugs, assaulted his girlfriend, gambled, and stole money.

Defendant further contends that the evidence was uncontroverted that the murders were committed while he was under the influence of mental or emotional disturbance and that his capacity was impaired. Defendant's expert, Dr. Noble, testified that defendant was under the influence of a mental or emotional disturbance when he killed Caroline and Miller. Dr. Noble further testified that when defendant killed Caroline, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was "diminished, but he did not completely lose his sense of right and wrong" and that at the time he killed Miller, defendant's capacity was "impaired." The State introduced evidence of different possible interpretations of the results of the MMPI, an assessment tool used by Dr. Noble. The computer software that scored the MMPI generated possible interpretations that defendant was manipulative, aggressive, rebellious of authority figures, resentful, uncompromising, and hedonistic, and that defendant might be physically threatening toward women to whom he was close when he felt frustrated. The State also presented evidence that defendant performed well in school, wrote well-organized homework assignments, and had been accepted at North Carolina A&T State University. Finally, the State's evidence showed that following the murders, defendant disposed of evidence, went shopping, went to a party, and danced. Therefore, this evidence was controverted as well.

We find no error in the trial court's refusal to give peremptory instructions. This argument is rejected.

[24] In his nineteenth argument, defendant argues that the trial court committed constitutional error in refusing to instruct the jury that "life imprisonment without parole" was the punishment alternative to death and instructing instead that the alternative was merely "life imprisonment." Defendant concedes that the trial court informed the jury on some occasions that the punishment alternative was "life imprisonment without parole" but argues that the phrase was used infrequently and sporadically. Defendant argues that every time the trial court referred to the alternative to death, he should have instructed the jury that it was "life imprisonment without parole."

N.C.G.S. § 15A-2002 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." We hold that the judge in this case did instruct the jury that a sentence of life imprisonment means a sentence of life

without parole. In the charge to the jury, the judge instructed the jury, "If you unanimously recommend a sentence of life imprisonment, the court will impose a sentence of life imprisonment without parole." We find nothing in the statute that requires the judge to state "life imprisonment without parole" every time he alludes to or mentions the alternative sentence. We find no error in the trial court's actions. This argument is without merit.

[25] In his twentieth argument, defendant contends that the trial court erred in referring to the prosecutor as "our" and/or "your" district attorney. Defendant claims that the trial court's statements violated its duty of impartiality and constituted an improper expression of opinion in violation of N.C.G.S. § 15A-1222 as well as the United States and North Carolina Constitutions. We disagree.

N.C.G.S. § 15A-1222 provides that "[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." "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Further, since defendant claims that he was deprived of a fair trial by the judge's statements, he "has the burden of showing prejudice in order to receive a new trial." *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *cert. denied*, — U.S. —, 148 L. Ed. 2d 110 (Oct. 20, 2000) (No. 99-10222). "Whether the accused was deprived of a fair trial by the challenged remarks must be determined by what [was] said and its probable effect upon the jury in light of all attendant circumstances." *State v. Burke*, 342 N.C. 113, 122-23, 463 S.E.2d 212, 218 (1995).

In the instant case, during jury selection, the trial court asked prospective jurors whether they had any contact with "our" district attorney's office and whether they knew that the State was represented by "your" and "our" district attorney; and stated that this case would be prosecuted by "your" elected district attorney; and that the burden to prove death was on the State through "your" district attorney. Defendant failed to object to any of these statements.

We decline to hold that these comments by the trial judge constituted an improper expression of opinion. We first note that the opinion must be on a "question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1999). Whether the district attorney is "our" or "your" district attorney is not a question of fact to be decided by the jury. After a full examination of the trial transcript, we conclude that, when

viewed in the totality of circumstances, defendant has failed to show prejudice. This argument is without merit.

[26] In his twenty-first argument, defendant contends that the trial court erred in submitting both aggravating circumstances (e)(5) and (e)(6) to the jury. Defendant argues that the trial court's submission of both the (e)(5) and (e)(6) aggravating circumstances in this case constituted unconstitutional double-counting. We disagree.

" 'Double-counting' occurs when two aggravating circumstances based upon the same evidence are submitted to the jury." *Call*, 349 N.C. at 426, 508 S.E.2d at 523. In *State v. East*, 345 N.C. 535, 481 S.E.2d 652, *cert. denied*, 522 U.S. 918, 139 L. Ed. 2d 236 (1997), this Court stated:

> It is established law in North Carolina that it is error to submit two aggravating circumstances when the evidence to support each is precisely the same. *State v. Gibbs*, 335 N.C. 1, 58-59, 436 S.E.2d 321, 354 (1993), *cert. denied*, [512] U.S. [1246], 129 L. Ed. 2d 881 (1994); *State v. Jennings*, 333 N.C. 579, 627-28, 430 S.E.2d 188, 213-14, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Conversely, where the aggravating circumstances are supported by separate evidence, it is not error to submit both to the jury, even though the evidence supporting each may overlap. *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993); *State v. Jones*, 327 N.C. 439, 452, 396 S.E.2d 309, 316 (1990).

East, 345 N.C. at 553-54, 481 S.E.2d at 664. "[S]ome overlap in the evidence supporting each aggravating circumstance is permissible so long as there is not a complete overlap of evidence." *Call*, 349 N.C. at 426, 508 S.E.2d at 523.

As to the (e)(5) circumstance, whether the murder was committed while defendant was engaged in the commission of armed robbery, the trial court instructed the jury to consider only:

> [the] taking of the keys to the Bravada automobile, the taking of the Bravada automobile and the VCR which was in the family room . . . in considering this aggravating factor. You may not consider the taking of the credit card, Miss Joyce Miller's purse or the checks of Miss Joyce Miller in order for the State to prove this aggravating factor. Those items may be considered on another aggravating factor which I'll explain to you later, but you may not consider the taking of the credit card, the checks

or the purse of Miss Joyce Miller when you consider this aggravating circumstance.

As to the (e)(6) pecuniary gain circumstance, the trial judge then instructed the jury to consider only "the taking of the credit card, checks and the purse of Miss Miller." He further clarified that "[y]ou may not consider the taking of the VCR, the automobile—that is the Bravada—or the keys to the Bravada automobile when you consider this aggravating factor. Those items may only be considered for purposes of the armed robbery."

It is clear from the record that the trial court did not allow the jury to find both aggravating circumstances using the same evidence. Both circumstances were supported by sufficient, independent evidence. The trial court properly instructed the jury that it could not use the same evidence as the basis for finding both the (e)(5) and (e)(6) circumstances. This argument is rejected.

[27] In his twenty-second argument, defendant challenges the prosecutor's statements to the jurors during jury selection regarding the State's burden of proof. Defendant contends that he is entitled to a new capital sentencing proceeding because the prosecutor repeatedly told jurors during jury selection that the State's burden of proof was "beyond a reasonable doubt to the satisfaction of the jury." Defendant argues that the prosecutor misstated the standard, causing the jurors to believe that the burden of proof was essentially "satisfaction of the jury." Defendant further argues that the misstatement confused the jury, constituted plain error, and violated defendant's constitutional right to a fundamentally fair sentencing hearing.

Defendant failed to object to the prosecutor's statements. Defendant's failure to raise this issue in the trial court constitutes waiver. N.C. R. App. P. 10(b)(2). " 'This Court has applied the plain error analysis only to instructions to the jury and evidentiary matters.' " *McNeil*, 350 N.C. at 674, 518 S.E.2d at 497 (quoting *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)). Here, defendant assigns error to statements by the prosecutor during jury selection to which he failed to object. Therefore, defendant has waived appellate review of this issue. This argument is rejected.

[28] In his twenty-third argument, defendant contends that the trial court unconstitutionally chilled his right to testify.

The trial court addressed defendant as follows:

COURT: Mr. Davis, I just want to make an inquiry on the record. Have you had an opportunity to discuss with your lawyers about testifying in this matter?

DEFENDANT: Yes, sir.

COURT: You understand you have the right to testify, and if you do testify, that you'll be subject to being cross-examined on a variety of subject matters limited only by my discretion of what's relevant. Do you understand that?

DEFENDANT: Yes, sir.

COURT: As long as you've had that explained to you by your lawyers and you've been advised about your right, that's all I need to make an inquiry about.

Defendant argues that the trial court's instructions were erroneous in that they did not give more specific details about the rules that guide cross-examination.

We hold that the trial court properly instructed defendant since the trial court "did not attempt to give defendant detailed instructions concerning the scope of cross-examination and did not give an instruction inconsistent with any of the Rules of Evidence." *State v. Davis*, 349 N.C. 1, 31, 506 S.E.2d 455, 471 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Furthermore, the exchange above indicates that defendant had discussed the consequences of testifying with his counsel. *See Id.*

Accordingly, we conclude that the trial court's instructions were not erroneous and, therefore, did not impermissibly chill defendant's right to testify. This argument is without merit.

[29] In his twenty-fourth and twenty-fifth arguments, defendant contends that the trial court erred in denying his motion to dismiss both charges of first-degree murder on the grounds that the indictments: (1) failed to charge the elements of first-degree murder, (2) failed to allege facts to increase the maximum penalty for the crime, and (3) failed to allege capital aggravating circumstances.

Defendant recognizes that this Court has held for many years that the "short-form" murder indictment under N.C.G.S. § 15-144 is sufficient to allege first-degree murder under theories of both premeditation and deliberation and felony murder. *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); *Brown*, 320 N.C. at 191, 358 S.E.2d at 11; *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 793 (1985). However, defendant contends that the decision in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), brings our prior case law on short-form indictments into question. We disagree.

We addressed in full and rejected this argument in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 498, 69 U.S.L.W. 3364 (2000), and reaffirmed our position in *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000). In *Braxton*, this Court examined the validity of short-form indictments in light of *Jones*, 526 U.S. 227, 143 L. Ed. 2d 311, and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and held that nothing in either case altered prior case law on these matters. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 437-38. Accordingly, we conclude that the short-form indictments are constitutional. Defendant's arguments concerning the validity of his indictments are without merit and are rejected.

[30] In his twenty-sixth argument, defendant contends that the trial court erred in ordering defendant's mental health expert, Dr. Noble, to prepare and disclose to the State a written report of his findings and a copy of his handwritten notes of interviews with defendant. Defendant contends that the trial court's order exceeded the scope of N.C.G.S. § 15A-905(b) and violated defendant's attorney-client and Fifth Amendment privileges. We disagree.

N.C.G.S. § 15A-905 governs the procedures for court-ordered pretrial discovery in criminal cases. The statute provides, in relevant part:

> If the court grants any relief sought by the defendant under G.S. 15A-903(e), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony.

N.C.G.S. § 15A-905(b) (1999). In the case at hand, defendant requested discovery from the State and was given open file access to

the State's files. Once defendant was given access to the State's files, it was logical and permissible for the trial court to order defendant's expert to prepare a written report and to produce handwritten notes for the State's perusal pursuant to N.C.G.S. § 15A-905(b). The trial court's order in this case simply provided for the reciprocal discovery requirements under N.C.G.S. § 15A-905(b) and did not exceed the scope of the discovery statute. *See Atkins*, 349 N.C. at 92-94, 505 S.E.2d at 116-17 (court order for defense expert to produce "all reports" and all of his notes did not violate N.C.G.S. § 15A-905(b)). We find no error in the trial court's order, which ensured fairness to both sides in the preparation of their case.

[31] Defendant further contends that the trial court's order violated defendant's attorney-client privilege and privilege against self-incrimination. Defendant argues that the order allowed the State to gain access to information that defendant supplied to his attorney's agent, Dr. Noble, during and for the purpose of the investigation and preparation of his defense. We disagree.

Defendant's communications with Dr. Noble were not protected by an attorney-client privilege. The attorney-client privilege "covers only confidential communications made by the client to his attorney." *State v. Brown*, 327 N.C. 1, 20, 394 S.E.2d 434, 446 (1990). However, "[a] communication is covered by the attorney-client privilege if it has been 'made in the course of seeking or giving legal advice for a proper purpose.' " *Jennings*, 333 N.C. at 611, 430 S.E.2d at 204 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 62, 302 (3d ed. 1988)). Nothing indicates that Dr. Noble examined or communicated with defendant in the course of seeking or giving legal advice. We are aware that " '[d]isclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand.' " *State v. Ballard*, 333 N.C. 515, 522, 428 S.E.2d 178, 182 (quoting *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1054 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958, 53 L. Ed. 2d 276 (1977)), *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993). Even if Dr. Noble were the agent of defendant's attorneys, he clearly lost such privilege once he was placed on the witness stand. *Id.* Moreover, "the trial court is always at liberty to compel disclosure of privileged communications if it 'is necessary to a proper administration of justice.' " *East*, 345 N.C. at 545, 481 S.E.2d at 660 (quoting N.C.G.S. § 8-53.3 (Supp. 1996)). We find no abuse of the trial court's discretion in compelling disclosure of the communications. Likewise, defendant's argument that the order violated his

Fifth Amendment privilege against self-incrimination is feckless. Thus, this assignment of error is without merit.

II. PRESERVATION ISSUES

Defendant raises four additional arguments that he concedes have been previously decided contrary to his position, but asks this Court to reconsider those decisions: (1) the trial court committed reversible constitutional error by refusing to instruct jurors that they "must" rather than "may" consider mitigating circumstances when deciding Issues Three and Four during their jury deliberations, (2) the trial court committed reversible constitutional error by placing the burden of proof on defendant to satisfy the jury with respect to mitigating circumstances and refusing to instruct jurors that proof by a preponderance of the evidence is proof which indicates that it is more likely than not that a mitigating circumstance exists, (3) the trial court committed reversible constitutional error by erroneously instructing the jurors that they could find that a mitigating circumstance exists and simultaneously find that the mitigating circumstance has no mitigating value, and (4) the trial court committed reversible constitutional error by denying defendant's motion *in limine* to prohibit submission of the (e)(9) aggravating circumstance and subsequently instructing the jury on this factor.

After carefully considering defendant's arguments on these issues, we find no compelling reason to depart from our prior holdings. Accordingly, we reject these arguments.

III. PROPORTIONALITY

[32] Having concluded that defendant's capital sentencing proceeding was free of prejudicial error, we turn now to duties reserved exclusively for this Court in capital cases. It is our duty under N.C.G.S. § 15A-2000(d)(2) to ascertain: (1) whether the record supports the jury's finding of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In the Miller murder, the following aggravating circumstances were submitted to and found by the jury: (1) the murder was committed while defendant was engaged in the commission of armed rob-

bery, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). After thoroughly examining the record, transcripts, and briefs in the instant case, we conclude that the record fully supports the aggravating circumstances submitted to and found by the jury. Additionally, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We now turn to our final statutory duty of proportionality review.

[33] It is proper in our proportionality review to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). We have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 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 of the aforementioned cases where this Court has held that the death penalty was disproportionate. Some distinguishing characteristics of this case include: (1) defendant prevented the victim from calling for help by pulling the phone cord from the receptacle and hacking her to death; and (2) the jury found four aggravating circumstances, in a combination that this Court has never ruled to be disproportionate. However, it is not the number of aggravating circumstances found by one jury that controls the proportionality review. Rather, " 'we will consider the totality of the circumstances presented in each individual case and the presence or absence of a particular [aggravating circumstance] will not necessarily be controlling.' " *Stokes*, 319 N.C. at 23-24, 352 S.E.2d at 666 (quoting *Bondurant*, 309 N.C. at 694 n.1, 309 S.E.2d at 183 n.1). There is no question regarding specific intent to

kill in the instant case, as there sometimes is in felony murder cases. Here, defendant shot the victim and then made it impossible for her to call for help or leave. Moreover, Miller was shot at close range in her own home. This Court has emphasized that a murder committed in the home particularly "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *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).

It is also proper to compare this case to those where the death sentence was found proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. However, it is unnecessary to cite every case used for comparison. *Id.*; *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 "in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In the instant case, defendant, after being taken into Miller's home, stole from her and then, without adequate provocation, furtively waited in her home for her to return so that he could shoot her. While she was attempting to call for help, defendant hacked her to death with a meat cleaver, in the presence of her two foster children.

After comparing this case to other roughly similar cases as to the crime and defendant, we cannot conclude as a matter of law that the death penalty for the murder of Miller was excessive or disproportionate. Accordingly, the judgment of the trial court sentencing defendant to death must be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. TIMMY EUVONNE GROOMS

No. 39A99

(Filed 21 December 2000)

1. Constitutional Law— right to speedy trial—failure to raise at trial—no willful misconduct by State—no significant prejudice

Defendant was not denied his constitutional right to a speedy trial in a capital prosecution for first-degree murder, even though the length of delay from indictment to trial was three years and 326 days, because: (1) defendant waived appellate review of this issue by failing to properly raise the constitutional issue in the trial court; and (2) even if this issue was preserved, the record does not reveal that the delay resulted from willful misconduct by the State when much of the delay was attributed to defendant's unwillingness to cooperate with his attorneys in preparation for trial, defense counsel never filed any motions asserting defendant's right to a speedy trial, and defendant has failed to show that he suffered significant prejudice as a result of the delay.

2. Constitutional Law— effective assistance of counsel—failure to assert right to speedy trial

Defendant was not deprived of his constitutional right to effective assistance of counsel in a capital prosecution for first-degree murder even though defense counsel failed to assert defendant's constitutional right to a speedy trial, because defendant cannot show that he suffered any prejudice when defendant's constitutional right to a speedy trial was not violated.

3. Appeal and Error— preservation of issues—DNA evidence—pretrial motion to suppress—motion in limine—failure to object at trial—no argument in brief—issue waived

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion to suppress and motion in limine to exclude DNA evidence, because: (1) defendant's pretrial motion to suppress and motion in limine are not sufficient to preserve for appeal the question of the admissibility of the State's DNA evidence; (2) defendant waived appellate review of this issue by failing to object during trial to the admission of

the DNA evidence; and (3) although defendant's assignment of error includes plain error as an alternative, defendant does not specifically argue in his brief that there is plain error.

4. Constitutional Law— effective assistance of counsel— testing of DNA samples—State's failure to inform defense counsel

Defendant was not denied effective assistance of counsel in a capital prosecution for first-degree murder even though the State failed to inform defense counsel that the SBI had completed DNA testing which precluded defense counsel from making a timely request to observe the SBI's remaining test procedures, because: (1) defendant failed to show that defense counsel's performance was deficient by basing his claim on the State's failure to inform defense counsel of the SBI's progress in testing the DNA samples; (2) defendant does not contend that the SBI employed incorrect testing procedures or that those procedures were conducted improperly; and (3) there was no reasonable possibility that the outcome of the trial was affected.

5. Jury— challenge for cause—ability to render fair and impartial verdict

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's challenge for cause under N.C.G.S. § 15A-1212 of a prospective juror who initially indicated he would vote for the death penalty if the jury found defendant guilty of the charges, because: (1) defendant failed to follow the mandatory statutory procedure under N.C.G.S. § 15A-1214(h) to preserve this issue for appellate review; and (2) even if this issue was preserved, the prospective juror indicated upon further questioning that he could remain a fair and impartial juror, could follow the law concerning the burden of proof and presumption of innocence, and could consider both sentencing options.

6. Jury— challenge for cause—relationship with victim's family and State's witnesses—participated in pretrial protest of case

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's challenge for cause under N.C.G.S. § 15A-1212 of a prospective juror who had a relationship with the victim's family and two of the State's witnesses, and who also participated in a pretrial protest of the

delay in bringing this case to trial, because: (1) defendant failed to follow the mandatory statutory procedure under N.C.G.S. § 15A-1214(h) to preserve this issue for appellate review; and (2) even if this issue was preserved, the prospective juror indicated that his knowledge of the victim and her family members would not affect his ability to render a fair and impartial verdict.

7. Jury— challenge for cause—personal relationship with law enforcement officers

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's challenge for cause under N.C.G.S. § 15A-1212 of a juror on the basis of his personal relationship with several of the law enforcement officers who were prospective witnesses for the State because the juror indicated he could remain a fair and impartial juror, could base his decision on the evidence presented in the case, and would not give any greater weight to the testimony of these prospective witnesses.

8. Evidence— murder weapon—knife—testimony—drawing

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by overruling defendant's objections to testimony and a witness's drawing of a knife that defendant allegedly possessed and possibly used as a murder weapon, because: (1) the witnesses' descriptions of the approximate size of defendant's pocketknife overlap with the medical examiner's testimony regarding the approximate depth and width of the victim's wounds; and (2) the probative value of the evidence substantially outweighed any prejudicial effect.

9. Evidence— hacksaw frame—hacksaw blades—relevancy—proximity to victim—expert's conclusions

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's motion to suppress a hacksaw frame and three hacksaw blades, because: (1) the proximity of the hacksaw frame to the location of the victim's severed hand and the expert witness's conclusions that the victim's right hand was severed by a hacksaw blade similar to those seized from the residence of defendant's parents where defendant often resided made the evidence relevant; (2) the lack of evidence that the seized blades could fit into the rusty hacksaw frame and the common availability of hacksaw blades merely affects the weight or probative value of the evidence rather than

its admissibility; and (3) the probative value of the evidence substantially outweighed any prejudicial effect.

10. Evidence— blood, hair, and saliva samples—motion to suppress

The trial court did not err in a capital prosecution for first-degree murder by failing to suppress evidence of blood, hair, and saliva samples taken from defendant pursuant to a search warrant authorizing the State to seize blood, hair, and saliva samples, because: (1) probable cause existed to support issuance of the search warrant, including evidence of the victim's severed hand, a hacksaw frame located near the severed hand, hacksaw blades consistent in size with the hacksaw frame seized from the residence of defendant's parents where defendant occasionally resided, a medical examiner opined that the victim's hand was severed by a tool consistent with a hacksaw, witnesses saw defendant outside the victim's home on the night of the murder and later saw him running away from the area where the severed hand and hacksaw were discovered, a medical examiner found semen in the victim's body, there was evidence that the victim had struggled, defendant had numerous scratches and cuts on his body, and defendant had a history of committing sexual offenses; and (2) the State was not required to obtain a nontestimonial identification order or to provide defendant with the right to counsel during the execution of the search warrant.

11. Evidence— motion in limine—DNA testing—other individuals

The trial court did not err in a capital prosecution for first-degree murder by allowing the State's motion in limine to preclude defendant from eliciting from the State's expert witness testimony about DNA testing performed on other individuals in this case, because: (1) the DNA testing results excluded the other individuals as perpetrators of the crime; and (2) the evidence would have only highlighted the DNA match between defendant and the sample collected from the victim's body.

12. Appeal and Error— preservation of issues—no argument in brief—no objection at trial—issue waived

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence of defendant's past acts of violence against five females, because: (1) defendant's pretrial motion in limine is not sufficient to preserve for appeal the ques-

tion of the admissibility of the State's Rule 404(b) evidence, and defendant waived appellate review of this issue by failing to object during trial to the admission of prior bad acts; and (2) while defendant's assignment of error includes plain error as an alternative, there is no explanation, analysis, or specific contention in his brief to support this assertion.

13. Criminal Law— competency to stand trial—failure to order independent psychiatric evaluation

The trial court did not err in a capital prosecution for first-degree murder by failing to order an independent psychiatric evaluation under N.C.G.S. § 15A-1002 when defendant's capacity to proceed was raised by defense counsel at trial, because: (1) defendant points to nothing in the record to indicate that he was incompetent to proceed with trial; and (2) the record showed that defendant stated he did not want a mental health examination, he understood the proceedings and his rights, he assisted in his own defense throughout trial, and he understood the ramifications of his decision not to present mitigating evidence during the sentencing proceeding.

14. Homicide; Rape; Kidnapping; Robbery— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree murder, first-degree rape, first-degree kidnapping, and robbery with a dangerous weapon, because evidence was presented that: (1) the victim was last seen alive standing with defendant on a street corner; (2) defendant was nearly hit by a car while running away from the location where police later discovered the victim's severed hand; (3) defendant returned home with a scratched face, with a bleeding cut on his arm, and without the jacket that he frequently wore; (4) defendant gave several inconsistent explanations for the scratches and bleeding cut on his arm; (5) defendant told his girlfriend that he had thrown his coat away, he had buried his other clothes, and the police would never know where the clothes were; (6) defendant's DNA matched the sperm found in the victim's body; (7) the stab wounds on the victim's body were consistent in size and shape with a knife that defendant regularly carried; (8) the victim's right hand had been severed by a hacksaw with a blade designed exactly like the hacksaw blades seized from the residence of defendant's parents where defendant lived from time to time; (9) defendant asked a friend for money to get

out of town; and (10) the victim's body was found in pine straw in the woods, and defendant had on a previous occasion commented to one of the witnesses whom he had assaulted that he could kill her and hide her body under the pine straw in the woods.

15. Criminal Law— jury instruction—flight

The trial court did not err in a capital prosecution for first-degree murder by instructing the jury that it could consider evidence of flight in determining defendant's guilt, because the evidence taken in the light most favorable to the State permits an inference that defendant had a consciousness of guilt and took steps, even though unsuccessful, to avoid apprehension.

16. Criminal Law— prosecutor's argument—defendant as "the prince of darkness" and "the King of Cobra"

The trial court did not commit prejudicial error in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument that referred to defendant as "the prince of darkness" and "the King of Cobra," because: (1) the prosecutor never improperly compared defendant to an animal; (2) the prosecutor's references were connected to the evidence which suggested that defendant regularly rode his bicycle around during the night, that defendant drank King Cobra Beer on the night of the victim's disappearance, and that a King Cobra beer bottle was found near the victim's residence after the murder; and (3) the references were not disparaging and did not amount to satanic or demonic references as defendant contends.

17. Criminal Law— prosecutor's argument—defendant stalked the innocent

The trial court did not commit prejudicial error in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument that "defendant stalked the innocent, some of them children," because the statement was connected to evidence that showed defendant had committed acts of sexual violence against three young girls.

18. Criminal Law— prosecutor's argument—victim's last thoughts

The trial court did not commit prejudicial error in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument inquiring about what the victim was thinking as defendant choked, beat, raped, mutilated, and stabbed her, because: (1) the prosecutor did not improperly characterize defendant as satanic or demonic as defendant contends; (2) arguments concerning what a victim may have been thinking as he or she was dying are not grossly improper; (3) the argument was based upon the evidence presented at trial and reasonable inferences which could be drawn therefrom; and (4) the prosecutor did not ask the jurors to put themselves in the position of the victim.

19. Criminal Law— prosecutor's argument—referring to defense counsel's trial strategy as "ingenuity of counsel"—contention of creating a smoke screen

The trial court did not commit prejudicial error in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument repeatedly referring to defense counsel's trial strategy as "ingenuity of counsel" and contending that defense counsel created a smoke screen to take the focus away from defendant, because: (1) the prosecutor did not use abusive, vituperative, or opprobrious language; (2) the prosecutor did not impugn the integrity of defense counsel or repeatedly attempt to diminish defense counsel before the jury, but instead stated that both defense counsel were fine lawyers that he respected and who had done a good job representing defendant; and (3) the prosecutor never expressed a personal opinion regarding defendant's guilt, but merely asked the jury to find facts and draw permissible inferences based upon the competent evidence introduced during trial.

20. Criminal Law— prosecutor's argument—defendant's pocketknife could have been murder weapon

The trial court did not commit prejudicial error in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument that the pocketknife regularly carried by defendant could have been the murder weapon, because: (1) the prosecutor made reasonable inferences from the competent evidence introduced during trial

based on the witnesses' descriptions of the size of defendant's pocketknife; and (2) the witnesses' descriptions overlap with the medical examiner's testimony regarding the size and depth of the stab wounds on the victim's body.

21. Constitutional Law— capital sentencing—strategy—defendant's wishes

The trial court did not err in a capital prosecution for first-degree murder by ordering defense counsel to defer to defendant's wishes not to present mitigating evidence, because: (1) the Eighth and Fourteenth Amendments do not require a defendant to acquiesce in a trial strategy to present mitigating evidence where defendant and his counsel reach an absolute impasse; and (2) defendant was fully informed of and understood the potential consequences of his decision.

22. Constitutional Law— effective assistance of counsel—deferring to defendant's wishes not to present mitigating evidence

The trial court did not deny defendant his right to effective assistance of counsel in a capital prosecution for first-degree murder by ordering defense counsel to defer to defendant's wishes not to present mitigating evidence, because: (1) defendant concedes in his brief that his counsel's performance was not deficient; and (2) defendant cannot show that the trial court's ruling prejudiced his defense when the trial court did not err in precluding defense counsel from presenting mitigating evidence.

23. Criminal Law— prosecutor's argument—defendant received sentence of imprisonment for prior crime

The trial court did not err in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument urging the jury to recommend the death sentence based on the fact that defendant already received a sentence of imprisonment for his prior acts of violence against other women and he was not deterred, because: (1) the prosecutor never used the word "parole" and never mentioned the possibility that a life sentence for this crime would mean that defendant would eventually be released; (2) the prosecutor merely referred to the fact that defendant committed this crime after serving a prison term for another similar crime, implying that imprisonment had not deterred defendant in the past; and (3) the prosecutor's argument properly focused on the importance of the

jury's duty and suggested that the death penalty would specifically deter defendant from committing future crimes.

24. Criminal Law— prosecutor's argument—defendant has opportunity to go last and argue as many times as he chooses during closing arguments

The trial court did not err in a capital prosecution for first-degree murder by failing to intervene ex mero motu during the prosecutor's closing argument that defendant has the opportunity to go last and to argue as many times as he chooses during closing arguments, because: (1) the prosecutor's argument was a proper statement of the law under N.C.G.S. § 15A-2000(a)(4); and (2) the prosecutor was not improperly implying to the jury that defendant did not present any mitigating evidence or make a closing argument based on the fact that defendant did not have any evidence or argument to present since defense counsel did not announce until after the prosecutor's closing argument that defendant refused to present any closing arguments.

25. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence because: (1) defendant was convicted of first-degree murder based upon premeditation and deliberation and under the felony murder rule; (2) the jury found the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance of defendant's prior conviction for a violent felony; (3) the jury found the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of first-degree rape; (4) the jury found the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of first-degree kidnapping; (5) the jury found the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that the murder was committed for pecuniary gain; and (6) the jury found the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Ellis (B. Craig), J., on 24 April 1998 in Superior Court, Scotland County, upon a jury verdict finding defendant guilty 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 11 September 2000.

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

Leslie Ann Laufer for defendant-appellant.

PARKER, Justice.

Defendant Timmy Euvonne Grooms was indicted on 11 April 1994 for robbery with a dangerous weapon, first-degree kidnapping, and first-degree murder in the kidnapping and killing of victim Krista Kay Godwin. On 31 October 1994 defendant was indicted for first-degree rape. 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 rape, first-degree kidnapping, and robbery with a dangerous weapon. 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 forty years' imprisonment for defendant's convictions of robbery with a dangerous weapon and first-degree kidnapping and to life imprisonment for the first-degree rape conviction. 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 Krista Kay Godwin were neighbors in Laurel Hill, North Carolina. On 14 February 1994, Godwin was planning an intimate Valentine's Day dinner with her fiancé, Michael McDaniel. Godwin spent the afternoon with a friend, Myra Martin. Around 6:30 p.m. Godwin spoke on the telephone with her mother and with McDaniel, who called Godwin from work during his 6:30 break. Godwin and Martin then went to Rita Quick's house for approximately thirty or forty-five minutes. While at Quick's house, Godwin ate some dinner and phoned her mother. Godwin and Martin returned to Godwin's home, and Martin left around 7:30 p.m. Godwin called her father between 8:00 p.m. and 9:00 p.m. and told her father that she was waiting for McDaniel to come home from work.

McDaniel attempted to phone Godwin from work around 10:00 p.m. When no one answered his repeated attempts to call Godwin, McDaniel became concerned and left work early. McDaniel arrived at Godwin's home around 10:25 p.m. The front door was unlocked; the

lights were on; the dogs were in the yard; and Godwin's shoes, purse, and jacket were in the house, but Godwin was missing. McDaniel phoned Martin, Godwin's father, and the police. Martin then phoned the police, the hospital, and Quick. Godwin's father helped McDaniel search the neighborhood for Godwin.

Meanwhile, around 6:00 p.m. Chad Miller noticed defendant straddling his bike in some bushes near Godwin's house. Miller called out to defendant, and defendant rode away on his bike without answering. Miller proceeded to downtown Laurel Hill, where he sat on the steps of an abandoned building and drank beer with defendant. Miller walked defendant home, leaving defendant at the house defendant shared with Hope Norton at approximately 9:00 p.m. Around 10:00 or 10:15 p.m. Kenneth Boswell noticed defendant and Godwin standing together on a street corner. At approximately 1:00 a.m. Shirley Johnson nearly hit defendant with her car as he ran down the street from the direction of Mildred's Florist Shop. Johnson told law enforcement officers that defendant was wearing a blue jacket, a dark hat, and light-colored jeans. Defendant then returned home twice for short periods, both times without the blue jacket that he frequently wore and that he had been wearing earlier.

When defendant returned home the next morning, his face was scratched; and he was bleeding from a long cut on his arm. Defendant told Norton that two black men had assaulted him, that his dog had scratched his face, that he had gotten scratched riding his bicycle under a tree, and that he had gotten scratched in some bushes while breaking into a house. Defendant also told Norton that he had thrown away his jacket. Later, defendant told Norton that he had buried the other clothing he had worn that night and that the police would never find this other clothing.

On the morning of 16 February 1994 Marvin Radford, Jr., discovered a severed human hand when he climbed onto the roof of Mildred's Florist Shop to patch some leaks. On that same day a search team looked for Godwin in a nearby wooded area. As he walked through the wooded area, Deputy Thomas Butler discovered a negligee. Deputy Butler continued to search the surrounding area until he saw human toes sticking up from some pine straw. Deputy Butler then recognized the outline of a human body, which was later uncovered and identified as Godwin.

The pathologist who performed the autopsy on Godwin found a total of twelve stab wounds on Godwin's body, all of which were

inflicted by the same instrument, possibly a pocketknife. One stab wound perforated Godwin's aorta and would have caused Godwin's death within minutes; however, several other wounds that penetrated Godwin's chest cavity were potentially fatal. The pathologist found numerous linear scratches and scrapes on Godwin's back and on the back of Godwin's legs that were consistent with the dragging of the body. Additionally, Godwin's face exhibited scrapes and extensive bruising around the eyes and nose resulting from blunt-force trauma inflicted while Godwin was still alive. Internal bleeding and hemorrhaging in the tissues of the neck indicated that Godwin had been choked before she was stabbed. Vaginal smears revealed the presence of intact sperm. Godwin's right hand had been sawed off at the forearm; and Godwin's left hand had been partially sawed off, then the bone had been forcibly broken or snapped. The contents of Godwin's stomach indicated that Godwin had eaten her last meal within four or five hours of her death.

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

PRETRIAL ISSUES

[1] In his first assignment of error, defendant contends that he was denied his constitutional right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution. Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel as a result of defense counsel's failure to assert defendant's right to a speedy trial.

Before trial defense counsel filed various motions seeking to compel discovery from the State; and defendant filed several *pro se* motions, including a petition for writ of habeas corpus. At a pretrial hearing on 26 February 1997, defendant clarified for the trial court that his request for a writ of habaes corpus was based on his inability to prepare for trial without discovery from the State; and defendant mentioned that he had been denied his right to a speedy trial. However, defense counsel never demanded a speedy trial, nor did counsel file a motion to dismiss for failure to provide a speedy trial.

Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel. *See* N.C.G.S. § 1-11 (1999); *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by*

State v. Freeman, 314 N.C. 432, 437-38, 333 S.E.2d 743, 746-47 (1985); *State v. Phillip*, 261 N.C. 263, 268, 134 S.E.2d 386, 391, *cert. denied*, 377 U.S. 1003, 12 L. Ed. 2d 1052 (1964). Thus, defendant waived appellate review of this issue by failing to properly raise the constitutional issue in the trial court. *See State v. Barnes*, 345 N.C. 184, 237, 481 S.E.2d 44, 73, *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).

Assuming *arguendo* that the speedy trial issue was raised in the trial court, defendant's right to a speedy trial was not violated. In *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972), the United States Supreme Court identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. These factors are: (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay. *See id.*; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution. *See Flowers*, 347 N.C. at 27, 489 S.E.2d at 406; *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 532-33 (1984).

First, the length of the delay is not *per se* determinative of whether the defendant has been deprived of his right to a speedy trial. *See State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). The United States Supreme Court has found postaccusation delay "presumptively prejudicial" as it approaches one year. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). However, presumptive prejudice "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Id.* In this case the length of delay, from indictment to trial, was 3 years and 326 days. This delay is clearly enough to trigger examination of the other factors.

Second, defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351. Here, defendant contends that the State willfully refused to comply with discovery despite representations to the trial court that it would proceed with discovery in a timely manner. However, the record does not reveal that the delay resulted from willful misconduct by the State. To the contrary, the

record shows numerous causes for the delay, including the appointment of substitute defense counsel in June of 1994 and changes in the prosecutors who were handling the case. Additionally, although defense counsel filed numerous discovery requests and motions contending that the State refused to proceed with discovery in a timely manner, the record indicates that defendant repeatedly requested discovery of evidence or information to which he was not statutorily entitled; and the State expeditiously complied with discovery orders issued by the trial court. Finally and most significantly, in 1996, nearly two years after indictment, defense counsel filed a motion to withdraw as a result of defendant's continued refusal to cooperate in the preparation of his defense. Thus, much of the delay was attributable to defendant's unwillingness to cooperate with his attorneys in preparation for trial. "A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice." *State v. Tindall*, 294 N.C. 689, 695-96, 242 S.E.2d 806, 810 (1978).

Third, as stated above, defense counsel never filed any motions asserting defendant's right to a speedy trial. On 26 February 1997, nearly three years after his indictment, defendant himself mentioned the right to a speedy trial in the context of discussing with the trial court his request for a writ of habeas corpus. Defendant's failure to assert his right to a speedy trial, or his failure to assert his right sooner in the process, does not foreclose his speedy trial claim, but does weigh against his contention that he has been denied his constitutional right to a speedy trial. *See Webster*, 337 N.C. at 680, 447 S.E.2d at 352.

Fourth, in considering whether the defendant has been prejudiced because of a delay between indictment and trial, this Court noted that a speedy trial serves " '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *Id.* at 681, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118).

Defendant has failed to show that he suffered significant prejudice as a result of the delay. Defendant contends that two material witnesses, Shirley Johnson and Tony Mauldin, became unavailable by reason of the delay. Defendant contends that he was unable to confront these witnesses, whose hearsay statements were introduced at trial by the State. However, defendant rebutted the State's hearsay statement from Johnson by introducing a hearsay statement that

Johnson made to defendant's investigator; and although defense counsel indicated that defendant would similarly rebut the State's hearsay statement from Mauldin, defendant never actually attempted to introduce any hearsay statements from Mauldin.

Defendant also contends that he was prejudiced by "prolonged and oppressive pretrial incarceration." Defendant argues that he suffered anxiety and concern as the result of the delay. Defendant cites his outbursts during trial and his refusal to allow mitigating evidence at the capital sentencing proceeding as evidence of his anxiety and concern. However, nothing in the record supports defendant's contention that his disruptive behavior resulted from his prolonged incarceration; but the timing of these outbursts permits the inference that defendant's actions were calculated to intimidate State's witnesses as they testified on *voir dire*. Likewise, defendant's refusal to present mitigating evidence during the capital sentencing proceeding did not stem from incarceration, as the record indicates that defendant refused to cooperate with his attorneys from the outset.

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

[2] Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel as a result of defense counsel's failure to assert defendant's constitutional right to a speedy trial. A defendant's right to counsel includes the right to effective assistance of counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970). When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). In order to meet this burden, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693.

In this case, defendant cannot satisfy this two-part test. Even assuming *arguendo* that defense counsel erred by failing to assert defendant's right to a speedy trial, defendant cannot show that he suffered any prejudice. Defendant argues that defense counsel's deficient performance deprived him of the dismissal to which he was entitled. However, as explained above, defendant's constitutional right to a speedy trial was not violated; and defendant was not entitled to a dismissal of the charges against him. Thus, after examining the record we conclude that there is no reasonable probability that the alleged error of defense counsel affected the outcome of the trial. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). This assignment of error is overruled.

[3] Defendant next contends that the trial court erred by denying defendant's motion to suppress the DNA evidence and motion *in limine* to exclude the DNA evidence. Defendant argues that any probative value of the State's DNA evidence was substantially outweighed by unfair prejudice. Defendant also contends that he was deprived of his right to effective assistance of counsel as a result of defense counsel's failure to ensure the reliability of the State's DNA testing results through observation of the State's testing procedures. We disagree.

In this case the trial court, at a pretrial hearing, denied defendant's motion to suppress DNA evidence and motion *in limine*. During trial the State called State Bureau of Investigation ("SBI") Special Agent Mark Boodee to testify as an expert witness. Defendant objected three times during Special Agent Boodee's testimony. The trial court overruled defendant's objection to the State's question concerning the percentage of cases in which Special Agent Boodee declared a match and to the State's question about the percentage of the population excluded by the DNA tests performed in this case. The trial court sustained defendant's objection to and allowed defendant's motion to strike Special Agent Boodee's testimony that his boss and another analyst reviewed his test results. However, defendant never objected to the admissibility of the State's DNA evidence or to Special Agent Boodee's testimony regarding the probability of selecting someone other than defendant with the same DNA profile as the sample obtained from the victim's body.

We have previously stated that 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 State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302,

303 (1999) (per curiam). We have also held that a pretrial motion to suppress, a type of motion *in limine*, is not sufficient to preserve for appeal the issue of admissibility of evidence. *See State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000). Thus, defendant's pretrial motion to suppress and motion *in limine* are not sufficient to preserve for appeal the question of the admissibility of the State's DNA evidence; and defendant waived appellate review of this issue by failing to object during trial to the admission of the DNA evidence. Additionally, while defendant's assignment of error includes plain error as an alternative, he does not specifically argue in his brief that there is plain error in the instant case. Accordingly, defendant's argument is not properly before this Court. *See* N.C. R. App. P. 10(c)(4); *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198-99; *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).

[4] Defendant further contends that he was denied the effective assistance of counsel due to the State's bad faith conduct, as a result of which defense counsel failed to ensure the reliability of the State's DNA testing results by requesting an opportunity to observe the State's procedures. We disagree.

The SBI began testing the DNA samples from this case on 7 March 1994 and completed the testing procedures on 22 August 1994. The entire male DNA sample collected from the victim's body was consumed during the extraction process done by the SBI on 7 March 1994. At a 15 April 1994 pretrial hearing, the trial court entered a verbal order that the DNA samples for this case should be preserved by the SBI pending trial to provide defendant with an opportunity for independent testing. The trial court declined to order disclosure of the SBI's DNA testing and preservation methods. Instead, the trial court instructed the State to confer with the SBI about the possibility that the SBI could discuss and mutually agree upon proper testing and preservation methods with defendant's expert witness. However, the trial court did not order, and defense counsel did not request, that the SBI provide defendant with the opportunity to have a defense expert observe the SBI's testing procedures. At a hearing on 8 September 1994 the State informed defense counsel and the trial court that the entire male DNA sample collected from the victim's body was consumed in the SBI's testing procedure.

Defendant asserts that the State's failure to inform defense counsel that the male DNA sample had been consumed until 8 September 1994, after the SBI had completed the DNA testing, rendered defense

counsel ineffective in that defense counsel was precluded from making a timely request to observe the SBI's remaining testing procedures. As we explained above, to establish a claim for ineffective assistance of counsel, defendant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

In this case, defendant cannot satisfy this two-part test. First, defendant has failed to show that defense counsel's performance was deficient, instead basing his claim on the State's failure to apprise defense counsel of the SBI's progress in testing the DNA samples. Further, although defendant challenges the conclusions reached by Special Agent Boodee, defendant does not contend that the SBI employed incorrect testing procedures or that those procedures were conducted improperly. Therefore, after examining the record, we conclude that there is no reasonable probability that the outcome of the trial was affected by the State's failure to apprise defense counsel of the SBI's progress or by defense counsel's failure to request an opportunity to observe the SBI's testing procedures. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. This assignment of error is overruled.

By assignments of error, defendant contends that the trial court erred in denying his challenges for cause of prospective jurors John Chavis and Spencer Jones and juror Donald Dean on the basis of their inability to render a fair and impartial verdict. We disagree.

During jury selection the trial court denied defendant's challenges for cause as to jurors Chavis and Jones, and defendant used a peremptory challenge to remove juror Chavis. Defendant used his final peremptory challenge to remove juror Jones. Defendant then made a general renewal of his objections to the trial court's rulings excusing jurors. The trial court denied defendant's renewed objections and his request for an additional peremptory challenge. As defendant had exhausted his peremptory challenges, the trial court subsequently seated juror Dean after denying defendant's challenge for cause. Defendant then renewed "each of the challenges" for cause, and defendant specifically renewed his earlier challenge for cause to juror Jones. The trial court again denied defendant's renewed objections and his request for an additional peremptory challenge.

N.C.G.S. § 15A-1212 sets forth the grounds for challenging a juror, including the ground that the juror, for any other cause, is unable to render a fair and impartial verdict. N.C.G.S. § 15A-1212(9) (1999).

N.C.G.S. § 15A-1214 provides that a defendant may seek reversal of the trial judge's refusal to allow a challenge for cause provided the defendant has exhausted his peremptory challenges, has renewed his challenge, and has had his renewal motion denied. N.C.G.S. § 15A-1214(h) (1999).

In this case, defendant complied with the requirements of N.C.G.S. § 15A-1214(h) by specifically renewing his challenge for cause as to juror Jones. However, defendant failed to specifically renew his motions for cause as to jurors Dean and Chavis. Instead, defendant made a general renewal of his prior challenges for cause; and defendant's requests for additional peremptory challenges do not bolster his general renewal of his challenges for cause. *See State v. Roseboro*, 351 N.C. 536, 544, 528 S.E.2d 1, 7 (2000) (holding that the defendant's request for an additional peremptory challenge was insufficient to renew his earlier challenge for cause). Thus, defendant failed to follow the mandatory statutory procedure to preserve for appellate review his exception to the rulings on his challenges for cause of jurors Dean and Chavis.

Assuming *arguendo* that defendant's general renewal of his challenges for cause preserved for appellate review the trial court's rulings as to jurors Dean and Chavis, we find defendant's assignments of error without merit. The determination of whether to grant a challenge for cause rests in the sound discretion of the trial court and will not be disturbed absent a showing of abuse of that discretion. *See State v. Trull*, 349 N.C. 428, 441-42, 509 S.E.2d 178, 188 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80 (1999); *State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). In addition to abuse of discretion, defendant must show prejudice to establish reversible error concerning *voir dire*. *See Trull*, 349 N.C. at 442, 509 S.E.2d at 188.

[5] First, defendant maintains that the trial court should have excused prospective juror John Chavis on the basis that Chavis would vote for the death penalty if the jury found defendant guilty of the charges. Chavis gave unequivocal responses to the prosecutor's questions about his ability to consider both the death penalty and life imprisonment. However, defendant then engaged Chavis in a lengthy dialog about whether Chavis believed that the death penalty would be the only appropriate punishment if defendant was convicted of all the charges. Chavis' answers varied between a willingness to consider life imprisonment and the belief that the death penalty was the only appropriate punishment in this case. Chavis ultimately agreed that

his ability to consider life imprisonment upon a conviction of first-degree murder would be substantially impaired by the answers that he had given. Defendant then challenged Chavis for cause, and the trial court permitted the prosecutor and defendant to ask Chavis some additional questions. In response to the follow-up questions, Chavis explained that he had been confused by defendant's earlier questions; and Chavis unequivocally indicated that he could remain a fair and impartial juror, could follow the law concerning the burden of proof and presumption of innocence, and could consider both sentencing options. On this record defendant has failed to demonstrate an abuse of the trial court's discretion in denying the challenge for cause as to prospective juror Chavis.

[6] Second, defendant argues that the trial court erred in failing to remove prospective juror Spencer Jones for cause based on: (i) his relationship with the victim, the victim's father, and the victim's uncles; (ii) his relationship with State witnesses Kevin Blades and Kevin Wallace; and (iii) his participation in a pretrial protest of the delay in bringing this case to trial. The transcript reveals that Jones knew who the victim was but that they were not friends. Additionally, Jones knew the victim's family through his father, who was a friend of the victim's father and uncles. Jones had no intention of getting involved in the protest of this case, but he ended up at the protest because he was spending the day with his father. Jones unequivocally stated that his knowledge of the victim and her family members would not affect his ability to render a fair and impartial verdict and that he had no opinion about defendant's guilt or innocence. Further, Jones explained that he had been a friend of State witnesses Kevin Blades and Kevin Wallace in the past; that he considered them to be honest people; and that he would tend to believe their testimony. However, Jones also explained that he could fairly and impartially assess the credibility of a stranger's testimony. Thus, Jones' responses do not demonstrate that he could not return a verdict in accordance with the law of North Carolina. The trial court heard prospective juror Jones' responses, observed his demeanor, assessed his credibility, and in its discretion, made the decision to reject defendant's for-cause challenge. Again, on this record, defendant has failed to show an abuse of discretion.

[7] Finally, defendant contends that the trial court erred in denying his challenge for cause to juror Donald Dean on the basis of his personal relationship with several of the law enforcement officers who were prospective witnesses for the State. Dean was a friend of Scotland County Sheriff Wayne Bryant and was acquainted with sev-

eral other law enforcement officers, mainly through athletic events. However, Sheriff Bryant did not testify as a witness in this case; and Dean's unequivocal responses indicated that he could remain a fair and impartial juror, could base his decision only on the evidence presented in this case, and would not give any greater weight to the testimony of these prospective witnesses. Thus, defendant has failed to demonstrate that the trial court abused its discretion in denying the challenge for cause as to juror Dean. These assignments of error are overruled.

GUILT-INNOCENCE PHASE

[8] By assignments of error, defendant contends that the trial court committed reversible error in overruling his objections to testimony about and to a drawing of a knife that defendant allegedly possessed. Defendant also contends that the trial court committed reversible error in denying his motion to suppress a hacksaw frame and three hacksaw blades. Defendant argues that, because the State failed to associate the knife, the hacksaw frame, or the hacksaw blades with the commission of the offense, the items bore absolutely no relevance to whether defendant committed the offense and should have been excluded. We disagree.

This Court has previously explained the applicable standard of relevance concerning the admissibility of a possible murder weapon:

> Under our rules of evidence, unless otherwise provided, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1988). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). In criminal cases, " '[e]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury.' " *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966)).

State v. Felton, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992), *quoted in State v. DeCastro*, 342 N.C. 667, 680-81, 467 S.E.2d 653, 659, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996). In *DeCastro*, this Court held that the trial court properly admitted into evidence a knife found three months after the murder in a pond some distance away from the crime scene. *See DeCastro*, 342 N.C. at 682, 467 S.E.2d at 659.

Although the knife had no bloodstains and was not tested for fingerprints, the medical examiner opined "that some of the fatal knife wounds found on both victims were consistent with the length and width of the knife and that the knife could have been one of the murder weapons." *Id.* at 681, 467 S.E.2d at 660. We noted that the lapse in time in finding the knife and the distance of the knife from the crime scene affected the weight or probative value of the evidence, not its admissibility. *Id.* at 682, 467 S.E.2d at 660; *see also Felton*, 330 N.C. at 638, 412 S.E.2d at 356 (failure of State's expert to match conclusively four bullets to the gun that fired the fatal bullet affected the weight, not the admissibility, of the evidence).

In this case, State witness Chad Miller described a pocketknife that defendant frequently carried with him. Miller described defendant's knife as having a blade approximately three and one-half inches in length. Miller also identified a drawing that he had made of defendant's pocketknife. State witnesses Hope Norton and Scotland County Deputy Sheriff Randy Jacobs subsequently testified that defendant possessed a pocketknife, and both witnesses indicated that defendant's knife was similar to the pocketknife drawn by Miller. Additionally, Deputy Jacobs testified that the blade of defendant's knife was approximately one-half inch to one inch wide and three to four inches long. Finally, the medical examiner who conducted the victim's autopsy testified that the stab wounds found on the victim's body measured approximately .3 to .5 inches wide and were, at most, four to five inches deep. The medical examiner concluded that the stab wounds would be consistent with a pocketknife if the pocketknife was the approximate size and shape of the wounds.

Because the witnesses' descriptions of the approximate size of defendant's pocketknife overlap with the medical examiner's testimony regarding the approximate depth and width of the victim's wounds, we conclude that the trial court did not err in overruling defendant's objections to the drawing of and testimony about the knife. Defendant's argument concerning the slight variance in size between the knife described by the witnesses and the medical examiner's description of the victim's wounds merely affects the weight or probative value of the evidence, not its admissibility.

[9] Similarly, defendant's argument that the hacksaw frame and hacksaw blades were not relevant in this case is without merit. At the hearing on the motion to suppress, Detective Paul Lemmond of the Scotland County Sheriff's Department testified that he found an old

adjustable hacksaw frame lying on the ground near the location where the victim's severed hand had been discovered. Detective Lemmond also recovered a package of three hacksaw blades from a storage building at the residence of defendant's parents. Detective Lemmond never measured the hacksaw frame or tried to insert the seized hacksaw blades into the recovered frame; instead, Detective Lemmond submitted the hacksaw frame and blades to the SBI for testing. Former SBI Special Agent Mark Gavin, an expert in forensic tool-mark examination, subsequently examined the seized hacksaw frame and hacksaw blades. Although Special Agent Gavin did not find any fingerprints, blood, or bone fragments on the hacksaw blades seized by Detective Lemmond, he concluded that the victim's right hand was severed by a saw with relatively small teeth, consistent with those found on the seized hacksaw blades.

Based on the proximity of the hacksaw frame to the location of the victim's severed hand and the expert witness' conclusions that the victim's right hand was severed by a hacksaw blade similar to those seized from the residence of defendant's parents, we conclude that the trial court did not err in denying defendant's motion to suppress the hacksaw frame and three hacksaw blades. Defendant's arguments regarding the lack of fingerprints on the hacksaw frame, the lack of evidence that the seized blades could be fitted into the rusty hacksaw frame, and the common availability of hacksaw blades merely affect the weight or probative value of the evidence, not its admissibility.

Defendant also argues that the prejudicial effect of this evidence substantially outweighed its probative impact and that the trial court should have excluded it under N.C.G.S. § 8C-1, Rule 403. The decision to exclude relevant evidence under Rule 403 lies within the trial court's discretion. *See Felton*, 330 N.C. at 638, 412 S.E.2d at 356. As noted above, three State witnesses described a pocketknife owned by defendant that was consistent with the width and depth of the stab wounds found on the victim's body; and this pocketknife circumstantially connects defendant to the murder. Further, the hacksaw frame was discovered near the victim's severed hand; and the expert witness concluded that the victim's hand was severed with a hacksaw blade similar to the seized blades. Thus, we cannot conclude that there was unfair prejudice to defendant substantially outweighing the probative value of this evidence, such that the trial court abused its discretion in allowing its admission. These assignments of error are overruled.

[10] By his next assignment of error, defendant contends that the trial court erred in failing to suppress blood, hair, and saliva samples taken from him pursuant to a search warrant authorizing the State to seize blood, hair, and saliva samples. Defendant argues that the State should have seized this evidence pursuant to a nontestimonial identification order obtained under article 14 of chapter 15A of the General Statutes and that the State should have accorded him the right to counsel as provided by those statutes. Defendant further contends that he was denied the effective assistance of counsel as a result of defense counsel's failure to object to the procedures by which the State obtained DNA samples from defendant. We disagree.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). Similarly, the Constitution of the State of North Carolina provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20.

The invasion of a person's body to seize blood, saliva, and hair samples is the most intrusive type of search; and a warrant authorizing the seizure of such evidence must be based upon probable cause to believe the blood, hair, and saliva samples constitute evidence of an offense or the identity of a person who participated in the crime. *See* N.C.G.S. § 15A-242(4) (1999); *State v. Dickens*, 346 N.C. 26, 37, 484 S.E.2d 553, 558-59 (1997). In contrast, a nontestimonial identification order authorized by article 14 of chapter 15A of the General Statutes of North Carolina is an investigative tool requiring a lower standard of suspicion that is available for the limited purpose of identifying the perpetrator of a crime. *See State v. Welch*, 316 N.C. 578, 584, 342 S.E.2d 789, 792 (1986). Under N.C.G.S. § 15A-273 a judge may issue a nontestimonial identification order on an affidavit which establishes (i) that there is probable cause to believe that a felony offense or a class A1 or class 1 misdemeanor has been committed, (ii) that there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense, and (iii) that the

results will be of material aid in determining whether that particular person committed the offense. Additionally, although the constitutional right to counsel does not apply to Fourth Amendment searches and seizures, *see, e.g., State v. Warren*, 348 N.C. 80, 95-97, 499 S.E.2d 431, 439-40 (explaining that an alleged defendant has the right to counsel under the Fifth Amendment during custodial interrogation and that the Sixth Amendment right to counsel attaches once adversary judicial proceedings have been initiated), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998), the General Assembly created a statutory right to the presence of counsel during any nontestimonial identification procedure for persons subject to a nontestimonial identification order, *see* N.C.G.S. § 15A-279(d) (1999).

In this case the trial court issued a search warrant on 22 February 1994 authorizing the State to seize blood, hair, and saliva samples from defendant. The affidavit signed by Detective Lemmond contained ample evidence to support issuance of the warrant, *inter alia*: (i) that the victim's severed hand was discovered on the roof of a store; (ii) that Detective Lemmond located a hacksaw frame near the location of the severed hand; (iii) that hacksaw blades consistent in size with the hacksaw frame were seized from the residence of defendant's parents, where defendant occasionally resides; (iv) that, in the medical examiner's opinion, the victim's right hand was severed by a tool consistent with a hacksaw; (v) that witnesses had seen defendant outside the victim's home on the night of her murder and, later, running away from the area where the severed hand and hacksaw were discovered; (vi) that the medical examiner found semen in the victim's vagina; (vii) that evidence at the crime scene suggested that the victim had struggled; (viii) that defendant had numerous scratches and cuts on his legs, face, and neck; and (ix) that defendant had a history of committing sexual offenses. The cumulative effect of this information establishes that the blood, hair, and saliva samples seized from defendant provide evidence of the offense and the identity of the person participating in the crime. Accordingly, probable cause existed to support issuance of the search warrant; and the State was not required to obtain a nontestimonial identification order or to provide defendant with the right to counsel during the execution of the search warrant.

Furthermore, defendant's claim for ineffective assistance of counsel must fail. Defendant cannot show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The State

properly obtained a search warrant, and defendant was not entitled to the presence of counsel during the execution of that warrant. Thus, there is no possibility that the outcome of the trial would have been affected if defense counsel had objected to the State's procedures. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. This assignment of error is overruled.

[11] Next, defendant assigns error to the trial court's ruling allowing the State's motion *in limine* to preclude defendant from eliciting from the State's expert witness testimony about DNA testing performed on other individuals. Defendant argues that the DNA testing of other individuals was clearly relevant to a crucial issue in the case, namely, whether defendant, not some other person, was in fact the perpetrator of the crime. Defendant also contends that the excluded evidence casts doubt upon this fundamental aspect of the State's case in that continued testing of other suspects reflected a weakness in the State's evidence that defendant was the perpetrator. Thus, considering that the State's case against defendant, other than DNA evidence, was based entirely on circumstantial evidence, the trial court's error in allowing the State's motion *in limine* was prejudicial error entitling defendant to a new trial. We disagree.

In this case defendant made a motion *in limine* seeking to exclude the results of DNA testing performed on Tony Mauldin; Chad Miller; Kevin Morgan; and the victim's fiancé, Michael McDaniel. The trial court allowed the motion as to Mauldin, Miller, and Morgan on the basis that the evidence was not relevant. Defendant then withdrew the motion against the advice of defense counsel. Prior to cross-examination of the State's expert witness, the State made a motion *in limine* to exclude the DNA testing results for Mauldin, Miller, and Morgan on the bases that the evidence was not relevant and that the probative value of the evidence was substantially outweighed by its prejudicial value. The trial court allowed the State's motion.

Under 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 or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). Relevant evidence is generally admissible, and in criminal cases "any evidence calculated to throw any light upon the crime charged" should be admitted by the trial court. *See State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

Even assuming *arguendo* that the evidence in question was relevant, defendant cannot show that he suffered any prejudice as a result of the trial court's ruling. The DNA testing results excluded Mauldin, Miller, and Morgan as perpetrators of the crime. Given this circumstance, the evidence would have only highlighted the DNA match between defendant and the sample collected from the victim's body. Accordingly, defendant cannot demonstrate a reasonable possibility that, absent the trial court's ruling, a different result would have been reached at the trial. *See* N.C.G.S. § 15A-1443(c) (1999). This assignment of error is overruled.

[12] In his next assignment of error, defendant contends that the trial court erred in admitting evidence of past acts of violence against Judy Caulder, Elizabeth Johnson, Amber Smith, Rose Smith, and Hope Norton. Defendant argues that the evidence was inadmissible under N.C.G.S. § 8C-1, Rule 404(b) and that its probative value, if any, was substantially outweighed by the danger of unfair prejudice to defendant under N.C.G.S. § 8C-1, Rule 403. The crux of defendant's argument is that acts of violence committed against these witnesses have nothing to do with the murder of the victim.

In this case defendant filed a motion *in limine* to exclude evidence of past acts of violence against Caulder, Johnson, Amber Smith, Rose Smith, and Norton. The trial court, after hearing *voir dire* testimony from each of the witnesses, denied defendant's motion, concluding that the prior acts were sufficiently similar to this case and not too remote in time so as to be admissible under N.C.G.S. § 8C-1, Rule 404(b). The State then elicited testimony on direct examination from each of the women about past acts of violence committed by defendant. Defendant never objected to the admissibility of the State's Rule 404(b) evidence or to the witnesses' testimony regarding the acts of domestic violence and sexual violence committed against them by defendant.

As stated earlier, 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. Thus, defendant's pretrial motion *in limine* is not sufficient to preserve for appeal the question of the admissibility of the State's Rule 404(b) evidence; and defendant waived appellate review of this issue by failing to object during trial to the admission of the evidence of prior bad acts. Additionally, while defendant's assignment of error includes plain error as an alternative, 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." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000). Accordingly, defendant's argument is not properly before this Court. *See* N.C. R. App. P. 10(c)(4); *Cummings*, 352 N.C. at 637, 536 S.E.2d at 61; *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198-99; *McNeil*, 350 N.C. at 681, 518 S.E.2d at 501. This assignment of error is overruled.

[13] Next, defendant contends that the trial court erred in failing to order an independent psychiatric evaluation pursuant to N.C.G.S. § 15A-1002 when defendant's capacity to proceed was raised by defense counsel at trial. We disagree.

The transcript reveals that defense counsel twice raised the issue of defendant's capacity to proceed with trial. Defense counsel cited defendant's refusal to present mitigating evidence during the capital sentencing proceeding as evidence of defendant's incapacity. At an *ex parte* hearing on 15 April 1998, defendant explained that he did not need a psychiatric evaluation and that he had refused to cooperate with defense counsel in preparing mitigation evidence for the sentencing proceeding because he was innocent of these charges and, if found guilty, would rather be dead than spend the rest of his life in prison. Defendant also explained his frequent outbursts at trial as his spontaneous reactions when witnesses lied during their testimony. The trial court then ruled that defendant had been fully advised by counsel, that defendant understood his rights, and that defendant had made a conscious decision not to have an independent psychiatric evaluation. At the beginning of the capital sentencing proceeding, defense counsel again filed an *ex parte* motion for an independent competency evaluation. The trial court concluded that defendant understood the nature of the proceedings and that defendant had assisted in and directed his own defense throughout the trial. Further, the trial court noted that defendant refused to cooperate with an independent evaluation; and the trial court denied defense counsel's motion for an independent evaluation.

N.C.G.S. § 15A-1001 provides, in pertinent part, as follows:

> (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the

> proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (1999). A trial court may order a mental health evaluation of a defendant when that defendant's capacity to proceed is questioned. *See* N.C.G.S. § 15A-1002(b)(1) (1999). The trial court has the power on its own motion to order such an evaluation as part of an inquiry into the defendant's capacity to proceed. *See State v. Rich*, 346 N.C. 50, 60-61, 484 S.E.2d 394, 401, *cert. denied*, 522 U.S. 1002, 139 L. Ed. 2d 412 (1997). Where a defendant demonstrates or where matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to proceed with trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health in accord with N.C.G.S. § 15A-1002(b)(1). *See id.* at 61, 484 S.E.2d at 401.

Defendant points to nothing in the record in the present case, however, tending to indicate that he was incompetent to proceed with trial. Our review of the record discloses that defendant was adamant and unequivocal about not wanting a mental-health examination; that defendant fully understood the proceedings and his rights; that defendant assisted in his own defense throughout trial by directing the filing of motions, the questioning of witnesses, and the presentation of evidence; that defendant fully understood the ramifications of his decision not to present mitigating evidence during the sentencing proceeding; and that defendant's outbursts during trial occurred during the *voir dire* of the five Rule 404(b) witnesses, suggesting defendant's deliberate intent to intimidate these witnesses. In the absence of any evidence suggesting that defendant may have been incompetent, we conclude that the trial court did not err in deciding not to order the evaluation. This assignment of error is, therefore, overruled.

[14] Defendant next contends that the trial court erred by denying his motion to dismiss the charges of first-degree murder, first-degree rape, first-degree kidnapping, and robbery with a dangerous weapon. Defendant does not argue that these crimes did not occur; instead, defendant argues that the State's evidence was not sufficient to prove that he was the perpetrator of these crimes. We disagree.

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).

In this case the evidence, viewed in the light most favorable to the State, shows that on the evening of the victim's disappearance, defendant stood near the victim's home at a place where he could look into her window. The victim was last seen alive around 10:00 p.m. on 14 February 1994 standing with defendant on a street corner. Around 1:00 a.m. defendant was nearly hit by a car while running away from the location where police later discovered the victim's severed hand. Defendant returned home the next morning with a scratched face, with a bleeding cut on his arm, and without the jacket that he frequently wore. Defendant then gave several inconsistent explanations for the scratches and bleeding cut on his arm. Defendant further told his girlfriend that he had thrown his coat away; that he had buried his other clothes which he had taken from his girlfriend's house; and that the police would never know where the clothes were. The State's evidence further showed that defendant's DNA matched the sperm found inside the victim's vagina; that the stab wounds on the victim's body were consistent in size and shape with a knife that defendant regularly carried; and that the victim's right hand had been severed by a hacksaw with a blade designed exactly like the hacksaw blades seized from the residence of defendant's parents where defendant lived from time to time. Finally, about one month after the murder, defendant appeared at a friend's house wanting to sell the friend a VCR for twenty dollars. Although defendant did not have the VCR with him, the friend gave defendant twenty dollars. Later that evening defendant called the same friend at work and asked for money so that he could "get out of town." Further, defendant had on a previous occasion commented to one of the witnesses whom he had assaulted that he could kill her and hide her body under the pine straw in the woods, and it would

kill the odor of the body or cause the body to deteriorate. We hold that this evidence is sufficient to permit a rational jury to find that defendant was the perpetrator. This assignment of error is overruled.

[15] Defendant next assigns error to the trial court's action in instructing the jury that it could consider evidence of flight in determining defendant's guilt. The trial court instructed the jury as follows:

> The [S]tate contends that the defendant talked to Johnny Bailey about assisting him in leaving town. Evidence of flight may be considered by you, together with all the other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show of consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore it must not be considered by you as evidence of premeditation or deliberation.

A flight instruction is proper where " 'some evidence in the record reasonably support[s] the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). The relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension. *Id.* at 165, 388 S.E.2d at 429.

In this case the evidence tended to show that defendant, after killing the victim, hid the body in pine straw in the woods, left the scene of the crime, and returned to the home that he shared with his girlfriend, Hope Norton. Additionally, several weeks after the killing, defendant called Johnny Bailey at work and asked Bailey to bring twenty dollars to him at the bus stop. According to Bailey, defendant sounded "a little panicked." Defendant told Bailey "that they were after him" and "that he had to get out of town." Bailey refused to meet defendant at the bus stop or to give defendant any money; instead, Bailey left work and informed a law enforcement officer about his conversation with defendant. These facts, taken in the light most favorable to the State, permit an inference that defendant had a consciousness of guilt and took steps, albeit unsuccessful, to avoid apprehension. Thus, the trial court's jury instruction on flight was jus-

tified. *See State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996) (holding that the trial court properly instructed the jury on flight where the defendant ran from the crime scene, got into a car waiting nearby, and drove away). Furthermore, the trial court's instruction correctly informed the jury that proof of flight was not sufficient by itself to establish guilt and would not be considered as tending to show premeditation and deliberation. *See State v. Brewton*, 342 N.C. 875, 879, 467 S.E.2d 395, 398 (1996). This assignment of error is overruled.

[16] 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." *See State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

In this case the prosecutor first argued to the jury that defendant "stalk[ed] the innocent, some of them children"; and the prosecutor twice referred to defendant as "the prince of darkness" and "the King of Cobra." Defendant argues that these characterizations constitute abusive and impermissible references to defendant in that the prosecutor demonized defendant and created a metaphor in which defendant was Satan.

This Court has stated that it is improper to compare "criminal defendants to members of the animal kingdom." *State v. Richardson*, 342 N.C. 772, 793, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). However, in this instance the prosecutor never compared defendant to an animal. Instead, the prosecutor's references to defendant as "the prince of darkness" and "the King of Cobra" were connected to the evidence which suggested that defendant regularly rode his bicycle around Laurel Hill during the night; that defendant drank King Cobra beer on the night of the victim's disappearance; and that a King Cobra beer bottle was found near the victim's residence after the murder. In context the use of the phrases "the prince of darkness" and "the King of Cobra" to describe

defendant was not disparaging and did not amount to satanic or demonic references. *See State v. Braxton*, 352 N.C. 158, 203, 531 S.E.2d 428, 455 (2000) (holding that the prosecutor's description of the defendant as "cowardly" did not warrant intervention by the trial court *ex mero motu* where the evidence showed that the defendant killed a physically smaller and weaker man).

[17] Likewise, the prosecutor's comment that defendant "stalk[ed] the innocent, some of them children," was connected to the evidence which showed that defendant had committed acts of sexual violence against three young girls. The State's evidence tended to show that defendant raped Judy Caulder when she was eleven years old, Amber Smith when she was sixteen or seventeen years old, and Elizabeth Johnson when she was twelve or thirteen years old. Thus, in context, the prosecutor's reference to defendant as a stalker of innocent children was not a disparaging remark requiring intervention by the trial court *ex mero motu*.

[18] The prosecutor also made a lengthy argument to the jury in which the prosecutor inquired about what the victim was thinking as defendant choked, beat, raped, mutilated, and stabbed her. The prosecutor concluded this argument as follows:

> What was she thinking then? Did she feel the life itself just trickle out of her? We don't know. What was she thinking? No doubt, if her eyes could even possibly be open at that point, no doubt there in the pine forest in the domain of this man right here, all those pine needles, when she looked up, no doubt those black pine boughs looked like the black gulf into hell and she was riding in there.

Defendant asserts that the prosecutor's argument improperly bolstered the allusion to defendant as demonic or satanic.

As stated above, the prosecutor did not improperly characterize defendant as satanic or demonic. Further, we have previously reviewed closing arguments that suggested what a victim may have been thinking as he or she was dying and concluded that they were not grossly improper. *See State v. Jones*, 346 N.C. 704, 714, 487 S.E.2d 714, 720 (1997); *State v. Hunt*, 339 N.C. 622, 652, 457 S.E.2d 276, 294 (1994); *State v. King*, 299 N.C. 707, 711-13, 264 S.E.2d 40, 43-44 (1980). Here, the prosecutor described what the victim may have been thinking and the pain that she was experiencing as defendant choked, beat, raped, mutilated, and stabbed her to death. This argu-

ment was based upon the evidence presented at trial and reasonable inferences which could be drawn therefrom. By making this argument the prosecutor did not ask the jurors to put themselves in the position of the victim. Accordingly, we conclude that the trial court did not err by failing to intervene *ex mero motu.*

[19] Further, the prosecutor repeatedly referred to defense counsel's trial strategy as "ingenuity of counsel." The prosecutor also argued to the jury as follows:

> I want you to think about and consider what is the role of these two lawyers right over here, Lawyer Diehl and Lawyer Horne? And they are fine lawyers. I've got a great deal of respect for both of them. They're fine lawyers and I'm not talking about them personally, but what is a defense counsel's role in this case? . . . Their job, and they've done a good job of it, is to take issue with everything that happens in this courtroom, everything. . . . Their job, and rightly so and they have done it well, is to take the focus away from this man right here. They'll talk about everything and anything other than whether or not [defendant] committed these horrible crimes. . . . Their job is, and they have done it well, is to create as much smoke and fog . . . as possible.

Defendant contends that the prosecutor improperly impugned the good faith and credibility of defense counsel and that the prosecutor impermissibly interjected into the jury argument his personal views and opinions of the defense.

"[A] trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). In this case, the prosecutor did not use abusive, vituperative, or opprobrious language; nor did the prosecutor impugn the integrity of defense counsel or repeatedly attempt to diminish defense counsel before the jury. Instead, the prosecutor emphasized that both defense counsel were "fine lawyers," that he respected defense counsel, and that defense counsel had done a good job in representing defendant. The prosecutor never expressed a personal opinion regarding the guilt of defendant, but merely asked the jury to find facts and draw permissible inferences based upon the competent evidence introduced during trial. After reviewing the prosecutor's argument in context, we conclude that the prosecutor's statements were not so grossly

improper as to require the trial court to intervene *ex mero motu*. *See State v. White*, 349 N.C. 535, 558, 508 S.E.2d 253, 268 (1998) (holding that the trial court did not err by failing to intervene *ex mero motu* where the prosecutor argued that it was defense counsel's job to defend the defendant regardless of the truth and that the lawyers were "honorable men"), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999); *State v. Larrimore*, 340 N.C. 119, 160, 456 S.E.2d 789, 811 (1995) (finding no gross impropriety in the prosecutor's argument that defense counsel created a smoke screen); *State v. Harris*, 338 N.C. 211, 230, 449 S.E.2d 462, 472 (1994) (finding no gross impropriety in the prosecutor's reference to the defense strategy as "ingenuity of counsel").

[20] Finally, the prosecutor argued to the jury that the pocketknife regularly carried by defendant could have been the murder weapon. Defendant contends that this argument was based on incompetent evidence in that the dimensions of the knife are not consistent with the wounds on the victim's body. However, as we explained earlier, the witnesses' descriptions of the size of defendant's pocketknife overlap with the medical examiner's testimony regarding the size and depth of the stab wounds on the victim's body. Thus, the prosecutor made a reasonable inference based upon the competent evidence introduced during trial; and the trial court did not err by failing to intervene *ex mero motu*. This assignment of error is overruled.

SENTENCING PROCEEDING

[21] Defendant next contends that the trial court erred in ordering defense counsel to defer to defendant's wishes not to present mitigating evidence. Defendant also contends that the trial court by its order deprived defendant of his constitutional right to effective assistance of counsel. We disagree.

In this case defense counsel twice requested that the trial court order an independent psychiatric evaluation of defendant based on defendant's continued refusal to cooperate with defense counsel in preparing mitigation evidence for the sentencing proceeding. The trial court discussed defense counsel's position with defendant, and defendant reiterated that he understood his rights and the consequences of his decision; but defendant still adamantly refused to present mitigating evidence at the sentencing proceeding. The trial court subsequently denied defense counsel's motions for an independent evaluation and ordered defense counsel to comply with defendant's directive not to present mitigating evidence.

The United States Supreme Court has held that the Eighth and Fourteenth Amendments to the United States Constitution mandate that a jury in a capital case must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). However, the Eighth and Fourteenth Amendments do not require a defendant to acquiesce in a trial strategy to present mitigating evidence where the defendant and his counsel reach an absolute impasse. *Compare White*, 349 N.C. at 567, 508 S.E.2d at 273 (holding that the defendant was not required to present certain evidence in mitigation where the defendant and defense counsel had reached an absolute impasse as to the mitigating value of the evidence), *with State v. Wilkinson*, 344 N.C. 198, 212, 474 S.E.2d 375, 382 (1996) (holding that the trial court properly required defense counsel to present mitigating evidence where the defendant had expressed his desire to simplify the sentencing proceeding but had not reached an absolute impasse with defense counsel over the presentation of any mitigating evidence).

In general, the responsibility for tactical decisions, such as the type of defense to present, "rests ultimately with defense counsel." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991). However, "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991). Further, when such impasses arise, defense counsel should make a record of the circumstances, the advice given to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. *See id.*

After reviewing the transcript in this case of the discussions among the trial court, defendant, and defense counsel, we conclude that the trial court properly found that defendant and his counsel had reached an absolute impasse over the tactical decision of whether to present mitigating evidence during the capital sentencing proceeding. Defense counsel made a proper record of the circumstances, including their advice to defendant and the reasons for their decision to present mitigating evidence. From these statements of defense counsel and defendant's answers to questions directed to him by the trial court, we conclude that defendant was fully informed of and

understood the potential consequences of his decision. Thus, we hold that the trial court did not err in prohibiting defense counsel from presenting evidence in mitigation.

[22] Defendant further argues that he was deprived of the effective assistance of counsel as a result of the trial court's ruling prohibiting defense counsel from presenting evidence in mitigation. To establish a claim for ineffective assistance of counsel, defendant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Here, defendant cannot satisfy this two-part test. First, defendant concedes in his brief that defense counsel's performance was not deficient, instead basing his claim on the trial court's ruling. Second, as we have concluded that the trial court did not err in precluding defense counsel from presenting mitigating evidence, defendant cannot show that the trial court's ruling prejudiced his defense by rendering trial counsel's assistance ineffective. This assignment of error is, therefore, overruled.

In his next assignment of error, 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 State v. Warren*, 348 N.C. 80, 124, 499 S.E.2d 431, 456, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998), 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).

[23] Defendant first argues that the prosecutor made improper references to the possibility of parole and that the prosecutor urged the jury to recommend the death sentence as punishment for defendant's prior acts of violence against Amber Smith, Rose Smith, and Hope Norton. The prosecutor referred to defendant's prior conviction for attempted first-degree rape, then argued to the jury, in pertinent part, as follows:

> Lo and behold, same man, [defendant], who has sat before you all this time, in 1980, pled guilty to the offense of attempted first

> degree rape. It went on to give the judgment in that case. He should be imprisoned for a term of not less than 15 years and not more than 20 years in the custody of the Department of Corrections. That is disturbing information when you're trying to decide the fate of the man who sits over behind me. What does that mean when you think about it in terms of what your recommendation should be in this case? Justice, or at least a judgment produced in the year 1980, and what did it turn out to be? That's temporary justice for this defendant. Temporary justice is what that is. Temporary justice, Ladies and Gentlemen, will no longer suffice. Temporary justice will not be justice for this. You have seen and you have heard about in 1991, you have heard about the events concerning Amber Smith. You've heard from Rose Smith and you heard from Hope Norton, and then you heard about Valentine's Day of 1994. You heard all about [the victim] in this courtroom. Temporary justice. Temporary justice is what led to this. Hasn't [defendant] done enough? . . . No doubt he would like to look ahead. However long that road may be, he would like to look ahead to another time and another place where he can roam and he can lurk and he can prey upon the innocent. There's no doubt. But let me tell you, it's up to you 12 people right here and now in Scotland County to see that such a thing does not happen again.

Defendant contends that, in this argument, the prosecutor improperly implied that defendant was released on parole before serving the entire prison term for his conviction of attempted first-degree rape.

This Court has consistently held that the possibility of parole is not a proper consideration in a capital sentencing proceeding. *See, e.g., Warren*, 348 N.C. at 122, 499 S.E.2d at 455; *State v. Conaway*, 339 N.C. 487, 520, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). However, we have considered and rejected arguments similar to that made by defendant in this case. *See State v. Larry*, 345 N.C. 497, 527-28, 481 S.E.2d 907, 925, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997). Here, as in *Larry*, the prosecutor never used the word "parole" and never mentioned the possibility that a life sentence for this crime could mean that defendant would eventually be released. Instead, the prosecutor referred to the fact that defendant committed this crime after serving a prison term for another similar crime, implying that imprisonment had not deterred defendant in the past. Thus, when read in context, the prosecutor's argument

focused on the importance of the jury's duty and suggested that the death penalty would specifically deter defendant from committing future crimes, both permissible lines of argument by the prosecutor. *See id.* at 527, 481 S.E.2d at 925 (holding that the prosecutor's argument about the defendant's prior convictions and terms of imprisonment properly suggested that only the death sentence would deter defendant from committing future crimes); *see also State v. Williams*, 350 N.C. 1, 28, 510 S.E.2d 626, 644 (specific deterrence arguments are proper), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 162 (1999); *State v. Jones*, 336 N.C. 229, 256, 443 S.E.2d 48, 61 (argument emphasizing the responsibility and duty of each juror and of the jury as a whole was not improper), *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994).

[24] Defendant also contends that the prosecutor improperly argued to the jury that, in making closing arguments, defendant "ha[s] the opportunity to go last[;] he has the opportunity to argue as often or, through his counsel, he has the opportunity to argue as many times as he chooses." Defendant contends that, in the context of this capital sentencing proceeding, the prosecutor improperly implied to the jury that defendant did not present mitigating evidence or make a closing argument because he did not have any evidence or argument to present. However, the prosecutor's argument was a proper statement of the law pursuant to N.C.G.S. § 15A-2000(a)(4), which provides that the defendant or defense counsel shall have the right to the last argument. Further, defense counsel did not announce until after the prosecutor's closing argument that defendant refused to present any closing arguments. Thus, at the time of the prosecutor's closing argument, the trial court could not have definitively known that defendant would not present a closing argument; and the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's proper closing argument. *See Daniels*, 337 N.C. at 278, 446 S.E.2d at 320 (holding that the trial court did not err by failing to intervene *ex mero motu* where the prosecutor's closing argument was a correct statement of the law). This assignment of error is overruled.

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 conducting with defense counsel and the prosecution numerous unrecorded bench conferences outside defendant's presence but while defendant was present in the courtroom; (ii) whether

the trial court erred when it refused to include defendant's requested instruction regarding parole eligibility in its final charge to the jury; (iii) whether the trial court's capital sentencing jury instructions requiring defendant to prove mitigating circumstances to the "satisfaction" of each juror adequately guided the jury's discretion about the requisite degree of proof; (iv) whether the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1999), is unconstitutionally vague and overbroad; (v) whether the trial court erred in instructing the jury that it had a "duty" to impose the death penalty if the jury failed to find that the mitigating circumstances outweighed the aggravating circumstances; (vi) whether the trial court's definition of mitigating circumstances unconstitutionally limited the mitigating evidence that the jury could consider; (vii) whether the trial court erred by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed the evidence not to have mitigating value; (viii) whether the trial court erred by instructing the jury that defendant has the burden of proving the existence of mitigating circumstances; (ix) whether the death penalty statute is unconstitutionally vague and overbroad.

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

[25] 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, briefs, and oral arguments of counsel, we are convinced that the jury's findings of the five 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, 400-01, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant was convicted of first-degree murder based upon premeditation and deliberation and under the felony murder rule. Defendant was also convicted of first-degree rape, first-degree kidnapping, and robbery with a dangerous weapon. The jury found the five aggravating circumstances submitted: (i) that defendant had been previously convicted of a felony involving the use or threat of violence to another person, N.C.G.S. § 15A-2000(e)(3); (ii) that the murder was committed while defendant was engaged in the commission of first-degree rape, N.C.G.S. § 15A-2000(e)(5); (iii) that the murder was committed while defendant was engaged in the commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); (iv) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (v) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

One statutory mitigating circumstance was submitted for the jury's consideration: the catchall mitigating circumstance that there existed any circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury did not find this statutory mitigating circumstance to exist. The trial court did not submit any nonstatutory mitigating circumstances.

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). 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. First, defendant was convicted of premeditated and deliberate murder. We have noted that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Further, "[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). Here, the jury found the (e)(3) aggravating circumstance based on defendant's previous conviction of the violent felony of attempted first-degree rape.

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." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We specifically note

that this Court deemed the death penalty proportionate in a case involving comparable facts. *See Trull*, 349 N.C. at 459, 509 S.E.2d at 198. In *Trull*, the defendant kidnapped, raped, and stabbed the victim to death, then abandoned the victim's body in a wooded area; and the jury subsequently found the (e)(3), (e)(5), and (e)(9) aggravating circumstances in recommending the death sentence. *See id.* at 457-58, 509 S.E.2d at 197. Similarly, in this case, defendant kidnapped, raped, choked, beat, mutilated, and stabbed the victim to death, then abandoned the victim's body in a wooded area; and the jury subsequently found the (e)(3), (e)(5), (e)(6), and (e)(9) aggravating circumstances in recommending the death sentence.

Finally, this Court has deemed four statutory aggravating circumstances, standing alone, to be sufficient to sustain death sentences; the (e)(3), (e)(5), and (e)(9) circumstances 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). Therefore, 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 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. JEFFREY KARL MEYER

No. 379A95-2

(Filed 21 December 2000)

1. Sentencing— capital—mitigating circumstance—age of defendant—evidence not sufficient

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance for the age of the defendant, N.C.G.S. § 15A-2000(f)(7), where defendant was twenty years old at the time he committed the crimes, in honors

English and history classes in high school and a voracious reader, had completed his general equivalency diploma, served in the military, and did well in quartermaster school. Defendant presented evidence of emotional immaturity but not of mental impairment, and, based on his chronological age, his apparently normal physical and intellectual development, and his level of experience, the evidence did not reasonably support nor require the court to submit this circumstance.

2. Homicide— first-degree murder—short-form indictment

The North Carolina short-form indictment for first-degree murder is constitutional.

3. Homicide— first-degree murder—guilty plea—finding of premeditation and deliberation—surplusage

A trial court "finding" of premeditation and deliberation constituted unnecessary surplusage where defendant pled guilty to two first-degree murders; a plea of guilty means, nothing else appearing, that defendant is guilty upon any and all theories available to the State.

4. Sentencing— capital—codefendant's sentence—irrelevant

The trial court did not err in a capital sentencing proceeding by not admitting evidence of a codefendant's life sentences and not submitting the nonstatutory mitigating circumstance that defendant's codefendant received life sentences. A codefendant's sentence for the same murder is irrelevant in sentencing proceedings; the accomplices' punishment is not an aspect of defendant's character or record nor a mitigating circumstance of the particular offense.

5. Sentencing— capital—jury selection—personal views on death penalty—instruction

The trial court did not err during jury selection or in the jury charge in a capital sentencing proceeding by not giving defendant's requested instructions that it was permissible for the jurors' personal views concerning the death penalty to influence their sentencing decision. The requested instructions were not a correct statement of the law; moreover, the trial court properly instructed the jury.

6. Sentencing— capital—aggravating circumstance applying to each of two counts—instruction

The trial court did not err in a capital sentencing proceeding for two murders in its instruction on the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), that the circumstance "applies equally to both murders." Although defendant contended that a rational juror could interpret the instruction to indicate that the trial court believed the aggravating circumstance existed and should be given equal weight in each case, the trial court was merely reiterating its previous admonition that the law as to both murder counts was generally the same since the jury would be considering the same aggravating and mitigating circumstances. Viewed contextually, the challenged instruction did not mislead the jury.

7. Sentencing— capital—nonstatutory mitigating circumstance—depression

The trial court did not err during a capital sentencing proceeding by failing to submit defendant's requested nonstatutory mitigating circumstance that he was depressed after he returned from military service in Korea. Defendant requested and the trial court allowed the mitigating circumstance that defendant "has suffered from emotional problems," the trial court determined that the proposed circumstance was subsumed in the mitigating circumstance allowed, the jury heard and considered testimony about defendant's unhappiness after he returned from overseas and his attempted suicide, and the court submitted the catchall mitigating circumstance.

8. Jury— selection—capital sentencing—whether juror could impose life sentence—redundant—court's discretion

The trial court did not abuse its discretion in a capital sentencing proceeding by refusing to allow defense counsel to ask a prospective juror whether he could consider imposing a life sentence after being informed that defendant was guilty of two homicides. Assuming that defendant's stake-out question was permissible, the court still had discretion to disallow the question; this question was redundant and superfluous because the prospective juror had already clearly indicated his ability and intention to perform his legal duties as a juror, including recommending the sentence required by law under the facts of this case.

9. Jury— selection—capital sentencing—residual mitigation

The trial court did not abuse its discretion in a capital sentencing proceeding by preventing defendant from asking a prospective juror whether he could consider residual mitigation under the catchall circumstance, N.C.G.S. § 15A-2000(f)(9), where the prospective juror had indicated that he could follow the law as instructed by the trial court and the court's instruction on the catchall mitigating circumstance after the evidence was heard was proper.

10. Appeal and Error— preservation of issues—failure to object

The defendant in a capital sentencing proceeding failed to preserve for appellate review the question of whether the trial court erred by reassigning a prospective juror to a later panel where defendant never objected at trial, never complied with N.C.G.S. § 15A-1211(c), and expressly approved the reassignment of the prospective juror.

11. Criminal Law— prosecutor's argument—capital sentencing—outside record—defendant's guilt not in issue—comment minor in context of entire record

There was no error so grossly improper that the trial court erred by not intervening ex mero motu in a capital sentencing proceeding where the prosecutor's argument that the blood of both victims was found on defendant's clothing was not wholly supported by the record. Defendant's guilt was not at issue in this proceeding and the comment was minor in the context of the prosecutor's entire closing statement.

12. Sentencing— capital—aggravating circumstance—especially heinous, atrocious, or cruel—not unconstitutionally vague

The especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague. N.C.G.S. § 15A-2000(e)(9).

13. Sentencing— capital—aggravating circumstance—especially heinous, atrocious, or cruel—sufficiency of evidence

The trial court did not err in a capital sentencing proceeding by submitting the especially heinous, atrocious, or cruel aggravating circumstance where defendant argued that the jury was permitted to vicariously apply the circumstance based on the

conduct of his accomplice but, considered in the light most favorable to the State, there was sufficient evidence from which the jury could conclude that defendant personally participated in the killing of both victims, defendant pled guilty to both first-degree murders, and defendant does not dispute that the manner in which both victims were murdered is sufficient to warrant this circumstance. N.C.G.S. § 15A-2000(e)(9).

14. Sentencing— capital—death sentence not arbitrary

The evidence fully supported the aggravating circumstances found by the jury in a capital sentencing proceeding and there was no indication that the two death sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor.

15. Sentencing— capital—death penalty—not disproportionate

Death sentences for two first degree-murders were not disproportionate where defendant was convicted of two counts of first-degree murder; the three aggravating circumstances found by the jury are among the four which have been found sufficient to support a death sentence standing alone; although an accomplice received a sentence of life imprisonment, defendant pled guilty to two counts of first-degree murder, admitting guilt on any and all theories available to the State, including premeditation and deliberation and felony murder; these murders were found to be part of a course of conduct which included crimes of violence against another person, and the victims were killed in their home; and, based on the brutal nature of the crimes, these cases are more similar to cases in which the sentence of death was found proportionate than to those in which it was found disproportionate.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from two judgments on 3 February 1999 imposing sentences of death entered by Jenkins, J., at a resentencing proceeding held in Superior Court, Cumberland County, upon defendant's convictions of first-degree murder. Heard in the Supreme Court 12 September 2000.

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

Janine Crawley Fodor for defendant-appellant.

WAINWRIGHT, Justice.

On 2 February 1987, Jeffrey Karl Meyer was indicted for two counts of first-degree murder, one count of first-degree burglary, and two counts of robbery with a dangerous weapon. On 12 May 1988, defendant pled guilty to the robbery and burglary charges, and on 16 May 1988, defendant pled guilty to the first-degree murder charges. The trial court entered judgments in the noncapital cases, sentencing defendant to life imprisonment for first-degree burglary and to two consecutive terms of forty years' imprisonment for the two counts of robbery with a dangerous weapon.

During his first capital sentencing proceeding that began on 3 June 1988, defendant escaped from custody, forcing the trial court to declare a mistrial. *See State v. Meyer*, 330 N.C. 738, 740, 412 S.E.2d 339, 340 (1992) (*Meyer I*). Following a capital sentencing proceeding that began on 24 October 1988, the jury recommended sentences of death for the two first-degree murders, and the trial court entered judgments in accordance with that recommendation. *See id.* at 740, 412 S.E.2d at 341. On appeal, this Court vacated the judgments and remanded for a new capital sentencing proceeding pursuant to *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Meyer I*, 330 N.C. 738, 412 S.E.2d 339.

On 31 August 1995, following another capital sentencing proceeding, another jury recommended sentences of death for the two counts of first-degree murder, and the trial court entered judgments in accordance with those recommendations. *State v. Meyer*, 345 N.C. 619, 620, 481 S.E.2d 649, 650 (1997) (*Meyer II*). On appeal, this Court vacated the judgments and remanded for resentencing because defendant was absent from an unrecorded, in-chambers conference involving the trial judge, defense counsel, and counsel for the State. *Id.* at 623, 481 S.E.2d at 651-52.

On 3 February 1999, following yet another capital sentencing proceeding, another jury once again recommended sentences of death for the two first-degree murders, and the trial court entered judgments in accordance with those recommendations. Defendant appeals his sentences to this Court.

The State's evidence at defendant's capital sentencing proceeding tended to show the following: In December 1986, defendant and Mark Thompson were soldiers on active duty and stationed at Fort Bragg. Defendant and Thompson began watching a residence owned by an

elderly couple, planning to burglarize the couple's home. Based on their surveillance efforts, defendant and Thompson knew that Paul and Janie Kutz (the victims) were an "elder couple" who owned two vehicles but "usually traveled" together in the same car.

On 1 December 1986, defendant and Thompson, dressed in "ninja" suits, broke into the victims' home in Fayetteville, North Carolina. Surprised by Mr. Kutz, defendant shot him with a blow gun (a martial arts weapon that launches sharp darts from a hollow tube). When Mr. Kutz continued to advance, defendant stabbed and killed him with a butterfly knife. Defendant and Thompson also stabbed and killed Mrs. Kutz with butterfly knives. Thereafter, defendant and Thompson stole jewelry, credit cards, and a television from the Kutz residence.

During the early morning hours of 2 December 1986, military police officer Robert Provalenko intercepted defendant and Thompson as they traveled in a red pickup truck through a restricted area of Fort Bragg. Officer Provalenko observed that defendant and Thompson were dressed in black pants and ninja boots. When Officer Provalenko noticed a black-handled butterfly knife in the glove compartment of the truck, directly in front of defendant, he asked defendant and Thompson to exit the vehicle. Thompson then consented to a search of his vehicle. During the ensuing search, Officer Provalenko and military police officer George Clark found a second butterfly knife, a pair of nunchucks, a blowgun, and latex rubber gloves. The officers also found jewelry, a television, and credit cards, all of which were later identified as belonging to the victims.

Later that morning, following a report from the military police about credit cards seized from defendant and Thompson, Cumberland County Deputy Sheriff David Stewart was dispatched to respond to a possible break-in at the victims' residence. Upon arriving at the victims' residence, Deputy Stewart observed signs of a break-in, including an open window and door. After entering the victims' residence, Deputy Stewart discovered the victims' stabbed bodies. Deputy Stewart found Mr. Kutz's body lying in a recliner in the den and discovered Mrs. Kutz's body lying on a bed in the master bedroom. John Trogdon, a crime-scene technician with the Fayetteville Police Department, examined the victims' residence and observed footprints consistent with ninja boots in the dirt around the house, as well as on a dining room chair. State Bureau of Investigation (SBI) Agent Lucy Milks, an expert in forensic serology, tested various evidence seized from the victims' residence. Among other things, Agent

Milks determined that human blood consistent with the type of both victims was present on the black-handled butterfly knife. A test conducted on the chrome butterfly knife revealed the presence of human blood consistent with the type of Mrs. Kutz.

SBI agent John Bendure, an expert in fiber analysis and comparison, testified that his testing of the black-handled butterfly knife revealed the presence of light-brown polyester fiber that was consistent with the upholstery of the chair in which Mr. Kutz's body was found. Agent Bendure also tested the chrome butterfly knife and associated fiber samples from that knife with a blue blanket found with Mrs. Kutz's body. In addition, Agent Bendure testified that fibers from the pink nightgown worn by Mrs. Kutz at the time of her death could be associated with both knives. Finally, Agent Bendure testified that fibers associated with the blanket and sheets in the bedroom were found on the clothing worn by both defendant and Thompson.

On 3 December 1986, Dale Wayne Wyatt, then a soldier stationed at Fort Bragg, was detained in the Cumberland County jail waiting to appear in court on a worthless-check charge. Wyatt testified at trial that he met defendant in one of the holding facilities during his detention. According to Wyatt, defendant told him that "he was being investigated in a double homicide" and that his clothes were being held as evidence. Wyatt testified that defendant told him about the murder of Mr. Kutz. Defendant told Wyatt that when he entered the Kutz residence, he saw Mr. Kutz, shot him with a blowgun dart, then stabbed him with a butterfly knife.

Forensic pathologist Dr. George Lutman performed an autopsy on the sixty-two-year-old body of Mrs. Kutz. In Dr. Lutman's expert opinion, Mrs. Kutz's death was caused by multiple stab wounds. Dr. Lutman testified that Mrs. Kutz had been stabbed or cut approximately twenty-five or twenty-six times. Four stab wounds penetrated into the right side of Mrs. Kutz's chest, and another penetrated into the left side. Mrs. Kutz also suffered multiple wounds to the liver, a stab wound into her neck that reached to the spinal column, a stab wound that cut the tip of her spleen, and a stab wound that cut one of the tubes from the kidney to the bladder. Dr. Lutman also noted "defensive wounds" to Mrs. Kutz's hands, indicating an attempt to fend off an attacker. The most critical wound was located near Mrs. Kutz's right shoulder, where a knife "tunneled up" and severed her windpipe and her carotid artery, causing Mrs. Kutz to aspirate blood into her lungs when she inhaled. Dr. Lutman observed that Mrs.

Kutz's "lungs were markedly expanded with . . . trapped air and blood." This aspiration indicated to Dr. Lutman that Mrs. Kutz had remained alive "for some period of time after receiving the wound."

Forensic pathologist Dr. Fred Ginn performed an autopsy on the sixty-eight-year-old body of Mr. Kutz. Dr. Ginn testified that wounds to the front of Mr. Kutz's body included a stab wound above the left eye, a stab wound above the right collar bone down in his neck, a "large gaping wound across the neck," two stab wounds in the upper left chest, and an "oval shaped stab wound . . . in the sixth rib space." Dr. Ginn also noted defensive wounds on Mr. Kutz's left hand and, on Mr. Kutz's left shoulder, "a small punctate mark of the size that would be made by a needle or dart." Dr. Ginn further testified that wounds to the back of Mr. Kutz's body included a cut above the left elbow; three stab wounds into the left side of the chest and one into the right side of the chest; and stab wounds to the left and right of the spine, with the left wound extending into the left kidney. A wound to the chest and left ventricle of Mr. Kutz's heart caused 150 milliliters of blood from the heart to collect between the heart wall and the connective tissue sac that encases the heart. Dr. Ginn opined that the probable cause of death was the stab wound to the heart. Dr. Ginn also testified that "between half a minute to five minutes could have elapsed before" Mr. Kutz died from the effects of the stab wounds and that Mr. Kutz "could have been conscious any of that time up to the maximum."

[1] By assignment of error, defendant contends the trial court erred by failing to submit to the jury the (f)(7) mitigating circumstance, "[t]he age of the defendant at the time of the crime." N.C.G.S. § 15A-2000(f)(7) (1999). Although defendant did not request submission of the (f)(7) mitigating circumstance, he now contends the trial court should have submitted the circumstance on its own motion. We disagree.

This Court has characterized "age" as a "flexible and relative concept." *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986); *accord State v. Spruill*, 338 N.C. 612, 660, 452 S.E.2d 279, 305 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). We have recognized that chronological age is not the determinative factor with regard to submission of the (f)(7) mitigating circumstance. *See State v. Peterson*, 350 N.C. 518, 528, 516 S.E.2d 131, 138 (1999), *cert. denied*,— U.S. —, 145 L. Ed. 2d 1087 (2000); *State v. Bowie*, 340 N.C. 199, 203, 456 S.E.2d 771, 773, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 435 (1995). Rather, the trial court must consider other "vary-

ing conditions and circumstances." *Peterson*, 350 N.C. at 528, 516 S.E.2d at 138; *accord 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, defendant was twenty years old at the time he committed the crimes. During defendant's capital sentencing proceeding, he presented evidence through several lay witnesses regarding his emotional immaturity, but no evidence whatsoever of mental impairment. Although evidence showing emotional immaturity is relevant to submission of the (f)(7) mitigating circumstance, "this Court will not conclude that the trial court erred in failing to submit the age mitigator *ex mero motu* 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. 227, 257, 536 S.E.2d 1, 19 (2000); *accord Spruill*, 338 N.C. at 660, 452 S.E.2d at 305; *Johnson*, 317 N.C. at 393, 346 S.E.2d at 624.

The evidence here showed that defendant "was of normal intelligence," that he was in honors English and history classes in high school, that he was a "voracious" reader, that he completed his General Equivalency Diploma, and that he served in the military and did well in quartermaster school. Based on defendant's chronological age of twenty, his apparently normal physical and intellectual development, and his level of experience, we conclude the evidence does not reasonably support the submission of, nor does it require the trial court to submit, the (f)(7) mitigating circumstance. This assignment of error is overruled.

[2],[3] By assignments of error, defendant argues his pleas of guilty to first-degree murder must be vacated because the indictments charging defendant with first-degree murder were constitutionally deficient. Specifically, defendant contends the short-form indictments were improper because they did not allege the elements of premeditation and deliberation in first-degree murder. Defendant also argues the trial court made an improper judicial "finding" that "upon the evidence produced . . . [today] by the State of North Carolina, . . . there is substantial evidence as to the elements of premeditation and deliberation, and that for the purpose of the plea adjudication they were proven beyond a reasonable doubt."

With regard to defendant's short-form indictment argument, this Court has recently addressed this issue in *State v. Braxton*, 352 N.C.

158, 531 S.E.2d 428 (2000), and defendant has presented no basis for this Court to revisit the issue in the present case. As for the trial court's judicial "finding" of premeditation and deliberation in this case, we have held that

> [a] defendant, nothing else appearing, pleads guilty to a charge contained in a bill of indictment[,] not to a particular legal theory by which that charge may be proved. His plea waives his right to put the state to its proof. It obviates the necessity for the state's invocation of some particular legal theory upon which to convict defendant. The question of which theory, if there is more than one available, upon which defendant might be guilty does not arise. His plea of guilty means, nothing else appearing, that he is guilty upon any and all theories available to the state.

State v. Silhan, 302 N.C. 223, 263, 275 S.E.2d 450, 478 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997). Because defendant pled guilty to two first-degree murders in the instant case, the trial court's subsequent "finding" of premeditation and deliberation constitutes unnecessary surplusage. These assignments of error are overruled.

[4] By assignments of error, defendant contends the trial court erred by failing to admit evidence of codefendant Thompson's life sentences and by declining to submit to the jury the nonstatutory mitigating circumstance that defendant's codefendant received life sentences. We disagree.

This Court has repeatedly held that a codefendant's sentence for the same murder is irrelevant in the sentencing proceedings. *See, e.g.*, *State v. Smith*, 352 N.C. 531, 563, 532 S.E.2d 773, 793 (2000); *State v. Sidden*, 347 N.C. 218, 231, 491 S.E.2d 225, 232 (1997), *cert. denied*, 523 U.S. 1097, 140 L. Ed. 2d 797 (1998). We have stated that a codefendant's lesser sentence " 'does not reduce the moral culpability of the killing [or] 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.' " *Smith*, 352 N.C. at 563, 532 S.E.2d at 793 (quoting *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)).

Nonetheless, defendant contends that in *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 498

(2000) this Court acknowledged the relevance of evidence pertaining to a codefendant's sentence. Contrary to defendant's argument, however, this Court in *Roseboro* reaffirmed that "[e]vidence of a codefendant's sentence is not relevant to a defendant's character or record or to the circumstances of the killing; hence such evidence is not relevant to show a mitigating circumstance." *Id.* at 546, 528 S.E.2d at 8. Therefore, defendant's argument is without merit. These assignments of error are overruled.

[5] By assignments of error, defendant contends the trial court committed error by failing to instruct the jury that it was permissible for the jurors' personal views concerning the death penalty to influence their approach to the sentencing decision. We disagree.

Prior to trial, defendant asked the trial court to give prospective jurors special preselection instructions that explained the sentencing process. The requested instruction at issue reads in pertinent part as follows:

> If you are selected as a juror, it will be your duty to consider all the evidence presented and follow the instructions of the Court. If the jury unanimously finds the existence of an aggravating circumstance, it will be your duty to consider both Life Imprisonment and the Death Penalty, *regardless of your personal views concerning capital punishment. However, you should know that it is acceptable for jurors to have different views about what circumstances call for the death penalty, and to use their personal views in deciding whether the mitigating circumstances outweigh the aggravating circumstances or when deciding whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to call for the death penalty.* You are not required to return a verdict of death in any given case; you are required to consider the evidence fairly, and to follow the instructions of the Court in deciding the appropriate punishment.

(Emphasis added.) The trial court declined to give the emphasized portion of defendant's requested instruction, explaining that the instruction was not a proper statement of law. The trial court stated that "[t]he correct statement is that [the jurors] are to follow the law as the Court gives it to them and not as they think it is or might like it to be."

At the conclusion of the sentencing proceeding, during the charge conference, defendant requested the following similar instruction:

> Each of you has expressed varying views about the circumstances under which you might feel that the punishment of death should be imposed. You were selected to serve on this jury because of and not in spite of those differences. When determining those matters in the course of your deliberations which call for you to make subjective judgments, you are expected, indeed required, to bring your personal views into play.

The trial court denied defendant's requested instruction.

Defendant contends the trial court erred by declining to submit both the preselection instruction and the charge conference instruction. Defendant argues that both instructions were correct statements of law and, therefore, should have been submitted by the trial court.

Regarding defendant's preselection instruction, the trial court "has the duty 'to supervise the examination of prospective jurors and to decide all questions relating to their competency.' " *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (quoting *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976)). Moreover, we have repeatedly held that the trial court has "broad discretion to see that a competent, fair and impartial jury is impaneled[,] and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979), *quoted in State v. Ward*, 338 N.C. 64, 89, 449 S.E.2d 709, 722 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995).

In the instant case, the trial court correctly determined that defendant's proposed instruction misstated the law concerning the duty of a juror in a capital case. Moreover, the trial court properly instructed the jury to "consider the evidence fairly and to follow [its] instructions . . . in deciding the appropriate punishment." *See State v. Sokolowski*, 351 N.C. 137, 148, 522 S.E.2d 65, 72 (1999); *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, the trial court did not err in declining to give the instruction requested by defendant.

We likewise find no error in the trial court's denial of defendant's requested instruction during the charge conference. When a defendant requests an instruction that is supported by the evidence and is a correct statement of law, the trial court must give the instruction in substance. *See State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996); *State v. Hill*, 331 N.C. 387, 420, 417 S.E.2d 765, 782 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). In the instant case, however, the requested instruction, like the preselection instruction requested by defendant, is not a correct statement of law. Rather, the instruction would serve only to confuse jurors regarding their duties in a capital case by inviting personal views to trump the rule of law. During its charge to the jury, the trial court correctly instructed the jury in accordance with the pattern jury instructions that "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 might like it to be." *See* N.C.P.I.—Crim. 150.10 (2000). Therefore, defendant's argument is without merit. These assignments of error are overruled.

[6] By assignment of error, defendant contends the trial court committed reversible error by expressing an opinion on the existence of and weight to be given to the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that "the murders were especially heinous, atrocious, or cruel." We disagree.

The trial court instructed the jury on the (e)(9) aggravating circumstance as follows:

> Now, the third alleged aggravating circumstance on the form concerns the murder of each victim—concerning the murder of each victim is as follows: Was this murder especially heinous, atrocious or cruel. Now, members of the jury, you must understand that this alleged circumstance or aggravating circumstance applies equally to both murders and you will consider this aggravating circumstance in making your recommendation as to punishment in each case.

Defendant contends the above instruction to the jury could be interpreted by a rational juror to indicate that the trial court believed the (e)(9) aggravating circumstance existed and should be given equal weight in each case. Defendant also argues that he was prejudiced by the trial court's instruction because the jury found the (e)(9) aggravating circumstance in each case.

N.C.G.S. §§ 15A-1222 and 15A-1232 prohibit the trial court from expressing an opinion in the presence of the jury on any question of fact to be decided by the jury. N.C.G.S. §§ 15A-1222, 15A-1232 (1999); *see also State v. York*, 347 N.C. 79, 92, 489 S.E.2d 380, 387-88 (1997). " 'In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.' " *State v. Jones*, 347 N.C. 193, 207, 491 S.E.2d 641, 649 (1997) (quoting *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995)). This Court has also held that

> " '[t]he charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . .' *State v. Wilson*, 176 N.C. 751, [754-55,] 97 S.E. 496[, 497] (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal."

State v. Rich, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (alterations in original) (citations omitted)). Finally, we have stated that the trial court's words " 'may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.' " *State v. Chandler*, 342 N.C. 742, 752, 467 S.E.2d 636, 641 (quoting *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E.2d 476, 479 (1971)), *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996).

Applying the foregoing principles to the present case, we hold that, based on the totality of circumstances, the trial court's charge did not constitute an impermissible expression of opinion on the evidence. At the outset, we note that the trial court characterized the (e)(9) aggravating circumstance as the "third *alleged* aggravating circumstance." (Emphasis added.) Moreover, the record reveals the trial court explained to the jury at the beginning of its charge that the jury must (1) consider and make recommendations as to each count of murder, (2) consider all of the evidence as it related to each count of murder, and (3) apply the trial court's instructions on the law to each count of murder. Further, the trial court instructed the jury as follows:

As you are well aware, there are two offenses of first degree murder to which the defendant has pled guilty. And you, of course, must consider and make recommendations as to each of the counts or each of the cases.

When I say two counts, one is for the murder of Mr. Kutz and one is for the murder of Mrs. Kutz. I will use these terms—use the terms cases and counts interchangeably during some of these instructions.

Now, it will be your duty in your deliberations to consider each of these two counts separately and to make separate recommendations on each of the two cases to which the defendant has pled guilty. This means you must consider each count separately during your deliberations, find the facts separately, apply the law separately and make a separate sentencing recommendation as to each of the counts of murder in the first degree.

. . . .

Now, in your deliberations, you are to consider all of the evidence as it relates to each case. You may consider the same evidence as to both counts if you find it to be applicable. The law as to both of the counts is generally the same since you will be considering the same aggravating and mitigating circumstances.

The above instructions reveal that, by instructing the jury that the (e)(9) aggravating circumstance "applies equally to both murders," the trial court merely reiterated its previous admonition that "the law as to both of the counts is generally the same since you will be considering the same aggravating and mitigating circumstances." Viewed contextually, the challenged instruction did not mislead the jury on the existence of the (e)(9) aggravating circumstance in each case. Therefore, this assignment of error is overruled.

[7] By assignment of error, defendant contends the trial court erroneously failed to submit defendant's requested nonstatutory mitigating circumstance that he was depressed after he returned from military service in Korea. Defendant requested and the trial court allowed the mitigating circumstance that defendant "has suffered from emotional problems." The trial court then determined that the proposed circumstance concerning his depression after returning from Korea was subsumed in the mitigating circumstance that defendant had suffered from emotional problems. Defendant's argument is based on the belief that the jury would have given more value

to two separate mitigating circumstances and that the circumstance given was overly broad. We disagree.

A jury in a capital case must "not be precluded from considering as a mitigating factor[] any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978), *quoted in State v. White*, 349 N.C. 535, 566, 508 S.E.2d 253, 272-73 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). However, we have continually refused to follow a "mechanical, mathematical approach to capital sentencing." *State v. Bond*, 345 N.C. 1, 30, 478 S.E.2d 163, 178 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997); *accord State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 442 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Moreover, we have held that trial courts may combine redundant mitigating circumstances. *State v. Frye*, 341 N.C. 470, 504, 461 S.E.2d 664, 682 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). This Court has also found harmless error where a proposed nonstatutory mitigating circumstance was subsumed within another nonstatutory mitigating circumstance. *See Bond*, 345 N.C. at 30, 478 S.E.2d at 178.

In the instant case, the trial court determined that the proposed circumstance concerning defendant's depression after returning from overseas was subsumed in the mitigating circumstance that defendant had suffered from emotional problems. Moreover, the jury was not precluded from considering evidence of defendant's depression as a mitigating circumstance. *See Greene*, 324 N.C. at 20, 376 S.E.2d at 442. The jury heard and considered testimony from defendant's family and friends about his unhappiness after he returned from overseas and about his attempted suicide. In addition, the court submitted the N.C.G.S. § 15A-2000(f)(9) catchall mitigating circumstance, which permitted the jury to consider "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9); *see also Greene*, 324 N.C. at 21, 376 S.E.2d at 442. Therefore, the trial court's refusal to submit the requested nonstatutory mitigating circumstance was not error. This assignment of error is overruled.

[8] By assignment of error, defendant contends the trial court erred by refusing to allow defense counsel to ask prospective juror Robert West, as well as other prospective jurors, whether he could consider

imposing a life sentence after he had been informed that defendant was guilty of committing two homicides. We disagree.

The trial court has broad discretion in ensuring that "a competent, fair, and impartial jury is impaneled." *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). In reviewing a trial court's rulings on *voir dire* questions, this Court has stated that

> while counsel may diligently inquire into a juror's fitness to serve, the extent and manner of that inquiry rests within the trial court's discretion. Moreover, in order to establish reversible error, a defendant must show prejudice in addition to a clear abuse of discretion on the part of the trial court.

State v. Parks, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989) (citation omitted). Both defendant and the State have the right to question prospective jurors about their views on capital punishment. *See State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 458 (1985). However, the extent and the manner of such inquiry rests within the trial court's discretion. *See Bond*, 345 N.C. at 17, 478 S.E.2d at 171; *State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 425 (1992).

In the instant case, the trial court did not abuse its discretion by disallowing defendant's question to prospective jurors. Defense counsel established through a series of questions that prospective juror West: (1) knew that defendant had pled guilty to two murders; (2) could possibly vote for life imprisonment under either theory of first-degree murder, after defense counsel had defined first-degree murder and explained the theories of both felony murder and premeditated and deliberated murder; (3) could possibly vote for the death penalty; (4) could consider, without hesitation, mitigating circumstances; (5) understood the legal requirement that aggravating circumstances must be proven beyond a reasonable doubt; whereas, mitigating circumstances need only be proven by a preponderance of the evidence; (6) was willing to make an individual decision about mitigating circumstances regardless of other jurors' decisions; and (7) would express his views and opinions about the evidence even if they differed from those of other jurors. Notwithstanding prospective juror West's indication that he could perform his legal duties as a juror and recommend either a death sentence or life imprisonment, defendant contends the trial court should have allowed defense counsel's question. Defendant argues that, contrary to the State's contention, the proposed inquiry was not an improper stake-out

question. Assuming, without deciding, that defendant's stake-out question was permissible under these facts, the trial court still had discretion to disallow the question. *See State v. Richmond*, 347 N.C. 412, 425, 495 S.E.2d 677, 683-84, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). As we held in *Richmond*, the trial court is not required "to allow any or all *voir dire* questions premised on uncontroverted facts, regardless of their tendency to stake out or indoctrinate jurors." *Id.* at 425, 495 S.E.2d at 684. We also note that defense counsel's proposed question to prospective juror West was redundant and superfluous. Prospective juror West had already clearly indicated his ability and intention to perform his legal duties as a juror, including recommending the sentence required by law under the facts of this case. Therefore, the trial court did not abuse its discretion in disallowing defense counsel's proposed question. This assignment of error is overruled.

[9] By assignment of error, defendant contends the trial court erred by preventing defendant from asking prospective juror James Eubank whether he could consider residual mitigation under the catchall circumstance, which gives the jury an opportunity to consider "any other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9). We disagree.

As previously noted, "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), and "in order to establish reversible error, a defendant must show prejudice in addition to a clear abuse of discretion on the part of the trial court," *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. During *voir dire*, " '[c]ounsel 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.' " *Braxton*, 352 N.C. at 179, 531 S.E.2d at 440 (quoting *Phillips*, 300 N.C. at 682, 268 S.E.2d at 455). Defense counsel's questions must "amount to a proper inquiry into whether the juror could follow the law as instructed by the trial judge." *Id.*; *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).

In the instant case, prospective juror Eubank responded appropriately to questions from defense counsel by stating that he "could listen to and consider mitigating circumstances that [he] had been instructed upon." Moreover, after the evidence was

heard, the trial court properly instructed the jury on the catchall circumstance:

> Now, ladies and gentlemen, we come to possible mitigating factor number eleven. In this possible mitigating factor, 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 find from a preponderance of the evidence any other mitigating factor and you deem it to have mitigating value, you will have your foreperson so indicate by writing "yes" after this possible mitigating circumstance on the issues and recommendations form. And if you were to find that other mitigating factors existed from the evidence which you deem to have mitigating value, then you would answer number eleven yes.

The trial court's instruction was in accordance with the pattern jury instructions. *See* N.C.P.I.—Crim. 150.10. Because prospective juror Eubank indicated that he could follow the law as instructed by the trial court and the trial court properly instructed the jury regarding the (f)(9) catchall mitigating circumstance, the trial court did not abuse its discretion by disallowing defense counsel's question to prospective juror Eubank. This assignment of error is overruled.

[10] By assignment of error, defendant contends the trial court committed structural error by reassigning prospective juror Kelly Parker to a later panel of prospective jurors. Defendant argues the trial court's action violated N.C.G.S. § 15A-1214 and that the violation entitles defendant to a new sentencing hearing. 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 divided the venire into several panels and seated each panel separately for *voir dire*. Defendant contends that this procedure resulted in advance notice of the identity of the next juror to be called when only one prospective juror remained in each panel. Defendant further argues that, by reassigning prospective juror Parker to another panel rather

than simply excusing her, the trial court destroyed the required randomness of the procedure.

Defendant did not object to the jury selection procedure at trial. However, " '[w]hen 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.' " *Braxton*, 352 N.C. at 177, 531 S.E.2d at 439 (quoting *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000)); *see also State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). In any event, a defendant's challenge to the jury must satisfy 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. § 15-1211(c) (1999); *see also Braxton*, 352 N.C. at 177, 531 S.E.2d at 439.

In the instant case, defendant never complied with N.C.G.S. § 15A-1211(c). 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." *Braxton*, 352 N.C. at 177, 531 S.E.2d at 439; *see also State v. Workman*, 344 N.C. 482, 499, 476 S.E.2d 301, 310 (1996). In fact, the following colloquy took place on 20 January 1999:

> THE COURT: . . . . The Court has received the following document from the clerk. Its letterhead says Fayetteville Ambulatory Surgery Center, Inc., here in Fayetteville. It's dated 1/20/99. Reads as follows: To whom this may concern, Kelly Parker was at our facility to provide transportation and postoperative care for Roy Parker. Any questions, please feel free to call, and it's signed S. Henley. This juror is one of the jurors on panel three. My suggestion is to have the clerk notify Ms. Parker that she is to report on Monday.
>
> [PROSECUTOR]: I don't have any objection to that, Your Honor.
>
> THE COURT: Just deal with it that way.
>
> [DEFENSE COUNSEL]: Yes, sir. No objection.

THE COURT: It's an ambulatory surgery. That indicates to me that the person is obviously her husband and we can just deal with it—if there's some health problem involving the husband next week, I don't see delaying court or anything this morning.

[DEFENSE COUNSEL]: No, sir.

[PROSECUTOR]: Just defer her until Monday.

THE COURT: Until Monday. Is that agreeable with all parties?

[DEFENSE COUNSEL]: It is, Your Honor.

[PROSECUTOR]: That's agreeable with the [S]tate.

THE COURT: All right. If you could notify her.

THE CLERK: All right.

The transcript demonstrates that not only did defendant never object to the jury selection process, he expressly approved the reassignment of prospective juror Parker. Based on defendant's failure to follow the procedures for jury panel challenges and "his failure to alert the trial court to the challenged improprieties," *Braxton*, 352 N.C. at 177, 531 S.E.2d at 439; *see also State v. Atkins*, 349 N.C. 62, 103, 505 S.E.2d 97, 122 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999), we conclude that defendant failed to preserve this issue for appellate review. This assignment of error is overruled.

[11] By assignment of error, defendant contends the trial court erred by allowing the prosecutor to argue, outside of the evidence, that both victims' blood was found on defendant's clothing. We disagree.

Counsel is allowed wide latitude in the argument to the jury, *see Johnson*, 298 N.C. at 368, 259 S.E.2d at 761, and "may argue the facts in evidence and all reasonable inferences therefrom," *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). The "scope of this latitude lies within the sound discretion of the trial court." *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672. When defendant fails to object during closing argument, as was the case here, "the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Blakeney*, 352 N.C. 287, 320, 531 S.E.2d 799, 822 (2000); *accord State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 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." *Atkins*, 349 N.C. at 84, 505 S.E.2d at 111, *quoted in Blakeney*, 352 N.C. at 320, 531 S.E.2d at 822. "[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. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996), *quoted in Blakeney*, 352 N.C. at 320-21, 531 S.E.2d at 822.

In the instant case, the record reveals that Agent Milks examined the black ninja pants that defendant wore on the night of the murders. Agent Milks' examination revealed the presence of human blood on defendant's pants consistent with that of both defendant and Mrs. Kutz. Agent Milks did not discover evidence of Mr. Kutz's blood on defendant's clothing. Therefore, the prosecutor's statement that the victims' blood was found on defendant's clothing is not wholly supported by the record. Nonetheless, the challenged statement was not so "grossly improper" as to require the trial court to intervene *ex mero motu*. *Blakeney*, 352 N.C. at 322, 531 S.E.2d at 822; *see also 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). In any event, the statement at issue in no way prejudiced defendant. Prior to his capital sentencing proceeding, defendant pled guilty to both murders. Therefore, defendant's guilt was not at issue in this case. Moreover, the challenged comment was minor in the context of the prosecutor's entire closing statement. *See 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). In short, the prosecutor's comment in no way impeded defendant's right to a fair capital sentencing proceeding. This assignment of error is overruled.

By assignments of error, defendant contends the trial court committed reversible error by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that the murders were "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). The jury found the (e)(9) circumstance in each case. Defendant contends new sentencing is required based on two separate grounds: (1) the (e)(9) circumstance is unconstitutionally vague, and (2) submission of the (e)(9) aggravating circumstance was not supported by the evidence. We disagree.

[12] This Court has consistently rejected defendant's argument that the (e)(9) aggravating circumstance is unconstitutionally vague, *see State v. Anderson*, 350 N.C. 152, 187, 513 S.E.2d 296, 317, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999); *State v. Lee*, 335 N.C. 244, 285, 439 S.E.2d 547, 568-69, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), and we decline defendant's invitation to reconsider our prior holdings.

[13] Defendant further contends the evidence does not support submission of the (e)(9) aggravating circumstance. Defendant does not contest that the murders in this case were especially heinous, atrocious, or cruel. Rather, he argues the jury was improperly permitted to vicariously apply the (e)(9) aggravating circumstance based on the conduct of his accomplice. Defendant contends the trial court should have instructed the jury to consider only conduct that it believed beyond a reasonable doubt had been committed by defendant.

"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.' " *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); *accord State v. Brewington*, 352 N.C. 489, 525, 532 S.E.2d 496, 517-18 (2000). " '[C]ontradictions and discrepancies are for the jury to resolve; and all evidence admitted that is favorable to the State is to be considered.' " *State v. McNeil*, 350 N.C. 657, 693, 518 S.E.2d 486, 508 (1999) (quoting *State v. Robinson*, 342 N.C. 74, 86, 463 S.E.2d 218, 225 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996)), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). This Court has also held that " 'capital sentencing must focus on the individual defendant, his crimes, personal culpability, and mitigation.' " *Brewington*, 352 N.C. at 525, 532 S.E.2d at 517 (quoting *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)). Accordingly, determination of whether submission of the (e)(9) aggravating circumstance is warranted depends on the particular facts of each case. *Id.*

The evidence presented in this case, when considered in the light most favorable to the State, was sufficient to warrant submission of the "especially heinous, atrocious, or cruel" statutory aggravating circumstance based on defendant's participation in the murders. The

record reveals that defendant discussed his participation in the murders with Dale Wyatt. At the time, Wyatt was a soldier at Fort Bragg who was in the Cumberland County jail waiting to appear in court on a worthless-check charge. Defendant initially told Wyatt that defendant's clothes were being held as evidence in a double homicide. Defendant later told Wyatt that defendant and his "partner" dressed in ninja suits and entered the victims' home through a window. Defendant further stated that he saw Mr. Kutz, shot him with a blowgun dart, then stabbed him with a butterfly knife.

Wyatt's testimony was corroborated by the testimony of Dr. Ginn, the forensic pathologist who performed an autopsy on the body of Mr. Kutz. Dr. Ginn testified that he found "on the front surface of the left shoulder a small punctate mark of the size that would be made by a needle or dart." Dr. Ginn also testified that he observed sixteen visible stab wounds on the body of Mr. Kutz. When asked about the "mechanics of death," Dr. Ginn stated, "I would think that between half a minute to five minutes could have elapsed before" Mr. Kutz died from the effects of the stab wound to his heart. Dr. Ginn further opined that Mr. Kutz "could have been conscious any of that time up to the maximum" and that Mr. Kutz would have been capable of feeling pain and suffering during that time.

The record further reveals that when defendant was arrested, the authorities discovered in the red pickup truck a receipt for the purchase of a butterfly knife from Black Dragon Knife Shop. The authorities also found in defendant's wallet a business card from Black Dragon Knife Shop. When defendant and Thompson were detained at Fort Bragg at 1:00 a.m. on 2 December 1986, a military police officer observed a black-handled knife in an open glove compartment directly in front of defendant. The officer noticed the knife when defendant reached into the same glove compartment to retrieve his identification card.

During the ensuing investigation, human bloodstains, consistent with the blood of both victims, were found on the black-handled butterfly knife. In addition, Agent Bendure, a forensic chemist with the SBI, tested the black-handled knife and observed light-brown polyester fiber that was determined to be consistent with the upholstery of the chair in which Mr. Kutz was sitting when his throat was cut. Agent Bendure also testified on direct examination that fibers from the pink nightgown that Mrs. Kutz was wearing could be associated with both knives. Finally, Agent Bendure testified that fibers as-

sociated with the blanket and sheets in the bedroom were found on the clothing worn by both defendant and Thompson.

Considering the evidence in the light most favorable to the State, we conclude there was sufficient evidence from which the jury could conclude that defendant personally participated in the killing of both victims. In addition, defendant pled guilty to both first-degree murders. Further, defendant does not dispute that the manner in which both victims were murdered is sufficient to warrant submission of the (e)(9) aggravating circumstance. Because the evidence tends to show that defendant personally participated in both of these especially heinous, atrocious, or cruel murders, we conclude 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 twelve additional issues that he concedes have been decided previously by this Court contrary to his position: (1) the trial court erred by not informing the jury about the amount of time defendant would have to serve before becoming eligible for parole, if sentenced to life imprisonment; (2) the trial court erred by twice submitting the aggravating circumstance that the murder was committed during the perpetration of a felony; (3) the trial court refused to instruct the jury that certain mitigating circumstances had been found to exist by the 1988 jury; (4) the trial court erred by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, after the 1988 trial court had not submitted the same circumstance based on lack of evidence; (5) the trial court refused to instruct the jury about the effect of a nonunanimous decision; (6) the trial court refused to instruct the jury that any member could decide to grant mercy to defendant based on feelings of sympathy arising from the evidence; (7) the trial court erred by denying defendant's motion to allocute; (8) the trial court erred by instructing the jurors that they were permitted to reject mitigating circumstances because they had no mitigating value; (9) the trial court erred by instructing the jurors that they "may" rather than "must" consider mitigating circumstances at Issues Three and Four; (10) the trial court erred by refusing to instruct that the burden of proof applicable to mitigating circumstances means proof showing that it is more likely than not that a mitigating circumstance exists; (11) the trial court's instruction that the jury must be unanimous to vote "No" to Issues Three and Four was unconstitutional; and (12)

the trial court erred by instructing the jury at Issues Three and Four that each juror may consider only mitigating circumstances found by that juror at Issue Two.

Defendant makes these arguments in order to allow this Court to reexamine its prior holdings and to preserve these issues for any possible further judicial review. We have thoroughly considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, these assignments of error are overruled.

PROPORTIONALITY REVIEW

[14] Having concluded that defendant's capital sentencing proceeding was free from prejudicial error, we now turn to our statutory duty of ascertaining as to each murder (1) whether the evidence supports the jury's findings of the aggravating circumstances upon which the sentences of death were based; (2) whether the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the instant case, defendant pled guilty to two counts of first-degree murder. Following the capital sentencing proceeding as to the murder of Mr. Kutz, the jury found the following submitted aggravating circumstances: (1) the murder was committed by defendant while defendant was engaged in the commission of, or an attempt to commit, robbery, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed by defendant while defendant was engaged in the commission of, or an attempt to commit, burglary, N.C.G.S. § 15A-2000(e)(5); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person, that being the murder of Janie Kutz, N.C.G.S. § 15A-2000(e)(11).

As to the murder of Mrs. Kutz, the jury found the following submitted aggravating circumstances: (1) the murder was committed by defendant while defendant was engaged in the commission of, or an attempt to commit, robbery, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed by defendant while defendant was engaged in the commission of, or an attempt to commit, burglary, N.C.G.S. § 15A-2000(e)(5); (3) the murder was especially heinous,

atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person, that being the murder of Paul Kutz, N.C.G.S. § 15A-2000(e)(11).

As to both murders, two statutory mitigating circumstances were submitted for the jury's consideration: (1) defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and (2) the catchall mitigating circumstance that there existed any other circumstance that any juror deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury found (f)(1) to exist but did not find any other circumstance that it deemed to have mitigating value. As to each murder, of the nine nonstatutory mitigating circumstances submitted to it, the jury found none to exist and have mitigating value. After a thorough review of the record, including the transcripts, briefs, and oral arguments, we conclude the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. Therefore, we turn to our final statutory duty of proportionality review.

[15] The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded 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).

This Court has determined a death sentence to be 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 this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was convicted of two counts of first-degree murder. This Court has never found a sentence of death disproportionate in a case where a defendant was convicted of murdering more than one victim. *See State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995).

Second, in each murder, the jury found the following three 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); (2) "[t]he capital felony was especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9); and (3) "[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). There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death. *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). The N.C.G.S. § 15A-2000(e)(5), (e)(9), and (e)(11) statutory aggravating circumstances, which the jury found here, are among those four. *See id.*

Nonetheless, defendant contends that the sentence of death entered against him is disproportionate because his equally or more culpable accomplice, Thompson, received sentences of life imprisonment. To support his contention, defendant cites *State v. Stokes*, in which this Court found the death penalty to be disproportionate where an equally or more culpable accomplice received a life sentence in a separate trial. *Stokes*, 319 N.C. 1, 352 S.E.2d 653. However, this case is clearly distinguishable from *Stokes*. First, in *Stokes*, the defendant was convicted of one count of first-degree murder solely under the theory of felony murder. *Id.* at 24, 352 S.E.2d at 666. In the instant case, however, defendant pled guilty to two counts of first-degree murder and, by doing so, admitted guilt "upon any and all theories available to the state," including premeditation and deliberation and the felony murder rule. *Silhan*, 302 N.C. at 263, 275 S.E.2d

at 478. Second, unlike the case in *Stokes*, the murders here were found to be part of a "course of conduct . . . which included the commission by . . . defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). Third, in *Stokes*, the victim was killed at his place of business, *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654, while the victims in the present case were murdered in their home. *See Chandler*, 342 N.C. at 763, 467 S.E.2d at 648 (stating that murders committed in the home of the victim particularly shock the conscience because they constitute a violation of "an especially private place, one in which a person has a right to be secure"). Therefore, *Stokes* does not support defendant's contention that the sentences of death entered against him are disproportionate. *See State v. Lemons*, 348 N.C. 335, 376-77, 501 S.E.2d 309, 334 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999).

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. While we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we reemphasize that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). Based on the brutal nature of the crimes, it suffices to say that these 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 defendant received a fair capital sentencing proceeding, free from prejudicial error, and the sentences of death recommended by the jury and entered by the trial court are not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. MELVIN JAMES HARDY, JR.

No. 169A99

(Filed 21 December 2000)

1. Jury— peremptory challenge—black prospective juror—race-neutral explanations

The trial court did not err in a capital trial 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 prosecutor gave race-neutral explanations for the challenge after defendant made a prima facie showing of potential purposeful discrimination, including the prospective juror's limited education, his limited ability to read and write, his failure to answer all questions on the juror questionnaire, his statement that he had never considered his views on the death penalty until that day, and the prosecutor's impression that the prospective juror may be out of touch with reality; and (2) defendant offered no rebuttal at trial to show that any explanation given by the prosecution was a pretext.

2. Constitutional Law— self-incrimination—trial court's instruction—defendant's decision not to testify

The trial court did not violate defendant's privilege against self-incrimination in a capital trial by its instruction that defendant's decision not to testify "creates into presumption against him" rather than the phrase found in the pattern jury instructions of "creates no presumption against him," because: (1) defendant failed to properly preserve this issue for appellate review since he did not object to this instruction at trial; (2) even if this issue was preserved, the alleged error was a misstatement rather than an omission, in light of the fact that the trial court went on to state that defendant's silence was not to influence the jury's decision in any way; and (3) the instruction taken in context and as a whole conveyed the correct legal standard to the jury and does not constitute plain error.

3. Sentencing— capital—mitigating circumstance—defendant has family and friends who support him

The trial court did not err during a capital sentencing proceeding by excluding testimony from defendant's friend as to the impact defendant's death would have on the friend in an effort to

show the mitigating circumstance that defendant has family and friends who support him, because a third party's feelings are irrelevant to the capital sentencing proceeding.

4. Sentencing— capital—mitigating circumstance—defendant had adjusted and could adjust to a lifetime of incarceration

The trial court did not err during a capital sentencing proceeding by excluding testimony from defendant's father regarding a conversation the father had with defendant during defendant's pretrial incarceration to show the mitigating circumstance that defendant had adjusted and could adjust to a lifetime of incarceration, because: (1) defendant failed to properly preserve this issue for appellate review since he made no offer of proof to show the content of the excluded conversation as required by N.C.G.S. § 8C-1, Rule 103(a)(2); and (2) even if the issue was properly preserved, any error was harmless beyond a reasonable doubt when the substance of the excluded conversation, that defendant's father believed his son would turn his life over to the Lord, did come before the jury.

5. Sentencing— capital—aggravating circumstance—murder committed to avoid or prevent lawful arrest

The trial court did not err during a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest because defendant's statement to a co-worker, that the victim won't be able to tell who robbed the store based on the fact that defendant was going to kill the victim, could lead a reasonable jury to find that one purpose in killing the victim was to avoid apprehension.

6. Criminal Law— prosecutor's argument—funeral services for the victim—victim's sons prayed for forgiveness of defendant

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital trial when the prosecutor commented during closing arguments on the funeral services for the victim and described how the victim's sons prayed for forgiveness for defendant, because even though the prosecutor traveled outside the record, taken in context the reference was made to illustrate to the jury the necessity for it to follow the law and to leave forgiveness to a higher power.

7. Criminal Law— prosecutor's argument—reference to one side of defendant's face as a monster

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital trial when the prosecutor stated during closing arguments that defendant was a one-eyed Jack with one side of his face that he showed to his friends and family versus the other side that he showed to the victim, because: (1) the prosecution's reference to one side of defendant's face as a monster was made to show the two sides of defendant's character; and (2) the prosecutor did not directly call defendant a monster, but simply compared the hidden side of defendant's character to that of a monster.

8. Criminal Law— prosecutor's argument—mischaracterization of evidence—trial court's warning sufficient

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital trial when the prosecutor stated during closing arguments that defendant had gotten a teenager involved in drugs when the evidence showed only that the teenager sold drugs for defendant and owed money to defendant for drugs, because: (1) the trial court sustained defendant's objection to this statement and admonished the jury to take the evidence as the jury recalled it; (2) the trial court's warning was sufficient to cure any mischaracterization of the evidence by the prosecution; and (3) jurors are presumed to follow the trial court's instructions.

9. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence because: (1) defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule; (2) defendant committed this crime while on pretrial release pending a separate murder trial; (3) the jury found the N.C.G.S. § 15A-2000(e)(2) aggravating circumstance that defendant had been previously convicted of another capital felony; (4) the jury found the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that defendant committed the murder for the purpose of avoiding a lawful arrest; and (5) the jury found the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that defendant was engaged in the commission of robbery with a firearm.

STATE v. HARDY

[353 N.C. 122 (2000)]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Bridges, J., on 18 December 1998 in Superior Court, Mecklenburg County, upon a jury verdict finding defendant guilty of first-degree murder. On 10 April 2000, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 13 September 2000.

Michael F. Easley, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Burton Craige for defendant-appellant.

PARKER, Justice.

Defendant Melvin James Hardy, Jr., was indicted for the first-degree murder of Andrew Ray and for robbery with a dangerous weapon. 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 robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder conviction; and the trial court entered judgment accordingly. The trial court also sentenced defendant to a term of 146 to 185 months' imprisonment for defendant's conviction of robbery with a dangerous weapon.

The State's evidence tended to show that defendant was an employee of the Hardee's restaurant where the victim was an assistant manager. On 19 March 1997 defendant gave his friend Essa Davidson a duffel bag containing a shotgun and a Bojangle's uniform. Defendant told Davidson to come to the restaurant that evening with the duffel bag and wearing the uniform. While working at the restaurant later that night, defendant had a telephone conversation with Martha Nicole Morris, a co-worker, during which he told her that he planned to rob the restaurant and that the victim would not "be able to tell it" because defendant was "going to kill him."

Around 9:45 p.m. Davidson arrived at the restaurant in the uniform and carrying the duffel bag containing the shotgun. Defendant took the bag from Davidson and went to the kitchen. Defendant then walked the victim into his office at gunpoint and ordered the victim to open the safe. Shortly thereafter Davidson and two other employees, Patricia Robinson and J.T. Sturdivant, heard a gunshot. Davidson

then saw defendant holding the shotgun while standing over the victim, who was lying on the floor with his legs twitching.

Defendant came out of the office and told Davidson, Robinson, and Sturdivant to gather the money and clean up. Defendant asked Robinson how much money she wanted. Robinson initially refused to take any money, but then agreed to take two hundred dollars. Defendant told Robinson to mop, but she could not do so after seeing the victim's feet in a pool of blood on the floor.

Defendant told the others to act as if it were an ordinary day by cleaning up and clocking out as usual and told Robinson and Sturdivant to say that the victim was alive when they left. Defendant, Sturdivant, and Davidson then divided the remaining money, approximately $1,600. Defendant, Sturdivant, and Robinson left; and Davidson remained behind to find out the bus schedule.

Davidson could not find a bus schedule, so he went across the street to a Harris-Teeter grocery store to call a cab from the pay phone. Davidson was carrying the blue duffel bag with him at this time. A security guard from the grocery store spoke with Davidson and told him that he could use the store phone. Davidson and the guard then went inside the store.

During this time, the victim's wife, Elichia Ray, had arrived at the Hardee's to drive the victim home. Ray became concerned when the victim did not come out of the restaurant and called the district manager to come check inside the store. The district manager called the general manager, Martin Green, and asked him to go to the store. Once Green arrived, he and Ray went inside the store and discovered the victim's body. Green took Ray out to the parking lot and had to restrain her, as she was screaming and trying to go back inside the store.

Davidson and the guard noticed Ray screaming, with Green restraining her, in the Hardee's parking lot. The guard called the police from a phone inside the grocery store, then went to help Ray. The police arrived; and the guard told them what was happening, then returned to the grocery store. At that point Davidson was sitting down inside the grocery store. The guard asked Davidson if he had seen anything earlier at the Hardee's, and Davidson responded that he had not. Davidson left the store, carrying the blue duffel bag. The guard then returned to the Hardee's parking lot and described Davidson and the duffel bag he was carrying to the officers.

The guard rode with the officers and located Davidson walking down the street. Davidson was no longer carrying the duffel bag. The officers picked up Davidson, who then led them to the duffel bag, which he had hidden near the Harris-Teeter. Among the items in the duffel bag were a shotgun, a paper bag containing coins, and two shirts bearing Hardee's restaurant logos. The officers took Davidson to the police station, where he eventually told them what happened. Police later determined that a live shell found in the shotgun was the same type and brand as a shell casing and pellets found at the crime scene. Furthermore, tests confirmed that the shell found at the crime scene had been fired from the shotgun.

The pathologist who performed the autopsy on the victim found that the victim suffered a close-range shotgun wound to the head inflicted at an angle consistent with the victim kneeling or sitting. The pathologist opined that the victim died within five to ten minutes after the shooting as a result of brain damage and blood loss.

Prior to this incident, on 12 June 1995, defendant and Davidson drove sixteen-year-old Kedrin Bradley to Reedy Creek Park, telling her they were going to a church picnic. Once there, defendant told Bradley to leave her beeper and jewelry in the car and to go for a walk with them. After about ten minutes walking on the trail, defendant told Bradley he was robbing her. He pulled out a bandana, placed it around her neck, and began choking her. Defendant then dragged Bradley into the woods and beat her with a stick. Bradley died as a result of the attack. Defendant and Davidson were charged with Bradley's murder on 6 December 1995. At the time of the killing of the victim in this case, both defendant and Davidson were on pretrial release for the killing of Bradley. Defendant was convicted for Bradley's murder on 11 June 1998, prior to the trial of this case.

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

JURY SELECTION

[1] Defendant first contends that the trial court erred in overruling defendant's objection to the State's impermissible use of a peremptory challenge to strike from the jury a black prospective juror, William Carter, 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 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; *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 prosecutor'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. City of Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985)).

With respect to prospective juror Carter, the trial court found that defendant made a *prima facie* showing of potential purposeful racial discrimination. The prosecutor then gave race-neutral explanations for the challenge, including the prospective juror's limited education, his limited ability to read and write, his failure to answer all questions on the juror questionnaire, his statement that he had never considered his views on the death penalty until that day, and the prosecutor's impression that the juror may be "out of touch with reality." The trial court concluded that the peremptory strike of prospective juror Carter was without racially discriminatory intent.

Defendant contends that the prosecutor's proffered explanations were clearly a pretext in that the prosecutor focused on prospective juror Carter's ability to comprehend the evidence despite the lack of significant scientific or complex evidence in this case. We disagree. We again note that a prosecutor's explanations for a peremptory strike " '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). Therefore, the prosecution is not required to show that prospective juror Carter could not understand the evidence, so long as the trial court believes that the race-neutral explanation is the prosecution's true motivation in exercising the challenge. Furthermore, we note that defendant proffered no rebuttal at trial to show that any explanation given by the prosecution was a pretext. *See id.* at 501, 391 S.E.2d at 152 (noting that defense counsel was apparently satisfied by the explanations offered by the prosecutor since defendant did not attempt to demonstrate that the explanations were merely a pretext); *Gaines*, 345 N.C. at 669, 483 S.E.2d at 409 (same).

We have reviewed the transcript and conclude that the explanations offered by the prosecution are supported in the record and are race-neutral reasons for exercising a peremptory challenge. *See, e.g.*, *State v. Carter*, 338 N.C. 569, 587, 451 S.E.2d 157, 166 (1994) (holding that peremptory challenge based on incomplete answers to juror questionnaire was race-neutral), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995); *State v. Robinson*, 336 N.C. 78, 96, 443 S.E.2d

306, 314 (1994) (holding that peremptory challenge based on prospective juror's inattention to detail and possible inability to retain evidence at trial was race-neutral), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995); *Thomas*, 329 N.C. at 430-32, 407 S.E.2d at 146-47 (holding that peremptory challenge on basis that juror had never considered death penalty before was race-neutral). The trial court's determination that there was no purposeful discrimination in the challenge of prospective juror Carter is not clearly erroneous. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[2] In his only argument pertaining to the guilt-innocence phase of his trial, defendant contends that the trial court violated his constitutional privilege against self-incrimination by erroneously instructing the jury regarding defendant's decision not to testify.

Both the Fifth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution establish a privilege against self-incrimination. This Court has held that a trial court must, upon request, " 'minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify' by giving an appropriate instruction." *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 892 (1988) (quoting *Carter v. Kentucky*, 450 U.S. 288, 305, 67 L. Ed. 2d 241, 254 (1981)).

Addressing defendant's failure to testify, the trial court in this case instructed the jury as follows:

> Now, the defendant in this case has not testified.
>
> The law of North Carolina, indeed the Constitution of this State as well as the Constitution of the United States, affords him this privilege.
>
> These same laws also assures [sic] this defendant . . . that his decision not to testify creates into presumption against him and therefore his silence in this case is not to influence your decision in any way.

Defendant argues that the trial court erred in using the phrase "creates into presumption against him," rather than the phrase as found in the pattern jury instructions, "creates no presumption against him." *See* N.C.P.I.—Crim. 101.30 (1974). Defendant contends the word "into" in this context implies that a presumption is created against defendant by virtue of his failure to testify in his own defense.

We begin by noting that defendant did not object to the instruction at trial and, thus, failed to properly preserve this issue 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 . . .; 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); *see also Ross*, 322 N.C. at 265, 367 S.E.2d at 891; *State v. Morgan*, 315 N.C. 626, 644-46, 340 S.E.2d 84, 95-96 (1986).

Defendant in this case had ample opportunity to object to the instruction outside the presence of the jury. After excusing the jury to the deliberation room, the trial court asked, "Prior to sending back the verdict sheets does the State wish to point out any errors or omissions from the charge?" The trial court then asked the same of defendant, and defendant responded with respect to other issues but did not object to the instruction in question. Though there is an exception to this rule where a requested instruction is omitted, *see Ross*, 322 N.C. at 265, 367 S.E.2d at 891, the alleged error here was a misstatement rather than an omission. As defendant failed to preserve this issue by objecting during trial, we will review the record to determine if the instruction constituted plain error. *See State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); *Morgan*, 315 N.C. at 644, 340 S.E.2d at 95.

Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result. *See State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)), *quoted in State v. Anderson*, 350 N.C. 152, 177, 513 S.E.2d 296, 311, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 326 (1999). Furthermore, in reviewing jury instructions this Court has stated:

> " 'The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended

> it and the jury to have considered it . . . .' *State v. Wilson*, 176 N.C. 751, [754-55,] 97 S.E. 496[, 497] (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal."

State v. Rich, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)) (alterations in original).

Defendant contends that the phrase "creates into presumption against him" could have led the jury to incorrectly understand that defendant's silence creates a presumption against him. However, the record shows that the trial court immediately went on to state, "therefore his silence in this case is not to influence your decision in any way." Use of the word "no" rather than "into" would not have led the jury to reach a different result in this case, given the context of the misstatement and the language immediately surrounding it. This Court will not construe isolated expressions in a charge out of context to infer prejudice to a defendant. *See State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978). We conclude that this instruction, when taken in context and as a whole, conveyed the correct legal standard to the jury and does not constitute plain error. Therefore, this assignment of error is overruled.

SENTENCING PROCEEDING

[3] Defendant next contends that the trial court erred during the sentencing proceeding by excluding testimony from defendant's friend Fred Walker as to the impact defendant's death would have on Walker. Defendant asserts this violated his right to present a complete defense, including evidence of mitigating circumstances, under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

A capital defendant must be permitted to present any aspect of the defendant's character, record, or any other circumstance which a jury could deem to have mitigating value. *See Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed.2d 973, 990 (1978); *State v. Locklear*, 349 N.C. 118, 160-61, 505 S.E.2d 277, 302 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). This Court has further explained that "[t]he feelings, actions, and conduct of third parties have no mitigating

value as to defendant and, therefore, are irrelevant to a capital sentencing proceeding." *Locklear*, 349 N.C. at 161, 505 S.E.2d at 302.

The trial court sustained the prosecutor's objection to the following question posed to Walker during the sentencing proceeding: "How do you feel about the possibility of losing [defendant]?" Defendant asserts that this testimony would have supported one of the mitigating circumstances submitted to the jury—that "defendant has family and friends who support him"—by showing the degree of attachment between defendant and Walker.

However, that mitigating circumstance and Walker's answer to this question, deal with a third party's feelings and are, therefore, irrelevant to the capital sentencing proceeding. We considered a similar mitigating circumstance in *Locklear*. *Locklear*, 349 N.C. at 160, 505 S.E.2d at 302 (finding no error where the trial court refused to submit the nonstatutory mitigating circumstance that "defendant continues to have family members, such as his mother, brother, aunts, and uncles, who care for and support him"). Therefore, we conclude that the trial court did not err in excluding this testimony.

[4] Next, defendant argues that the trial court similarly erred by refusing to allow defendant's father to testify during the sentencing proceeding regarding a conversation he had with defendant during defendant's pretrial incarceration. The following exchange occurred between defendant's counsel and defendant's father:

> Q. Do you feel that your son has been saved or if not can be saved?
>
> A. He hasn't been saved. I feel that he can. He just needs to turn his life over to the Lord. I don't think he's done that.
>
> Q. But you believe he can do that?
>
> A. I believe he can do that.
>
> Q. Do you believe he will do that?
>
> A. I believe he will do that. I was talking with him this past Sunday. He called the church. And I finally got the phone and it was him on the phone. I was talking with him, and I kind of went back and forth over all the things that we're all faced with because I feel there are a lot of victims here. I was just talking with him and he said, "dad"—

[PROSECUTOR]: OBJECTION to what he said.

THE COURT: SUSTAINED.

Q. Based on that conversation you feel given the opportunity he will be saved?

[PROSECUTOR]: OBJECTION; repetitious.

THE COURT: OVERRULED.

Q. You can answer that.

A. I believe he will.

The trial court sustained the prosecutor's objection on hearsay grounds. We initially note that the Rules of Evidence do not apply to sentencing proceedings. *See* N.C.G.S. § 15A-2000(a)(3) (1999); N.C.G.S. § 8C-1, Rule 1101(b)(3) (1999); *see also State v. Gray*, 347 N.C. 143, 172, 491 S.E.2d 538, 550 (1997) (relevant evidence should not ordinarily be excluded under the Rules of Evidence during a capital sentencing proceeding), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998).

Defendant argues that the conversation would have supported the mitigating circumstance submitted to the jury that "[d]efendant has adjusted and could adjust to a lifetime of incarceration." However, inasmuch as defendant made no offer of proof to show the content of the excluded conversation, this Court is precluded from evaluating the import of the excluded evidence. By failing to make an offer of proof, defendant has failed to properly preserve this issue for appellate review, pursuant to N.C.G.S. § 8C-1, Rule 103(a)(2). Furthermore, even if the issue were properly preserved, any error here would be harmless beyond a reasonable doubt. The record shows that defendant's father did, in fact, answer the question asked by stating his belief that his son would turn his life over to the Lord. Therefore, the substance of the excluded conversation, as argued by defendant on appeal, did come before the jury. *See State v. Hightower*, 340 N.C. 735, 745, 459 S.E.2d 739, 745 (1995). We overrule this assignment of error.

[5] Defendant next assigns error to the trial court's submission of the (e)(4) aggravating circumstance, that the murder was committed for the purpose of avoiding or preventing a lawful arrest. *See* N.C.G.S. § 15A-2000(e)(4). Defendant contends that this aggravating circumstance was not supported by the evidence, as the evidence showed he was motivated solely by resentment and dislike towards the vic-

tim, not by a desire to avoid apprehension for the robbery. We disagree.

Before the trial court may instruct the jury on the (e)(4) aggravating circumstance, it must find substantial, competent evidence in the record from which the jury can infer that at least one of defendant's purposes for the killing was the desire to avoid subsequent detection and apprehension for a crime. *See State v. Wilkinson*, 344 N.C. 198, 224-25, 474 S.E.2d 375, 389 (1996); *State v. Oliver*, 309 N.C. 326, 350, 307 S.E.2d 304, 320 (1983); *State v. Goodman*, 298 N.C. 1, 27, 257 S.E.2d 569, 586 (1979).

In this case the record contains substantial evidence that defendant was motivated by a desire to avoid subsequent detection and apprehension for the robbery he had just committed. Defendant's coworker Martha Nicole Morris testified as follows regarding a telephone conversation she had with defendant the day of the killing:

> He was talking about he was going to rob Hardee's. And I was like you're going to rob the place you work? He was like yeah. I was like how are you going to rob the place you work? They are you [sic] going to know who done it. I was like you all going to be wearing a mask or something? He was like, no. He was like he won't be able to tell it. He was speaking of [the victim]. I was like why not. He was like I'm going to kill him. And when he said that he was going to kill him I was like you're going to kill Andrew. He was like, yeah. I was like you can't just go rob Hardee's, you have got to kill this man? He was like, yeah. He was like he got to go, he got to go. I was like, well, I don't want to hear it, and I hung up.

We conclude that the jury could reasonably infer from the above statement that defendant was motivated, at least in part, by a desire to avoid apprehension. Defendant's comment that "[the victim] won't be able to tell it" because "I'm going to kill him" could certainly lead a reasonable jury to find that one purpose in killing the victim was to avoid apprehension. This testimony constituted sufficient, substantial evidence to support submission of this aggravating circumstance, and we find no error in the trial court's decision to submit it to the jury.

Defendant next contends that the trial court denied defendant's constitutional right to due process and to a fair trial by permitting the prosecutor to make three grossly improper statements during closing argument.

Closing arguments are left largely to the discretion of the trial court, though counsel cannot argue facts that are not supported by the evidence. *See State v. Fullwood*, 343 N.C. 725, 740, 472 S.E.2d 883, 891 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). However, "[w]hen 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*." *State v. Roseboro*, 351 N.C. 536, 546, 528 S.E.2d 1, 8 (2000). Furthermore, " '[t]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

[6] Defendant first argues that the trial court erred by permitting the prosecutor to comment on the funeral services for the victim and to describe how the victim's sons prayed for forgiveness for defendant, though no evidence was introduced at trial to support this argument. Defendant did not object to these statements at trial. While the prosecutor traveled outside the record by referring to the victim's funeral and the sons' prayers, taken in context, this reference was made to illustrate to the jury the necessity for it to follow the law and to leave forgiveness to a higher power. The prosecutor further stated:

> Melvin James Hardy can be forgiven. All he has to do is ask and it will be given to him.
>
> But that kind of forgiveness is going to have to come from a power far, far higher than this Court.
>
> You, ladies and gentlemen, have a duty, taken an oath, to decide based on the evidence and the law in this case the appropriate punishment.
>
> . . . .
>
> What this is about here today is to decide what the law and what the evidence tell[ ] you, the jury, . . . the appropriate sentence is.
>
> . . . .

> You're still human beings. And you still have the capacity for pity and sympathy, but that's not the factors upon which you make your decision.

The objectionable statements were a passing reference to focus the jury's attention on its duty. In comparison to the prosecutor's entire closing argument, the comments were minor. Thus considered, the mention of the funeral and the sons' participation, though perhaps moving, could not have prejudiced defendant. We conclude, therefore, that the prosecutor's statements regarding the funeral were not so improper that the trial court erred in not intervening *ex mero motu.*

[7] Defendant next argues that the following statement by the prosecutor was grossly improper:

> [Defendant] is a one-eyed Jack. You know what a one-eyed Jack is? You see one side of the face. That's the side that these people that come up here have seen.
>
> The other side of his face is more horrible than even those pictures, what he did to his victims [sic].
>
> Other side of his face is a monster. A monster.

Defendant did not object to this statement at trial. Again, we hold that the trial court did not abuse its discretion by failing to intervene *ex mero motu* during this portion of the prosecutor's closing argument. In previous cases, we have held that similar references do not warrant *ex mero motu* intervention by the trial court. *See, e.g., State v. Walls*, 342 N.C. 1, 63-64, 463 S.E.2d 738, 772 (1995) (referring to the defendant as "that devil" and comparing him to movie villains "Jason" and "Freddie Kruger"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996); *State v. Wilson*, 338 N.C. 244, 259-60, 449 S.E.2d 391, 400-01 (1994) (comparing the defendant to Hitler); *State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984) (referring to the defendant as an "animal").

The prosecution's reference to one side of defendant's face as a monster was made to show the two sides of defendant's character: the one he showed to his family and friends, and the other one he showed to the victim. The prosecutor did not directly call defendant a monster, but simply compared the hidden side of defendant's character to that of a monster. While we do not condone referring to any

defendant as a "monster," we decline to hold that the reference here rose to a level that required intervention by the trial court.

[8] Finally, the prosecutor stated in closing argument that defendant had gotten a teenager, Kedrin Bradley, involved in drugs. However, the evidence at trial showed only that Bradley sold drugs for defendant and owed money to defendant for drugs, not that defendant had gotten her involved in drugs. The trial court sustained defendant's objection to this statement and admonished the jury, "Members of the jury, again take the evidence as you recall it to be."

Once an objection is sustained, the trial court has a duty to "censor remarks not warranted by either the evidence or the law." *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975); *accord State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). Defendant contends that the trial court's curative instruction was not adequate to censor the prosecutor's misstatement of the evidence. We disagree. By sustaining the objection and admonishing the jurors to take the evidence as they recalled it, the trial court sent a clear signal that the prosecutor had misstated the evidence. Accordingly, we conclude that the trial court's warning in this instance was sufficient to cure any mischaracterization of the evidence by the prosecution. Jurors are presumed to follow the trial court's instructions, *see State v. McNeil*, 350 N.C. 657, 689, 518 S.E.2d 486, 505 (1999), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 321 (2000); therefore, a stronger or more thorough admonishment was not required. This assignment of error is 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 lacked jurisdiction to try or impose judgment on defendant for first-degree murder because the short-form murder indictment did not allege all the elements of first-degree murder; (ii) the trial court violated defendant's constitutional right to be present at every stage of his capital trial by permitting the oath to be administered to the jurors when neither defendant nor his counsel was present; (iii) the trial court erred in instructing the jury that a person acting in concert with another "is guilty of any other crime committed by the other in pursuance of the common purpose to commit that original crime or [that] is a natural or probable consequence thereof"; (iv) the trial court erred in submitting aggravating circumstance N.C.G.S.

§ 15A-2000(e)(2) for the reason that defendant had only been charged with but had not been convicted of a capital felony at the time he committed the murder for which he was on trial; (v) the trial court erred in instructing the jury that each juror "may" consider mitigating circumstances; (vi) the trial court erred in using the inherently ambiguous and vague terms "satisfaction" and "satisfy" in defining the burden of proof applicable to mitigating circumstances; (vii) the trial court erred in instructing that the jurors were required to determine whether nonstatutory mitigating circumstances had mitigating value; (viii) the trial court erred in instructing the jury that in deciding Issue Three a juror may consider any mitigating circumstance or circumstances that "the juror" determined to exist by a preponderance of the evidence in Issue Two; (ix) the trial court erred in sentencing defendant to death because the death penalty is inherently cruel and unusual, and the North Carolina capital sentencing scheme is unconstitutionally vague and overbroad.

Defendant raises these issues for 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. We overrule these assignments of error.

PROPORTIONALITY

[9] Finally, this Court exclusively has the statutory duty in capital cases, pursuant to 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, briefs, and oral arguments of counsel, we are convinced that the jury's findings of the three aggravating circumstances submitted were supported by the evidence. 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 Robinson*, 336 N.C. at 133, 443 S.E.2d at 334. The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). 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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Defendant was also convicted of robbery with a dangerous weapon. The jury found all three aggravating circumstances submitted: (i) that defendant had been previously convicted of another capital felony, N.C.G.S. § 15A-2000(e)(2); (ii) that defendant committed the murder for the purpose of avoiding a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (iii) that the murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5).

The trial court submitted two statutory mitigating circumstances for the jury's consideration: (i) defendant "was 19 years old at the time of the commission of this offense," N.C.G.S. § 15A-2000(f)(7); and (ii) 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 only the age mitigator to exist. The trial court also submitted ten non-statutory mitigating circumstances; the jury found none of these to exist.

We begin our proportionality 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 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). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

The present case has several features that distinguish it from the cases in which we have found the sentence to be disproportionate. First, the jury convicted defendant on the basis of premeditation and deliberation and under the felony murder rule. "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), *quoted in State v. Braxton*, 352 N.C. 158, 226, 531 S.E.2d 428, 467 (2000). Second, defendant committed this crime while on pretrial release pending a separate murder trial. Though a defendant on pretrial release is still presumed to be innocent, he is in a special position and should be especially cautious about committing another criminal offense. Whether or not he is guilty of the first crime, such a defendant demonstrates a disdain for the law by committing another offense while on pretrial release. *See State v. Webb*, 309 N.C. 549, 559, 308 S.E.2d 252, 257 (1983). Finally, in none of those cases were three aggravating circumstances found. Here, the jury found that the (e)(2), (e)(4), and (e)(5) aggravating circumstances existed. 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. This Court has deemed the (e)(5) aggravating circumstance, standing alone, to be sufficient to sustain a sentence of death, *see State v. Lawrence*, 352 N.C. 1, 36, 530 S.E.2d 807, 829 (2000), and has never found a death sentence to be disproportionate where either the (e)(2) or (e)(4) aggravating circumstance was found to exist, *see State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (N.C.G.S. § 15A-2000(e)(2)); *State v. Warren*, 348 N.C. 80, 499 S.E.2d 431 (N.C.G.S. § 15A-2000(e)(2)), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998); *State v. McCarver*, 341 N.C. 364, 407, 462 S.E.2d

25, 49 (1995) (N.C.G.S. § 15A-2000(e)(4)), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Furthermore, we note that the (e)(2) aggravating circumstance reflects on defendant's character as a recidivist. *See State v. Cummings*, 323 N.C. 181, 197, 372 S.E.2d 541, 552 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990). Viewed in this light, 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.

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

NO ERROR.

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

BAILEY v. STATE

[353 N.C. 142 (2000)]

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. 56PA00-2

(Filed 21 December 2000)

Attorney General— class action settlement—attorney fee award—standing to appeal

The Attorney General did not possess standing to oppose on appeal an attorneys' fee award in the settlement of a class action contesting a tax on retirement benefits and the appeal was dismissed. The Attorney General has common law powers as recognized by the General Assembly, but has not explained or established by case law how his power to take actions necessary for the protection of "property and revenue" of the state's citizens translates into a power to take actions necessary for the protection of "the public interest" and cites no source which suggests that his common law power to defend the public interest as an entity separate from the State extends to circumstances analogous to this case. Even if the Attorney General's premise that the issue of class action attorneys' fees is of public interest and that the public is somehow effectively served by allowing a defendant's long-term counsel to intervene on behalf of plaintiffs, the record here reveals neither an intervention motion on the part of the Attorney General nor an order granting such a motion from the trial judge, and there are no grounds under Rule 3 of the North Carolina Rules of Appellate Procedure on which to allow the appeal. The Supreme Court may not suspend the Rules of Appellate Procedure under Rule 2 to prevent injustice to a party or to expedite a decision in the public interest because the Attorney General is not a party for purposes of appeal, the Supreme Court is without a basis for jurisdiction, and jurisdictional requirements may not be waived even for good cause shown under Rule 2.

Chief Justice FRYE dissenting.

Justice FREEMAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered on 24 March 2000 by Thompson, J., in Superior Court, Wake County. Heard in the Supreme Court 18 October 2000.

Boyce & Isley, PLLC, by G. Eugene Boyce and Philip R. Isley; and Womble Carlyle Sandridge & Rice, PLLC, by Keith W. Vaughan and W. David Edwards for plaintiff-appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Chief Deputy Attorney General, and Norma S. Harrell and Thomas F. Moffitt, Special Deputy Attorneys General, for defendant-appellants.

Gulley & Calhoun, by Michael D. Calhoun, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

Law Offices of William F. Maready, by William F. Maready and Gary V. Mauney, on behalf of the 4th Branch, Coalition of State, Local and Federal Government Retiree Organizations; Federal Retiree Task Force of North Carolina; State Employee Association of North Carolina; the Retired Officer Association, North Carolina Council of Chapters; N.C. State & Local Employees Tax Rights Committee; National Association of Retired Federal Employees, North Carolina Federation of Chapters; North Carolina Police Officers Association; North Carolina Highway Patrol Retirees' Association; Air Force Association; Air Force Sergeants Association; Retired Military Association of North Carolina; National Guard Association of North Carolina; Army Aviation Association of America; Air Force Association; Association of Military Surgeons of the United States; Association of the United States Army; Chief Warrant Officer and Warrant Officer Association, United States Coast Guard; Commissioned Officers Association of the United States; Public Health Service, Inc.; Enlisted Association of the National Guard of the United States; Fleet Reserve Association; Gold Star Wives of America; Jewish War Veterans of the United States of America; Marine Corps League; Marine Corps Reserve Officers Association; the Military Chaplains Association of the United States of America; Military Order of

the Purple Heart; National Guard Association of the United States; National Military Family Association; National Order of Battlefield Commissions; Naval Enlisted Reserve Association; Naval Reserve Association; Navy League of the United States; Reserve Officers Association; the Retired Enlisted Association; the Retired Officers Association; the Society of Medical Consultants to the Armed Forces; United Armed Forces Association; United States Army Warrant Officers Association; USCG Chief Petty Officers Association; Veterans of Foreign Wars; and Veterans' Widows International Network, amici curiae.

ORR, Justice.

This matter is before the Court on appeal from the trial court's order granting attorneys' fees to counsel representing prevailing plaintiffs in a class action against the State. The Attorney General originally appealed the order to the Court of Appeals. Plaintiffs followed by filing with this Court a petition for discretionary review to bypass the Court of Appeals, which we granted. At issue are whether the Attorney General has standing to challenge the fees awarded to opposing counsel and whether such fees are excessive. In addition to the appeal, the Attorney General filed a motion for review of these issues pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and petitioned this Court for a writ of certiorari. Plaintiffs have countered by filing with this Court a motion to dismiss the Attorney General's appeal.

This matter arises out of the long and contentious litigation between plaintiffs—a consolidated class of retirees (both state and federal)—and the State over the constitutionality of a tax exemption cap on retirement benefits. To date, the case, on one issue or another, has been appealed to this Court five times. In *Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991) (*Bailey I*), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992), class plaintiffs took a voluntary dismissal after this Court concluded that their tax challenge failed to comply with mandatory statutory requirements. In *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998) (*Bailey II*), this Court: (1) affirmed a trial court's holding that the disputed tax was unconstitutional as "an improper impairment of contract and a taking of property without just compensation," *id.* at 167, 500 S.E.2d at 76; and (2) held that the class of plaintiffs could not be limited to those who filed protests over the tax, *id.* at 166, 500 S.E.2d at 76. In *Bailey v. State*, 351 N.C. 440, 526

S.E.2d 657 (2000) (*Bailey III*), decided after the parties had reached a settlement in the case, we determined the date that interest began to accrue on the settlement's initial payment. Shortly thereafter, in *Bailey v. State*, 352 N.C. 127, 529 S.E.2d 448 (2000) (*Bailey IV*), this Court determined the limitations on who would qualify for eligibility as a class member. Now, in "*Bailey V*," the Attorney General asks that we review the issue of attorneys' fees, as awarded by the trial court, to plaintiffs' Class Counsel. We decline to do so, for reasons set forth in Parts II and III of this opinion.

I

A.

This case commenced nearly a decade ago as a certified class action involving approximately 200,000 class members who alleged that a tax imposed on their retirement benefits was illegal. This Court, in *Bailey II*, agreed with the plaintiffs and held that the tax was unconstitutional. Subsequent to the *Bailey II* decision, attorneys for the class agreed to a settlement with the State in the amount of $799,000,000, which was to be distributed as a refund to affected class members in proportion to taxes each had actually paid. The settlement fund was established by an act of the General Assembly, which simultaneously "appropriated" and "transferred" monies from the State's General Fund to a reserve fund intended to compensate plaintiffs. Act of Sept. 30, 1998, ch. 164, sec. 2, 1998 N.C. Sess. Laws 534, 534.

As part of the 7 October 1998 order approving the settlement, the trial judge set aside 15% of the award to serve as a reserve fund for plaintiffs' attorneys' fees. The trial judge then appointed a referee to review class counsel's expenditures throughout the litigation. After examining the referee's report, the trial judge ordered that Class Counsel, along with their respective co-counsel, be paid fees of 8% of the $799,000,000 in the plaintiffs' common fund, an amount equal to $63,920,000. The 24 March 2000 order—"Memorandum and Order on Application for Assessment of Attorney Fees and Costs"—signed by Superior Court Judge Jack A. Thompson, who was appointed on 3 June 1998 by the Chief Justice to oversee the case through its completion, precipitated the Attorney General's filing of a notice of appeal.

From the outset, we note that the Attorney General represented the State and its various agencies as defendants throughout this

case's lengthy litigation, a position that placed his office squarely at odds with plaintiffs' interests for nearly a decade. Nevertheless, the Attorney General now contends that he has changed hats—eschewing his former clients in order to champion the cause of his long-term adversaries—because his self-described role as "defender of the public interest" allows, if not compels, him to do so. In short, the Attorney General argues that the amount awarded as fees to Class Counsel is excessive and concludes that since none of the prevailing class members have appealed the allocation of such fees, his office must carry the mantle—in the public interest.

B

The settlement agreement between class members and the State was signed by legislative representatives acting on behalf of the State and counsel for plaintiffs. It was additionally approved as to form by the Attorney General and was ultimately expressed as a consent order signed and approved by Judge Thompson. The order contains the following provision:

> 7. Attorney fees, costs and the expenses of administration shall be determined by the Court and shall be paid from the Settlement Fund. The defendants [the State, as represented by the Attorney General] waive any rights to be heard concerning these matters.

Moreover, the "Settlement Fund" referenced in provision 7 is composed of monies awarded to plaintiffs in satisfaction of their claim against the State. Although paid from the state treasury, the fund represents taxes illegally taken from class members. Once the settlement took effect, the funds were no longer state property but were money that belonged to the plaintiffs themselves.

From these facts, it is readily apparent that: (1) the State, as defendant, expressly agreed that it would not involve itself in the issue of plaintiffs' attorneys' fees; and (2) plaintiffs, none of whom appealed, were paying their attorneys not with State funds but with their own money. Thus, the Attorney General's client—the State as defendant—is without interest in either the allocation of attorneys' fees or the funds that paid them.

Despite this backdrop, the Attorney General's representatives sought to involve themselves in the attorneys' fees question from the outset, although at no point did they move to formally intervene as a party pursuant to Rule 24 of the North Carolina Rules of Civil

Procedure. When the trial court received Class Counsel's application for fees, the Attorney General filed an adversarial response to the application. In preparation for oral arguments before the trial court on the issue, the Attorney General filed a motion to be heard—and he was. His representatives also filed with the trial court a demand for access to plaintiffs' attorneys' billing records. Although the demand motion was denied, the trial court subsequently appointed a special referee to examine and assess those records. When plaintiffs moved to bar the Attorney General from further participation in the fees issue, his representatives filed a response in support of their continued presence. The issue was apparently never fully resolved, as the record reveals no definitive ruling by the trial judge on plaintiffs' motion. Finally, in response to the trial court's order awarding plaintiffs' attorneys' fees, the Attorney General filed this appeal, which bypassed review by the Court of Appeals when this Court allowed plaintiffs' petition for discretionary review. *See* N.C.G.S. § 7A-31(b) (1999).

II

In essence, the Attorney General considers the attorneys' fees awarded in this case to be "excessive," and argues that this Court should review both the amount of the awarded fees and the methods used by the trial court to calculate them. By way of establishing standing as a proper party to pursue his substantive claims, the Attorney General seeks to downplay his ten-year tenure as counsel for defendants in favor of gaining recognition for his self-ascribed, common law role as "defender of the public interest." According to the Attorney General, Class Counsel have an inherent conflict of interest with their own class members when it comes to the matter of their fees. Therefore, in order to ensure that the attorneys are not financially advantaged to the class members' detriment, the Attorney General advocates that his office be viewed as both overseer and protectorate, and justifies his intervention thusly: (1) because the attorneys' fees awarded are excessive and because such excessive fees are not in the public interest, the Attorney General, as defender of the public interest, is obligated to act; (2) moreover, because he served as counsel for defendants throughout this case's long history, the Attorney General is uniquely qualified to so act.

In further defense of his right to appeal the fees plaintiffs' attorneys have been awarded in this case, the Attorney General argues that he has extensive common law powers "to act in the public interest independently of his statutory duties to represent the State." *See*

N.C.G.S. § 114-1.1 (1999) (providing that "[t]he General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers . . . that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina"). We acknowledge that the Attorney General has common law powers as recognized by the General Assembly but those powers do not apply to the present case. Nonetheless, the Attorney General proceeds to lay claim specifically to his common law power "to take actions necessary for the protection of property and revenue" of the citizens of North Carolina, as recognized in *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987), a case involving a lease of property by the state. Thus, in the Attorney General's view, when he acts pursuant to this common law power, as in the case *sub judice*, his client is not the State but "the public interest." We note, however, that the Attorney General fails to explain or establish by case law how his power to take actions necessary for the protection of "property and revenue" of the state's citizens translates into a power to take actions necessary for the protection of "the public interest."

According to the Attorney General, it is the exercise of this broad, common law power to "defend the public interest" that allows his office to pursue this appeal. In sum, the Attorney General argues that plaintiffs' attorneys' fees in this case were "excessive," and that if such an excessive fee award stands, it will serve to inflate fees in future class actions against the State—a result adverse to the public interest.

The Attorney General's argument is unconvincing for two reasons. First, the Attorney General cites to no source—case or statute—which suggests that his common law power to defend the public interest as an entity separate from the State extends to circumstances analogous to the facts of this case. While this Court held in *Martin v. Thornburg* that the Attorney General had a duty to prosecute all actions necessary to defend "the property and revenue" of the people, 320 N.C. at 546, 359 S.E.2d at 479, it did not recognize a distinction between either the "people" and the "State," or their respective interests in that case. 320 N.C. at 546, 359 S.E.2d at 479. Moreover, no language within the *Martin* holding can be construed as to imply that the Attorney General may act to defend the "people's" interest at the expense of the State's interest. The potential for such conflict is evidenced by the State's expressed agreement—made while represented by the Attorney General—not to involve itself in

the issue of plaintiffs' attorneys' fees, a position at odds with the Attorney General's present contentions.

Second, in the absence of case law supporting the Attorney General's view, we examine next whether his claim of authority is rooted in statutory or constitutional mandates. Article III, Section 7(2) of the North Carolina Constitution, which creates the office of the Attorney General, simply states that the "duties [of the Attorney General] shall be prescribed by law." Such duties, therefore, are left to the discretion of the General Assembly and are set forth in N.C.G.S. § 114-2. Subsection (1) of N.C.G.S. § 114-2 requires the Attorney General to defend all actions in which the State is a party or is interested, while subsection (2) delineates the various State entities entitled to such defense. Neither subsection makes any reference to "the public interest." Subsection (3) has been repealed, and subsections (4), (5), (6), and (7) deal with designated duties that fall outside the realm of this case. The statute's final subsection, (8), is divided into two parts and reads, in pertinent part, as follows:

> It shall be the duty of the Attorney General:
>
> . . . .
>
> (8) *Subject to the provisions of G.S. 62-20*:
>
> a. To intervene, when he deems it advisable in the public interest, in proceedings before any courts, . . . in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have authority to institute and originate proceedings before such courts, . . . and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

N.C.G.S. § 114-2(8)(a) (1999) (emphasis added). As noted in the statute itself, subsection (8)(a) is subject to the provisions of N.C.G.S. § 62-20, which outline the Attorney General's function and duties while participating in Utilities Commission proceedings.[1]

1. N.C.G.S. § 62-20 provides as follows:

> The Attorney General may intervene, when he deems it to be advisable in the public interest, in proceedings before the [Utilities] Commission on behalf of the using and consuming public, including utility users generally and agencies of the State. The Attorney General may institute and originate proceedings before the Commission in the name of the State, its agencies or citizens,

Moreover, while subsection (8)(a) allows the Attorney General to intervene in proceedings when he deems it to be advisable "in the public interest," he may do so only as a representative of "the *using* and *consuming* public." (Emphasis added.) An examination of prior case law indicates that the Attorney General has served as such a representative under circumstances in which "the using and consuming public" were persons who used and/or consumed utility-related goods and services. *See, e.g., State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965); *State ex rel. Utils. Comm'n v. N.C. Textile Mfrs. Ass'n*, 59 N.C. App. 240, 296 S.E.2d 487 (1982), *rev'd on other grounds*, 309 N.C. 238, 306 S.E.2d 113 (1983); *State ex rel. Utils Comm'n v. General Tel. Co. of S.E.*, 12 N.C. App. 598, 184 S.E.2d 526 (1971), *modified on other grounds*, 281 N.C. 318, 189 S.E.2d 705 (1972). Such cases, as dictated by the language of N.C.G.S. § 114-2(8)(a) and N.C.G.S. § 62-20, were properly argued in proceedings originating before the Utilities Commission.

In his appeal to this Court, the Attorney General refers to no cases or other authority which suggest that his power to intervene under subsection (8)(a) extends to circumstances outside the scope of Utilities Commission proceedings. As for his authority to "institute and originate proceedings . . . and . . . to appear before agencies on behalf of the State and its . . . citizens in all matters affecting the public interest"—as delineated in subsection (8)(a)'s second clause—we note: (1) the clause is also subject to the provisions of N.C.G.S. § 62-20, (2) the Attorney General is seeking to intervene in an existing action here and is not "institut[ing] or originat[ing]" a proceeding, and (3) the Attorney General here is not seeking to "appear before [an] agenc[y]" but rather to appear before a court of law.

Even if we were to accept the Attorney General's premise that the issue of class action attorneys' fees is of public interest and that the public is somehow effectively served by allowing a *defendant*'s long-

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> in matters within the jurisdiction of the Commission. The Attorney General may appear before such State and federal courts and agencies as he deems it advisable in matters affecting public utility services. In the performance of his responsibilities under this section, the Attorney General shall have the right to employ expert witnesses, and the compensation and expenses therefor shall be paid from the Contingency and Emergency Fund. The Commission shall furnish the Attorney General with copies of all applications, petitions, pleadings, order[s] and decisions filed with or entered by the Commission. The Attorney General shall have access to all books, papers, studies, reports, and other documents filed with the Commission.

N.C.G.S. § 62-20 (1999).

term counsel to intervene on behalf of *plaintiffs*—a questionable proposition to be sure—the power to intercede does not grant the Attorney General an unconditional license to intrude in court affairs. The North Carolina Rules of Civil Procedure require a timely application from "*anyone*" seeking "to intervene in an action." N.C. R. Civ. P. 24 (emphasis added). Conspicuously absent from the numerous documents submitted to the trial court by the Attorney General, while allegedly acting in his independent capacity as defender of the public interest, is such an application.

North Carolina's intervention rule is divided into two substantive parts addressing both interventions as a matter of right and permissive interventions. The statute provides for interventions as a matter of right

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. R. Civ. P. 24(a)(2). In the alternative, applicants seeking permissive intervention may do so: (1) when a statute confers a conditional right to intervene, or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. N.C. R. Civ. P. 24(b). Again, assuming *arguendo* that the Attorney General meets the criteria of an applicant under either subsection, he must make his application pursuant to the procedural guidelines set forth in the rule's subsection (c):

> A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure.

N.C. R. Civ. P. 24(c). As a review of the record reveals neither an intervention motion on the part of the Attorney General nor an order granting such a motion from the trial judge, we are constrained by law to conclude that the Attorney General, at least in regard to his asserted role as "defender of the public interest," is not a party to this

action. As a consequence, we now must consider whether his appeal as a nonparty is appropriate.

In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407 (1991) (per curiam); *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683, *appeal dismissed and disc. rev. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990). The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 486 S.E.2d 735 (1997). In addition, the rules of the Supreme Court that regulate appeals, such as Rule 3, are mandatory and must be observed. *State v. Walker*, 245 N.C. 658, 660, 97 S.E.2d 219, 221 (1957), *cert. denied*, 356 U.S. 946, 2 L. Ed. 2d 821 (1958); *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 140 S.E. 230 (1927). The rule may not be disregarded by the legislature, by the judge of a superior court, or by litigants or counsel. *Walker*, 245 N.C. at 660, 97 S.E.2d at 221.

Rule 3 specifically designates that "any *party* entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal." N.C. R. App. P. 3 (emphasis added). More specifically, only a "party aggrieved" may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court. *Culton v. Culton*, 327 N.C. 624, 398 S.E.2d 323 (1990).

A careful reading of Rule 3 reveals that its various subsections afford no avenue of appeal to either entities or persons who are nonparties to a civil action. Therefore, as we have already determined that the Attorney General is not a party to the case *sub judice*, we can find no grounds on which to allow his appeal. Accordingly, as presented, it must be dismissed.

III

As alternatives to his appeal, the Attorney General seeks review of the attorneys' fees issue by: (1) petitioning this Court for a writ of certiorari, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure; and (2) requesting that this Court exercise its supervisory jurisdiction pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. We address the two avenues in successive order.

Rule 21 provides that a writ of certiorari may be issued to permit review of trial court orders under three circumstances: (1) when the right to an appeal has been lost by failure to take timely action, (2) when no right of appeal from an interlocutory order exists, or (3) when a trial court has denied a motion for appropriate relief. N.C. R. App. P. 21(a). Here, we have no interlocutory order or motion for appropriate relief to consider. Moreover, as it has been determined that the Attorney General has no right to an appeal (*see* Part II, *supra*), no such right could be lost by a failure to take timely action. Therefore, no circumstances exist that would permit the Court to issue a writ of certiorari pursuant to Rule 21.

Nevertheless, the Attorney General asks the Court to consider his petition outside the formal parameters of Rule 21 and argues that we should do so pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, which provides:

> To prevent injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided in 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.

N.C. R. App. P. 2. The plain language of the rule grants this Court the discretion to suspend appellate rules either "upon application of a party" or "upon its own initiative." As it has already been determined that the Attorney General is not a party to this action, this matter is thereby subject to review only through our initiative. However, even if we were so inclined, suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns. *See Bromhal v. Stott*, 116 N.C. App. 250, 447 S.E.2d 481 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995); *see also Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (adopting United States Supreme Court holding that an appellate court " 'may not waive the jurisdictional requirements . . . , even for "good cause shown" under Rule 2' " (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 298 (1988))). Since the Attorney General is not a party to this case for purposes of appeal pursuant to Rule 3(a), we are without a basis for jurisdiction over the matter. *See* N.C. Const. art. IV, § 12(1) (providing that "the Supreme Court shall have jurisdiction to review *upon appeal* any decision of the courts below") (emphasis

added).[2] As a consequence, suspension of the rules in order to accommodate the Attorney General's petition under the facts of this case is beyond the purview of this Court.

In conclusion, we dismiss as improper the Attorney General's appeal of the trial court's order awarding attorneys' fees to Class Counsel. In addition, the Attorney General's petition for a writ of certiorari to review the order of the Superior Court is dismissed, as is his motion seeking review of the order under Rule 2 of the Rules of Appellate Procedure.

APPEAL DISMISSED.

Chief Justice FRYE dissenting.

I respectfully dissent from the majority decision. Assuming, as the majority so painstakingly asserts, that the Attorney General does not have standing to appeal the award of attorneys' fees in this case; that this Court does not have authority to grant certiorari; and that this Court cannot review the trial court's decision under Rule 2; I would, nevertheless, review the trial court's decision in the exercise of this Court's inherent supervisory authority over the trial courts.

The majority, citing *In re Brownlee*, 301 N.C. 532, 548, 272 S.E.2d 861, 870-71 (1981), recognizes "that this Court has exercised its constitutional supervisory powers over inferior courts by allowing applications for review by nonparties under certain 'exceptional' circumstances." *Bailey v. State*, 353 N.C. 142, 158 n.2, 540 S.E.2d 313, 323 n.2. (2000) (*Bailey V*).

This case, in my opinion, meets the exceptionality circumstance. First, it involves a trial court's discretion in setting attorneys' fees in a class action involving some 200,000 plaintiffs who have settled a tax claim against the State of North Carolina. Second, the attorney general appeared in the trial court on the question of whether the attorneys' fees were excessive, and was heard by the trial court. Third, as the majority notes, this case has been appealed to this Court five times. The first time, in a split decision, this Court held that plaintiffs

2. We recognize that this Court has exercised its constitutional supervisory powers over inferior courts by allowing applications for review by nonparties under certain "exceptional" circumstances. *See In re Brownlee*, 301 N.C. 532, 548, 272 S.E.2d 861, 870-71 (1981). However, in *Brownlee* and its progeny, *In re Wharton*, 305 N.C. 565, 569, 290 S.E.2d 688, 690-91 (1982), the nonparties were subject to financial obligations imposed by order of a trial court. No such financial burden, or other exceptional circumstance, is apparent in the case *sub judice*.

could not proceed because they had not complied with mandatory statutory requirements. *State v. Bailey*, 330 N.C. 227, 412 S.E.2d 295 (1991) (*Bailey I*). The second time this Court, in a split decision, held that plaintiffs did not have to comply with the statutory requirements. *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998) (*Bailey II*). The third time, this Court decided an issue which arose out of a legislative settlement of the case. *Bailey v. State*, 351 N.C. 440, 526 S.E.2d 657 (2000) (*Bailey III*). The fourth time, this Court settled a dispute as to who could be a member of the class, *Bailey v. State*, 352 N.C. 127, 529 S.E.2d 448 (2000) (*Bailey IV*). Now, in *Bailey V*, the question is whether the substantial attorneys' fees actually awarded by the trial court in this class action involving refund of taxes were reasonable or excessive. *Bailey V*, 353 N.C. 142, 540 S.E.2d 313.

This case is clearly a matter of public interest. The trial judge, recognizing this, allowed the attorney general to participate and be heard. The highest Court of the State should do likewise.

I have thoroughly reviewed the trial court's order which makes findings of fact, draws conclusions of law and sets, under all the circumstances, a reasonable attorney's fee. The trial judge did not abuse his discretion, especially in light of the fact that the General Assembly itself provided authority for a fee in excess of that awarded by the trial court.

I vote to affirm the trial court.

Justice FREEMAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. THOMAS RICHARD JONES

No. 347A99

(Filed 21 December 2000)

1. Homicide— felony murder—DWI—implied intent

First-degree murder convictions which arose from driving while impaired were reversed where the defendant was found guilty under the felony murder rule, based upon injuries to others in the victims' car and resulting assault convictions. The North Carolina murder statute, N.C.G.S. § 14-17, designates five specific felonies as the basis for felony murder, each requiring actual

intent to commit the crime; while there is a catchall category of felonies committed with a deadly weapon (such as an automobile), all of the crimes qualified by case law require actual intent to commit the underlying crime. There is no first-degree murder case premised on implied intent as evidenced by culpable or criminal negligence and no language in N.C.G.S. § 14-17 suggesting that the legislature intended or even contemplated that first-degree murder might be premised on implied intent; however, the General Assembly has passed N.C.G.S. § 20-141.4, felony and misdemeanor death by vehicle, in contemplating situations similar to the case at hand. Moreover, the State's theory as to the applicability of the felony murder rule in reckless driving cases has the potential for profoundly unjust results, and it is presumed that the legislature did not intend an unjust result. If culpable negligence is to be a building block in a capital case, it must be by clear mandate of the legislature and not through judicial fiat or through innovative application by prosecutors. There is, however, ample evidence in the record to support a charge of second-degree murder.

2. Evidence— murder prosecution—pending DWI charge—malice

The trial court did not err in a prosecution for murder and assault arising from driving while impaired by admitting defendant's pending DWI charge. The circumstances attendant to the pending charge, such as speeding on the wrong side of the road and running another motorist off the road, demonstrate that defendant was aware that his conduct was reckless and inherently dangerous. The evidence therefore tended to show malice, an element of second-degree murder, and was properly admitted under N.C.G.S. § 8C-1, Rule 404(b).

3. Homicide— DWI—proximate cause and insulating negligence—instructions denied

The trial court did not err in a prosecution for murder and assault resulting from driving while impaired by not instructing the jury on proximate cause and insulating acts of negligence. The requested instruction that defendant's actions must be the sole and only proximate cause of the collision in order to hold him criminally liable was a misstatement of the law and the record shows no evidence of any negligence by the driver of the other car. Defendant was in her lane and she was forced to swerve into the left lane to try to avoid a collision; defendant's

argument that she should have swerved to the right and hit a telephone pole and/or mailboxes is entirely unpersuasive.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 448, 516 S.E.2d 405 (1999), finding no error in judgments entered by Freeman, (William H.) J., on 6 May 1997 in Superior Court, Forsyth County. On 2 December 1999, the Supreme Court retained defendant's notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and allowed discretionary review of additional issues. Heard in the Supreme Court 13 March 2000.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Jonathan P. Babb, Assistant Attorney General, for the State.

David B. Freedman, Dudley A. Witt, and Carol L. Teeter for defendant-appellant.

ORR, Justice.

Defendant was indicted on 21 October 1996 for the first-degree murders of Julie Marie Hansen and Maia C. Witzl. Defendant was simultaneously indicted for assault with a deadly weapon inflicting serious injury (AWDWISI) on Aline J. Iodice, Melinda P. Warren, and Margaret F. Penney. The State later reduced the charge related to Penney to assault with a deadly weapon (AWDW). On 10 February 1997, an additional indictment charged defendant with AWDWISI on Lea Temple Billmeyer and driving while impaired (DWI).

Defendant was tried capitally at the 21 April 1997 Criminal Session of Superior Court, Forsyth County. The State's evidence at trial tended to show that at approximately 10:30 p.m. on 4 September 1996, defendant crashed his vehicle into another vehicle occupied by six Wake Forest University students. Two of the students were killed in the collision, while three others were seriously injured.

Shortly before the crash, defendant was involved in an altercation while stopped at a red light at an intersection in Winston-Salem, North Carolina. Defendant repeatedly bumped another vehicle from behind with his own vehicle. A witness to the incident heard the defendant use profanity and tell the other driver to get out of the way. According to the witness, when the light changed defendant "zoomed" around the car and "shot on off," moving at an excessive

rate of speed. The driver defendant bumped from behind followed defendant to obtain his vehicle tag number and observed defendant's car run up on a curb, causing a hub cap to fall off. After obtaining defendant's plate number, the driver and his passenger stopped and called 911. The passenger told a police officer that defendant was "driving real crazy" and that "if somebody doesn't get him, he's going to kill somebody."

Prior to the collision at issue in this case, the six students from Wake Forest University were traveling eastbound on Polo Road, while defendant was traveling westbound on the same road at an excessive rate of speed. As the students rounded a curve, they observed two headlights moving quickly toward them in their lane of travel. Iodice, a passenger in the front seat of the vehicle driven by Penney, testified that the headlights "were moving so quickly and I realized they were in our lane from the very first time I saw them until" the collision occurred. Penney raised her foot off the accelerator pedal but could not pull her car to the right because of a telephone pole and mailboxes lining the side of Polo Road. Penney attempted to turn left onto Brookwood Drive to avoid colliding with defendant's vehicle, but defendant moved his vehicle back into his proper lane and crashed into the side of Penney's vehicle.

Hansen and Witzl, each nineteen-year-old passengers in Penney's vehicle, were killed. Billmeyer sustained serious injuries, including a contusion of her kidney, a concussion, and a fractured pelvis. Iodice was diagnosed with a ruptured bladder, internal bleeding, a fractured hip and pelvic bone, and a concussion. Warren's injuries included fractures to her ankle, femur, and pelvis, as well as internal bleeding. Penney received minor injuries, including abrasions and bruises.

The crash investigation revealed that defendant had been drinking alcohol and had a blood-alcohol content level of .046, well below the legal limit of .08. However, the presence of the drugs Butalbital, Alprazlam, and Oxycodone was also found. Although these controlled substances were prescribed by a physician, defendant's doctor and a registered nurse had previously instructed him not to drink or drive while taking the medications. The State's expert at trial testified that the combination of controlled substances and alcohol caused defendant to be appreciably impaired and unfit to operate a motor vehicle safely. Furthermore, the State introduced a record of defendant's 1992 conviction for DWI, as well as testimony concerning a pending DWI charge.

At the conclusion of the evidence, the jury found defendant guilty of the first-degree murders of Hansen and Witzl under the felony murder rule. The jury also found defendant guilty of AWDWISI on Billmeyer, Iodice, and Warren; AWDW on Penney; and DWI. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment without parole for the murders of Hansen and Witzl, and the trial court entered judgments in accord with that recommendation. The trial court arrested judgment on the three convictions for AWDWISI and sentenced defendant to an active term of 120 days for the AWDW on Penney and 90 days for the DWI. Defendant appealed to the Court of Appeals.

The Court of Appeals, in a divided opinion, found no error. *State v. Jones*, 133 N.C. App. 448, 516 S.E.2d 405 (1999). Defendant appealed to this Court as a matter of right based on a constitutional question and on the dissent below. On 2 December 1999, we allowed defendant's petition for discretionary review of additional issues.

The paramount issue in the case, as raised by the dissent and, in the alternative, defendant's Petition for Discretionary Review, is whether the defendant was properly convicted of first-degree murder under the felony murder rule. The Court of Appeals affirmed the decision of the trial court to allow defendant to be tried capitally for first-degree murder. For reasons outlined and discussed below, we hold the Court of Appeals erred in that for purposes of felony murder: (1) culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge; and, (2) a defendant may not be subject to a potential death sentence absent a showing of actual intent to commit one or more of the underlying felonies delineated or described in our state's murder statute, N.C.G.S. § 14-17. As a consequence of so holding, we find it unnecessary to address defendant's alternative arguments concerning alleged constitutional violations, *see State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969), and the so-called "merger doctrine." As for defendant's conviction for AWDW, he offers no arguments for appeal. It, therefore, stands affirmed. In addition, we affirm the Court of Appeals holding that the trial court committed no error by admitting evidence of defendant's prior acts or by omitting defendant's proposed jury instruction. Thus, defendant's convictions for DWI and AWDWISI are affirmed.

I

[1] In 1893 the General Assembly codified the common law offense of murder and subdivided first-degree murder into three categories, one of which was "killings occurring in the commission of certain specified felonies 'or other felony.' " *State v. Davis*, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982). In 1977, the General Assembly amended this third category of first-degree murder, commonly known as felony murder, so that it applies to any killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17; for a discussion on the history of section 14-17, *see Davis*, 305 N.C. at 422-23, 290 S.E.2d at 588. When a killing is committed in the perpetration of an enumerated felony (arson, rape, etc.) or other felony committed with the use of a deadly weapon, murder in the first degree is established " 'irrespective of premeditation or deliberation or malice aforethought.' " *State v. Wilson*, 313 N.C. 516, 537, 330 S.E.2d 450, 465 (1985) (quoting *State v. Maynard*, 247 N.C. 462, 469, 101 S.E.2d 340, 345 (1958). Moreover, intent to kill is *not* an element of felony murder. *See State v. York*, 347 N.C. 79, 97, 489 S.E.2d 380, 390 (1997).

In the instant case, defendant was charged with first-degree murder under the felony murder rule based on the underlying felony of AWDWISI. The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death. *See* N.C.G.S. § 14-32(b) (1999). We have defined assault as "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). A deadly weapon is " 'any article, instrument or substance which is *likely* to produce death or great bodily harm.' " *State v. Bagley*, 321 N.C. 201, 212, 362 S.E.2d 244, 251 (1987) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)) (alteration in original), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner. *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 779 (1955). Thus, a driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of AWDWISI provided there is either an actual intent to inflict injury or culpable or criminal negligence from

which such intent may be implied. *Id.* at 65, 86 S.E.2d at 778. Culpable or criminal negligence has been defined as " 'such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' " *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933). Moreover, " '[a]n intentional, wilful or wanton violation of a statute . . . , designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.' " *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92-93 (1985) (quoting *Cope*, 204 N.C. at 31, 167 S.E. at 458 (1933)). When a safety statute is unintentionally violated, culpable negligence exists where the violation is " 'accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable [foreseeability], amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others.' " *State v. Hancock*, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958) (quoting *Cope*, 204 N.C. at 31, 167 S.E. at 458). We note, too, that N.C.G.S. § 20-138.1, which prohibits drivers from operating motor vehicles while under the influence of impairing substances, is a safety statute designed for the protection of human life and limb and that its violation constitutes culpable negligence as a matter of law. *McGill*, 314 N.C. at 637, 336 S.E.2d at 93.

In the case *sub judice*, Hansen and Witzl were killed while defendant committed the crime of AWDWISI on Billmeyer, Iodice, and Warren. Defendant perpetrated the assault by operating his automobile, a deadly weapon, in a culpably or criminally negligent manner. His criminal or culpable negligence was established, as a matter of law, when he was convicted of DWI by the jury, *see id.*; such negligence was also demonstrated by other evidence tending to show that defendant was driving his vehicle substantially in excess of the posted speed limit and on the wrong side of the road. *See* N.C.G.S. § 20-141 (1999); N.C.G.S. § 20-146 (1999), respectively. Moreover, it is clear from the evidence presented at trial that defendant's actions proximately caused serious injury to Billmeyer, Iodice, and Warren. Thus, the elements of AWDWISI have been satisfied, and defendant was properly convicted of that offense as to each of the three victims. We next examine whether AWDWISI may serve as the underlying felony for defendant's first-degree murder conviction under the felony murder rule.

From the outset, we recognize that our analysis of defendant's conviction for AWDWISI demonstrates that culpable or criminal negligence may be used to satisfy the intent requisites for certain dangerous felonies, such as manslaughter, assault with a deadly weapon with intent to kill and AWDWISI. *See* N.C.G.S. § 14-32; *Eason*, 242 N.C. at 65, 86 S.E.2d at 778; *State v. Sudderth*, 184 N.C. 753, 755, 114 S.E. 828, 829 (1922). However, we are aware of no circumstance in which such negligence has served to satisfy the intent element of first-degree murder, a capital offense in North Carolina. Moreover, in interpreting our state's homicide statute, N.C.G.S. § 14-17, we can find no language suggesting that the legislature either contemplated or intended such a result.

A close examination of our state's murder statute reveals three types of criminal conduct that qualify as first-degree murder: (1) willful, deliberate, and premeditated killings (category 1); (2) killings resulting from poison, imprisonment, starvation, torture, or lying in wait (category 2); and (3) killings that occur during specifically enumerated felonies or during a "felony committed or attempted with the use of a deadly weapon" (category 3). N.C.G.S. § 14-17. All of these categories require that the defendant have a *mens rea* greater than culpable or criminal negligence; that is, they all require that the defendant had "actual intent" to commit the act that forms the basis of a first-degree murder charge.

First-degree murders committed under circumstances of willful deliberation and premeditation (category 1), by definition, require an actual intent on the part of a defendant to kill another. *State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65 (1972) (holding that a specific intent to kill is an essential element of first-degree murder). Case law has also established that a murder perpetrated by lying in wait (category 2) demonstrates by circumstance an actual intent to participate in conduct that results in a homicide. *State v. LeRoux*, 326 N.C. 368, 390 S.E.2d 314, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990). Other specifically designated criminal conduct under category 2, while not necessarily mandating an actual intent to kill, requires at minimum an actual intent to undertake the conduct resulting in death. Thus, even if the killing itself was not intended, the actual intent to torture, poison, starve, or imprison the victim must be present in order for the killing to qualify as first-degree murder. *See, e.g.*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) (killing by poison is murder in first degree if evidence tends to show only an intent to poison and not a specific intent to kill). Felony murder, as

exemplified by criminal conduct in category 3, operates similarly. Again, the actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required. This is not to imply that an accused must intend to break the law, but rather that he must be purposely resolved to participate in the conduct that comprises the criminal offense.

N.C.G.S. § 14-17 initially enumerates five specific crimes that may serve as underlying felonies for purposes of the felony murder rule (arson, rape, robbery, kidnapping, and burglary). The statute also incorporates a sixth umbrella grouping of "other felon[ies] committed or attempted with the use of a deadly weapon," which includes such crimes as AWDWISI and shooting into an occupied dwelling or vehicle. *See, e.g.*, N.C.G.S. § 14-32 *and* N.C.G.S. § 14-34.1 (1999), respectively. Each of the five enumerated felonies requires that the perpetrator "intends" to commit the offense. Burglary requires specific intent as one of its elements while rape, kidnapping, and robbery are general intent crimes. *See* N.C.G.S. §§ 14-51 (1999) (burglary), 14-27.2 (1999) (rape), 14-39 (1999) (kidnapping); for elements of robbery, a common law crime, *see State v. Lawrence*, 262 N.C. 162, 136 S.E.2d 595 (1964). Arson, as a "malice" type crime, is neither a specific nor a general intent offense but requires "*willful* and malicious" conduct. *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982) (emphasis added), *overruled on other grounds by State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223 (1993).

Whether "general intent," "specific intent," or "malice" crimes, all of the enumerated offenses require a level of intent greater than culpable negligence on the part of the accused. In short, the accused must be purposely resolved to commit the underlying crime in order to be held accountable for unlawful killings that occur during the crime's commission. *See, e.g.*, *Maynard*, 247 N.C. 462, 101 S.E.2d 340 (holding that first-degree murder conviction is appropriate if killing occurred during defendant's perpetration or attempt to perpetrate a robbery); other case examples showing defendant's actual intent to commit the underlying enumerated offense include *State v. Simmons*, 286 N.C. 681, 213 S.E.2d 280 (1975) (burglary), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976); *State v. McGlaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975) (arson), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976); *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494 (1945) (rape); and *State v. Roseborough*, 344 N.C. 121, 472 S.E.2d 763 (1996) (kidnapping).

Specific crimes that have qualified as an underlying felony under both the pre- and post-amendment statute's catchall grouping include: discharging a firearm into an occupied vehicle or structure, *see, e.g., State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); felonious escape, *see, e.g., State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970); armed felonious breaking and entering and larceny, *see, e.g., State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972); sodomy under threat of deadly weapon, *see, e.g., State v. Doss*, 279 N.C. 413, 183 S.E.2d 671 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 762 (1972); assault with a deadly weapon with intent to kill or with intent to inflict serious injury, *see, e.g., State v. Terry*, 337 N.C. 615, 447 S.E.2d 720 (1994); and felonious child abuse, *see, e.g., State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997). Without exception, each of these crimes, whether individually typed as specific intent or general intent in nature, have required actual intent on the part of the perpetrator. As with the enumerated felonies, in order to be held accountable for unlawful killings that occur during the commission or attempted commission of these crimes, the perpetrator must have been purposely resolved to commit the underlying offense. For example, a defendant may face a first-degree murder charge for an unintended killing that resulted from his firing a weapon into an occupied structure, *but only if the defendant intended to shoot into the building. See, e.g., State v. Cannon*, 341 N.C. 79, 459 S.E.2d 238 (1995) (evidence supported instruction that defendant confessed to first-degree murder [under felony murder rule] when he stated he willfully fired three times into an occupied vehicle). An examination of cases involving other felonies qualifying as "committed or attempted with the use of a deadly weapon" yields identical results: actual intent to commit the felony is required. *See, e.g., Terry*, 337 N.C. 615, 447 S.E.2d 720 (holding that facts show defendant intentionally committed assault with deadly weapon with intent to kill, an underlying felony for purposes of the felony murder rule). Moreover, after an exhaustive review, we can find in our jurisdiction no capital case of any variety which suggests that the intent element of first degree murder can be satisfied without a showing of either a specific intent to kill or an actual intent to participate in the conduct described in N.C.G.S. § 14-17. In every conviction for first degree murder by torture, poisoning, etc., the State proved beyond a reasonable doubt that the defendant actually intended to commit those acts. Similarly, in every felony murder conviction of which we are aware, the State proved beyond a reasonable doubt either that the defendant specifically intended to kill or that the defendant actually intended to commit the underlying offense. Although a showing of

culpable negligence can satisfy the intent requirement for certain aforementioned crimes, it has not formed the basis of intent for a first-degree murder conviction.

In sum, the North Carolina murder statute designates five specific felonies as qualifying to act as a basis for felony murder. Each requires a minimum of actual intent on the part of the accused to commit the crime. As for the statute's catchall category of felonies committed with the use of a deadly weapon, case law has qualified a host of other crimes, all of which share the requirement of actual intent to commit the underlying crime). Conspicuously absent is a first-degree murder case premised on implied intent as evidenced by a defendant's culpable or criminal negligence. Moreover, we can find no language in N.C.G.S. § 14-17 suggesting that our state's legislature even contemplated, no less intended, that the crime of first-degree murder might be premised on a defendant's implied intent (to kill or commit the underlying offense). If anything, recent action by our General Assembly indicates just the opposite is true for homicides resulting from impaired or negligent drivers. In contemplating situations similar to the case *sub judice*, the legislature passed N.C.G.S. § 20-141.4, titled "Felony and misdemeanor death by vehicle." The statute provides, in pertinent part:

> (a1) Felony Death by Vehicle—A person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving . . . and commission of that offense is the proximate cause of death.
>
> (a2) Misdemeanor Death by Vehicle—A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving . . . , and commission of that violation is the proximate cause of the death.
>
> (b) Punishments—Felony death by vehicle is a Class G felony. Misdemeanor death by vehicle is a Class 1 misdemeanor.
>
> (c) No Double Prosecutions—No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death . . . .

N.C.G.S. § 20-141.4 (1999).[1] Significantly, the sanctions associated with these crimes are substantially less draconian than the capital trial defendant faced in the instant case. It is apparent that the General Assembly has demonstrated its belief that the conduct described, though egregious and deserving of severe punishment, does not warrant the severity of sanctions concomitant with felony murder.[2]

When interpreting statutes, this Court presumes that the legislature did not intend an unjust result. *King v. Baldwin*, 276 N.C. 316, 325, 172 S.E.2d 12, 20 (1970). The State's theory as to the applicability of the felony murder rule in reckless driving cases has the potential for just such a result. Consider the following: Driver *A*, who drives with criminal negligence, hits another car containing only its driver, who is killed. Meanwhile, Driver *B* acts precisely the same way, but has the added misfortune of injuring a third party. In the State's view, Driver *A* can be convicted of, at most, second-degree murder; there is no "second victim" and, hence, no underlying felony on which a felony murder charge could depend.[3] Driver *B*, on the other hand, could well be charged with first-degree murder and capitally tried, with the AWDWISI on the third party serving as the underlying felony for felony murder.

While we acknowledge the legislature considered killing one person and injuring another a more serious crime than killing only one

1. We recognize that the statute does not preclude second-degree murder prosecutions for deaths resulting from DWI-related accidents when evidence proves defendant acted with malice or a depraved heart. *See, e.g., State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000) (upholding second-degree murder conviction in DWI-related collision causing death). However, as defendant in the case *sub judice* was not convicted of second-degree murder or charged with or convicted of felony death by vehicle, we do not address the issue of whether such charges may have proved more appropriate under the circumstances.

2. Georgia, among other states, has adopted a similar statutory scheme for vehicular deaths. Georgia's statute, in particular, extends to prohibit murder prosecutions for reckless drivers. *See* Ga. Code Ann. § 40-6-393 (2000) (vehicular homicide defined as deaths resulting from driving in reckless manner, under the influence of stimulants, or while fleeing police).

3. Although this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim, *see, e.g., State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

person, we conclude the increased punishment for hypothetical Driver *B* would bear no rational relationship to the punishment for Driver *A*. Driver *A*, who kills one person and is convicted of second-degree murder, may receive a sentence as short as ninety-four months, while Driver *B*, who kills one person and injures another, is subject to the death penalty and upon conviction receives, at minimum, a sentence of life in prison without parole. *See* N.C.G.S. § 14-17; N.C.G.S. § 15A-2000 (1999) (sentencing options for first-degree murder convictions); *and* N.C.G.S. § 15A-1340.17 (1999) (sentencing guidelines for felonies).

Although common sense, case law, and legislative history each suggest a driver who kills one person and injures another can expect greater sanction than a driver who kills only one person, the offenses and their respective punishments must reflect a rational relationship. In our view, that means Driver *B* may be punished for: (1) the death he caused—as felony death by vehicle, manslaughter, or second-degree murder; and (2) the separate injury he caused—as assault with a deadly weapon with intent to inflict serious injury. Such a limitation simultaneously eliminates the result of subjecting the accused to the extreme sanction of the death penalty while providing a means to enhance a defendant's punishment in proportion to his crimes. For the conduct as described, Driver *B* would face one prison sentence for the killing and an additional prison sentence for his assault on the injured person. Thus, if Driver *B* were convicted of second-degree murder for the killing and AWDWISI for the assault, he would receive a sentence of at least ninety-four months for the killing, and an additional sentence of fifteen to seventy-four months for the assault. Alternative conviction combinations would follow suit.

Finally, the potential effects of defendant's first-degree murder conviction serve well as harbingers of profoundly unjust results that could lie ahead. Consider the following:

(1) A mother, late for a PTA meeting, weaves through traffic driving 80 m.p.h. in a 55 m.p.h. speed zone. If she causes a collision that kills another driver and hurts his passenger, might she be subject to a death sentence for her actions?

(2) A corner-cutting contractor building a bleacher for a local college uses five-inch bolts instead of the six-inch bolts required by a safety statute.[4] If those bleachers later col-

4. When a safety statute (such as one designating a specific bolt size or length) is violated, culpable negligence exists where the violation is "accompanied by reckless-

lapse, killing one fan and injuring another, could the contractor face a capital trial?

Under the felony murder rule as espoused by the State in the instant case, both the mother and contractor could be tried capitally for their respective offenses—an extreme result to be sure and, not insignificantly, one without precedent in our state's jurisprudence. As our courts have never before yielded such results, we are equally certain the legislature neither contemplated nor intended such apparent injustices when it amended the state's murder statute in 1977. Moreover, we refuse to rely on prosecutorial discretion as a means to determine whether one criminally negligent driver should be tried capitally (as defendant in the instant case was) while another (the hypothetical mother) should not. If culpable negligence is to be a building block of a capital case, it must be by clear mandate of the legislature and not by judicial fiat or through innovative application by prosecutors. *See Price v. Edwards*, 178 N.C. 493, 101 S.E. 33 (1919) (holding that General Assembly is not presumed to intend innovations upon the common law and, accordingly, innovations not within the Assembly's intentions shall not be carried into effect). As a consequence, we hold that defendant's first-degree murder convictions must be reversed. In addition, we find there is ample evidence in the record to support a charge of the lesser included offense of second-degree murder. Therefore, pursuant to N.C.G.S. § 15A-1447(c), this case is remanded for proceedings not inconsistent with this opinion.

II

[2] Defendant additionally contends that the trial court erred by admitting evidence of his pending DWI charge and by omitting his proffered jury instruction on proximate cause and insulating acts of negligence. We disagree.

Evidence of defendant's pending DWI charge was used to demonstrate that he had the requisite state of malice, one of the elements of the charge of second-degree murder that was submitted to the jury. Rule 404(b) of the North Carolina Rules of Evidence allows evidence of other crimes, wrongs, or acts by a defendant if it is used to show a

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ness or probable consequences of a dangerous nature." *Hancock*, 248 N.C. at 435, 103 S.E.2d at 494 (1958). Thus, using the theory espoused by the State in the instant case, the contractor's actions as described would qualify for prosecution as first-degree murder under the felony murder rule.

mental state such as malice. *State v. Byers*, 105 N.C. App. 377, 383, 413 S.E.2d 586, 589 (1992). While we recognize that such evidence may not be used to show a defendant's propensity to commit a crime, *id.*, we agree with the State's contention that the circumstances attendant to the pending DWI charge—defendant was speeding on the wrong side of the road and ran another motorist off the road while impaired—demonstrate that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life. Thus, such evidence tended to show malice on the part of defendant and was properly admitted under Rule 404(b).

[3] As for defendant's contention that the trial court erred by failing to instruct the jury on proximate cause and insulating acts of negligence, we find his arguments to be unpersuasive. Defendant's requested instruction required the jury to find his actions were the sole and only proximate cause of the collision in order to hold him criminally liable. As such an instruction is a misstatement of the law, the trial court properly rejected it. *See State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985) (holding that defendant's culpable negligence need not be the only proximate cause of a victim's death in order to be found criminally liable; a showing that defendant's actions were one of the proximate causes is sufficient).

As to the jury instruction for insulating acts of negligence, the trial court again was correct in not submitting the charge. In order for the negligence of another to insulate defendant from criminal liability, that negligence "must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient to find him criminally liable." *Id.* As the Court of Appeals duly noted in the case *sub judice*, *see Jones*, 133 N.C. App. at 461, 516 S.E.2d at 414, the record shows no evidence of any negligence on the part of Penney while driving her automobile. Defendant was in Penney's lane of travel and she was forced to swerve into the left lane in an effort to avoid a collision. Defendant's argument that Penney should have swerved to the right and hit a telephone pole and/or mailboxes is entirely unpersuasive and is, accordingly, overruled.

As a result, we affirm the Court of Appeals' finding of no error on the part of the trial court involving defendant's multiple convictions for AWDWISI, AWDW or DWI. However, as we have reversed defendant's convictions of and sentences for first-degree murder, it is not necessary to arrest judgments for the AWDWISI convictions, as they

are no longer underlying felonies for the murders. We thus remand the AWDWISI convictions to the Court of Appeals for further remand to the trial court for sentencing.

In conclusion, as a result of the foregoing analysis, we affirm the Court of Appeals' holding of no error as to defendant's convictions and sentences for AWDW and DWI. We reverse the decision of the Court of Appeals as well as defendant's convictions and sentences of life imprisonment without parole for the first-degree murders of Julie Marie Hansen and Maia C. Witzl, and we remand those cases to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion. Finally, we affirm the Court of Appeals' holding of no error as to defendant's convictions for AWDWISI, but we remand those three cases to the Court of Appeals for further remand to the trial court for sentencing.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART, AND REMANDED FOR SENTENCING IN PART.

STATE OF NORTH CAROLINA v. ALLEN RICHARD HOLMAN

No. 200A99

(Filed 21 December 2000)

1. Homicide— first-degree murder—short-form indictment

Although the short-form indictment used to charge defendant with first-degree murder did not allege the elements of premeditation and deliberation, 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.

2. Homicide— first-degree murder—indictment—aggravating circumstances

Although the short-form indictment used to charge defendant with first-degree murder did not allege the aggravating circumstances upon which the State intended to rely at trial, the trial court did not err in concluding the indictment was constitutional because the State is not required to allege aggravating circumstances upon which it intends to rely.

3. Sentencing— capital—aggravating circumstance—especially heinous, atrocious, or cruel

The trial court did not err during a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel in a situation where defendant-husband chased and rammed his victim-wife's car, returned to the parking lot once the first officer had left, shot the victim in the back, got back into his car, shot the victim again, and left the victim helpless on the ground, because: (1) the victim was aware of who was pursuing her and feared for her life; (2) a reasonable jury could find that defendant's actions were calculated to torture the victim psychologically and to leave her aware that she was helpless to prevent impending death; and (3) the method chosen by defendant to carry out the killing was conscienceless and pitiless inflicting excessive fear and psychological torture.

4. Evidence— capital first-degree murder—motion in limine—deferred ruling

The trial court did not err during a capital sentencing proceeding by deferring its ruling on defendant's motion in limine concerning whether introduction of certain evidence including a letter and photograph would open the door to permit the State to introduce evidence of defendant's prior convictions, because: (1) the trial court could not know whether the context of the questioning or the specific questions themselves would open the door to evidence of defendant's prior convictions; and (2) defendant's decision not to introduce the evidence was a purely tactical one based on the possibility that the questioning might open the door to undesired cross-examination.

5. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence because: (1) defendant led police on a car chase away from the victim and demonstrated a callous lack of concern for the victim during his conversation with the victim's co-worker; and (2) the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel is sufficient standing alone to support a death sentence.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Spencer (James C.,

Jr.), J., on 7 April 1998 in Superior Court, Wake County, upon defendant's plea of guilty of first-degree murder. Heard in the Supreme Court 16 October 2000.

Michael F. Easley, Attorney General, by Joan M. Cunningham, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Allen Richard Holman was indicted on 19 August 1997 for the first-degree murder of his wife, Linda J. Holman. On 17 March 1998, prior to jury selection, defendant entered a plea of guilty to first-degree murder on the basis of premeditation and deliberation. A jury was empaneled to hear evidence and recommend a sentence to the trial court. At the conclusion of the capital sentencing proceeding, the jury recommended a sentence of death for the murder; and the trial court entered judgment accordingly. For the reasons discussed herein, we conclude that defendant's capital sentencing proceeding was free from prejudicial error.

The State's evidence presented at the sentencing proceeding tended to show that on 6 July 1997 the victim called the Morrisville Police Department and stated that she believed that her husband, defendant, would kill her if she returned home. Police officers were dispatched to meet the victim at the location from which she placed the call and to escort her home. When the officers met the victim, she appeared hysterical; she was crying and shaking, and she acted terrified. The officers escorted the victim home and spoke to defendant, who apologized for causing the officers to be called out and told the officers that he was packing to move away. Defendant was allowed to collect his remaining property and left with a warning from the officers that he would be cited for trespass if he returned.

The next day the victim unsuccessfully attempted to remove defendant's name from the lease to the home she rented, and she contracted to have a security system installed. Sometime thereafter, the victim began parking her car so that it faced the road and was closer to the door to the house; changed her phone number and the locks on her house; nailed the windows of her house shut; and began keeping the curtains drawn so that defendant could not shoot her from outside the house. The victim told the law enforcement agencies of

nearby municipalities that she feared defendant would kill her, and she verified that officers knew how to get to her house. The victim also circulated a petition to have the street that she lived on officially named to enable quicker response from police and emergency personnel. Witnesses testified that from 6 July 1997 to 28 July 1997 the victim repeatedly told them that she was terrified that defendant was going to kill her.

Around 6:04 a.m. on 28 July 1997 the victim called 911 from her cellular phone and told the dispatcher that she was driving eighty-five to ninety miles per hour on Highway 55 towards Apex, North Carolina, with defendant chasing her in his own car. The victim also told the dispatcher that defendant was trying to kill her and that he was ramming her vehicle with his own vehicle.

The dispatcher alerted police officers and told the victim that officers were waiting farther up the road for her car to pass them. The victim spotted an officer's car in a grocery store parking lot and stopped her car next to it. The officer in the car saw defendant make a quick turn and drive away. The victim was terrified, but the officer told her to wait in the parking lot for other officers to arrive; and the officer began pursuit of defendant.

Defendant eluded the officer and returned to the parking lot where the victim was still waiting for the other officers to arrive. A short time later Sergeant Denson, an officer with the Apex Police Department, pulled into the parking lot and saw defendant's car parked in front of the victim's car and defendant standing beside his driver's side door holding a shotgun. Defendant then got into his car, pointed the shotgun out the window, fired a shot, and drove away. As Sergeant Denson began chasing defendant in his own car, he saw the victim lying on the ground on the driver's side of her car in a pool of blood. Sergeant Denson pursued defendant and requested that other officers attend to the victim. When the officers requested by Sergeant Denson arrived at the parking lot, they found the victim's lifeless body lying face-up on the ground by her car.

Upon leaving the parking lot defendant drove back towards the victim's house with officers in pursuit. When he arrived at the victim's house, defendant held police at bay for a time before shooting himself in the abdomen. During this time in a phone conversation with a co-worker of the victim, defendant admitted shooting the victim twice in the parking lot. Defendant later also admitted to an officer that he had shot the victim. Police officers took defendant into cus-

tody. Defendant was subsequently treated by medical personnel for the self-inflicted wound.

The medical examiner who performed the autopsy on the victim found two shotgun slug entry wounds in the victim's back. The medical examiner further determined the cause of death to be massive blood loss attributable to these wounds.

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

JURISDICTIONAL ISSUE

[1] Defendant first contends that the short-form murder indictment violated his rights under the Fifth, Sixth, and Eighth Amendments as incorporated by the Fourteenth Amendment Due Process Clause of the United States Constitution and his rights under Article I, Sections 19, 22, and 23 of the North Carolina Constitution as it failed to allege all the elements of first-degree murder and failed to allege aggravating circumstances on which the State intended to rely for imposition of the death penalty.

The indictment against defendant for murder contained the following language:

> The jurors for the State upon their oath present that on or about the 28th day of July, 1997, in Wake County the defendant . . . unlawfully, willfully and feloniously and of malice aforethought did kill and murder Linda J. Holman. This act was done in violation of G.S. 14-17.

This indictment complied with the requirements of N.C.G.S. § 15-144, for a short-form murder indictment. 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). This Court has consistently held that a short-form indictment complying with N.C.G.S. § 15-144 satisfies the North Carolina Constitution. *See, e.g., State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 789, 792-93 (1985).

In *Jones v. United States*, relied on by defendant, the United States Supreme Court stated 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." *Jones*, 526 U.S. 227, 243 n.6, 143 L. Ed. 2d

311, 326 n.6 (1999). In *Apprendi v. New Jersey*, — U.S. —, —, 147 L. Ed. 2d 435, 446 (2000), the Court reaffirmed that portion of *Jones* in applying it to state criminal proceedings. Relying on this language from *Jones*, defendant argues that the short-form murder indictment in this case is insufficient in that it does not allege premeditation and deliberation.

However, in *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), this Court reviewed a short-form murder indictment in light of the recent decision by the United States Supreme Court in *Apprendi* and held that the short-form indictment is sufficient to allege first-degree murder under the United States Constitution:

> 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.

Id. at 175, 531 S.E.2d at 437-38. Considered in light of our recent decision in *Braxton* as well as our decisions in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, — U.S. —, 2000 WL 1468566 (Nov. 27, 2000) (No. 00-6281), and *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000), defendant's argument that the short-form murder indictment violates his Fourteenth Amendment Due Process rights is without merit.

Defendant also argues that the statute authorizing short-form indictments, N.C.G.S. § 15-144, is unconstitutional in that: (i) the statute violates the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and of Article I, Section 19 of the North Carolina Constitution by singling out a class of defendants and impinging on their fundamental right to notice under the Sixth Amendment; and (ii) the short-form murder indictment does not allow a defendant to determine whether the grand jury voted to indict the defendant for first-degree or second-degree murder.

Addressing defendant's claim that the short-form murder indictment violates the Equal Protection Clauses, we disagree that any existing classification impinges upon defendant's Sixth Amendment right to notice or his rights under Article I, Section 19 of the North Carolina Constitution. As we explained in *Braxton*, by reference to N.C.G.S. § 14-17 "[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." *Braxton*, 352 N.C. at 175, 531 S.E.2d at 437-38. Therefore, the short-form indictment gave defendant notice of all elements of first-degree murder; and defendant's right to notice has not been impinged upon.

As to defendant's argument that the indictment does not allow a defendant to determine whether the grand jury voted to indict the defendant for first-degree or second-degree murder, defendant did not make an assignment of error on this basis and is, thus, procedurally barred from arguing this issue on appeal. N.C. R. App. P. 10(a).

[2] Defendant next argues that the short-form murder indictment was unconstitutional in that it failed to allege the aggravating circumstances upon which the State intended to rely at trial. Defendant also contends that the trial court erred in denying defendant's motion for a bill of particulars to determine the aggravating circumstances upon which the State intended to rely. This Court recently held in *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), that, even in light of *Jones* and *Apprendi*, the State is not required to allege aggravating circumstances in the indictment; and a trial court may not require the State to disclose the aggravating circumstances upon which it intends to rely. *Id.* at 396-97, 533 S.E.2d at 193-94. Defendant has made no new argument and has cited no additional authority persuading us to depart from this holding.

Based on the foregoing, we conclude that the trial court did not err in denying defendant's motion to quash the indictment, defendant's motion to dismiss the indictment, and defendant's motions for bills of particulars or by accepting defendant's guilty plea to first-degree murder and entering judgment on the jury's recommendation of death.

SENTENCING ISSUES

[3] Defendant next assigns error to the trial court's submission to the jury of the aggravating circumstance that the murder was especially

heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1999). Defendant argues that the evidence was insufficient to support the (e)(9) aggravating circumstance. We disagree.

Whether the trial court properly submitted the (e)(9) aggravating circumstance depends upon the particular facts and circumstances of this case. *See State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Furthermore, "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. Fleming*, 350 N.C. 109, 119, 512 S.E.2d 720, 729, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 274 (1999); *see also State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

This Court has held that in determining whether sufficient evidence was presented to support submission of the (e)(9) aggravating circumstance, it is relevant whether the murder was a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Flippen*, 349 N.C. at 270, 506 S.E.2d at 706. We have interpreted the phrase "unnecessarily torturous" to encompass both physical and psychological torture, and to include a killing that leaves the victim aware of impending death but helpless to prevent it. *See Gibbs*, 335 N.C. at 61-62, 436 S.E.2d at 356. Likewise,

> where the facts in evidence support a finding that a victim is stalked and during the stalking the victim is aware of it and in fear that death is likely to result, the issue of whether the murder is especially heinous, atrocious, or cruel may be properly submitted for jury consideration.

State v. Moose, 310 N.C. 482, 494, 313 S.E.2d 507, 515 (1984).

Applying these principles to the case at hand, we conclude that ample evidence supported submission of this circumstance to the jury. In *Moose* this Court held that evidence that the victim was chased in his car by a stranger and killed when they both stopped was insufficient to allow submission of the (e)(9) circumstance. *Moose*, 310 N.C. at 494-96, 313 S.E.2d at 516. The Court held that there was no evidence that the victim feared for his life, as he did not know who was chasing him and, therefore, did not know what was going to happen when he stopped his car. *Id.* at 495, 313 S.E.2d at 516. By contrast, the victim in this case was well aware of who was pursuing her and, as a result, did fear for her life. While being chased by defend-

ant, the victim said to the 911 operator, "my husbands [sic] trying to kill me," and, "Oh please God. Oh please I don't want to die now." The victim, by her own explicit statements, knew who was chasing her and feared that death would be the likely result.

Defendant further contends that once the victim reached the safety of the first officer in the parking lot, her fear subsided and she was, therefore, not fearful of death immediately before the shooting occurred. We address this contention assuming *arguendo* that the victim no longer feared for her life once she reached the officer and that such a determination is relevant. Defendant's contention that the victim's state of mind at the time of the killing was mere apprehension and uncertainty, like the victim in *Moose*, ignores the terrible fear the victim must have felt when defendant returned to the parking lot and no officers were present to protect her. Likewise, the victim would have feared for her life between the time when defendant first shot her and when he shot her the second time from his car. A jury could reasonably find that these actions, in addition to defendant's chasing and ramming the victim's car with his own, left "the victim in her 'last moments aware of but helpless to prevent impending death.' " *Gibbs*, 335 N.C. at 62, 436 S.E.2d at 356 (quoting *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984)).

Defendant also contends that his actions were not calculated to cause the victim unnecessary fear; rather, defendant took only the actions necessary to carry out his goal of killing her. This Court has never held that a defendant must intend or calculate the excessive psychological torture of his victim for a murder to be deemed especially heinous, atrocious, or cruel. The critical inquiry is whether the murder was in fact physically or psychologically torturous. *See, e.g.*, *Gibbs*, 335 N.C. at 61-62, 436 S.E.2d at 356 ("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)"); *Brown*, 315 N.C. at 66, 337 S.E.2d at 827 ("killings which are less violent, but involve the infliction of psychological torture, placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death"); *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983) ("focus should be on whether the facts of the case disclose *excessive* brutal-

ity, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*"). Even were we to hold that evidence of calculation by defendant is required, in this case defendant chased and rammed the victim's car, returned to the parking lot once the first officer had left, shot the victim in the back, got back into his car, shot the victim again, and left the victim helpless on the ground. Viewing this evidence in the light most favorable to the State, a reasonable jury could find that defendant's actions were calculated to torture the victim psychologically and to leave her aware that she was helpless to prevent impending death.

The method chosen by defendant to carry out the killing was conscienceless and pitiless inflicting excessive fear and psychological torture. Therefore, we conclude that sufficient evidence was presented to allow the trial court to submit the (e)(9) aggravating circumstance to the jury. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in deferring its ruling on whether introduction of certain evidence by defendant would open the door to permit the State to introduce irrelevant and prejudicial evidence about defendant's prior convictions. Defendant argues that the trial court's refusal to rule violated defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution in that defendant was thereby improperly discouraged from seeking to introduce these items into evidence.

During the sentencing proceeding defendant contemplated introducing into evidence a recent letter found in the victim's car from the victim to her ex-husband, Jamie Johnson, and photographs of Johnson, including one nude photograph, that were found by the victim's bed. Defendant considered introduction of these items as evidence that the victim was rekindling the old relationship and, therefore, as evidence in support of the mitigating circumstance that defendant was acting under a mental or emotional disturbance at the time of the killing.

Defendant moved for a ruling that introduction of the letter and photographs would not "open the door" to allow the State to introduce the following evidence, which the trial court had previously ruled was irrelevant: that defendant was Johnson's cellmate when Johnson was still married to the victim, that defendant initially met the victim while defendant was a cellmate with Johnson, and the underlying charge for defendant's prison term at that time. The trial

court deferred ruling on the motion until it heard defendant's questions and their context in introducing the letters and photographs, stating:

> Well, I think that door—while it might get open—I don't think it automatically flies open . . . .
>
> . . . .
>
> . . . [N]either can I say that the door would not be opened, depending on what's asked. So, I mean, that's a matter they'll have to consider, I suppose.

Defendant chose not to introduce the letter and pictures, and now argues that the trial court's failure to make an immediate ruling improperly chilled defendant's right to present evidence. We disagree.

Though this motion was not made as a pretrial motion, it appears to be in the nature of a motion *in limine*; thus, we will address it as such. *See State v. Hightower*, 340 N.C. 735, 746, 459 S.E.2d 739, 745 (1995). The decision whether to grant a motion *in limine* rests in the discretion of the trial court. *Id.* at 746-47, 459 S.E.2d at 745.

The trial court had already decided that evidence of defendant's prior convictions was irrelevant to the sentencing proceeding. "However, '[t]his Court has consistently permitted the introduction of evidence in explanation or rebuttal of a particular fact or transaction even though such latter evidence would be incompetent or irrelevant had it been offered initially.' " *State v. Bishop*, 346 N.C. 365, 389, 488 S.E.2d 769, 782 (1997) (quoting *State v. Alston*, 341 N.C. 198, 234, 461 S.E.2d 687, 706 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996)).

In this case the trial court could not properly rule upon defendant's motion when it was made, as the trial court could not know whether the context of the questioning or the specific questions themselves would open the door to evidence of defendant's prior convictions. In *State v. White*, 340 N.C. 264, 288-89, 457 S.E.2d 841, 855, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995), this Court held that even though the State's evidence was inadmissible, the trial court did not err in refusing to rule on defendant's motion *in limine* to prohibit cross-examination about the inadmissible evidence, as the trial court could not know if defendant would open the door to the cross-examination.

At the point when the trial court deferred its ruling in the present case, it did not have sufficient information to decide upon the motion knowledgeably. Therefore, the trial court did not abuse its discretion by deferring its ruling on the motion until sufficient information was presented to allow the trial court to make a proper and informed decision.

Defendant's reliance upon this Court's decision in *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988), to support his argument that the trial court's failure to make an immediate ruling impermissibly chilled defendant's right to present evidence is misplaced. In *Lamb* this Court held that the trial court's "bald denial" of the defendant's motion to exclude statements that appeared inadmissible on their face impermissibly chilled the defendant's right to testify where it was obvious that the defendant's decision not to testify was based on the ruling. *Id.* at 649, 365 S.E.2d at 609. However, in this case the trial court did not issue a bald denial; the trial court merely deferred its ruling. Defendant's decision not to introduce the evidence in question was a purely tactical one based on the possibility that the questioning might open the door to undesired cross-examination. Defendant's choice of tactics in this instance did not implicate any of his rights. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises five additional issues which he concedes have previously been decided contrary to his position by this Court: (i) whether the instructions to the jury on the "especially heinous, atrocious, or cruel" aggravating circumstance were unconstitutionally vague, as they failed to distinguish death-eligible murders from those which are not death-eligible; (ii) whether the trial court erred by denying defendant's motion for allocution; (iii) 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; (iv) whether the trial court committed constitutional error in allowing the jury to refuse to give effect to mitigating evidence if the jury deemed the evidence not to have mitigating value; and (v) whether the death penalty is inherently cruel and unusual and the North Carolina capital sentencing scheme unconstitutionally vague and overbroad.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings. We have considered defendant's arguments on these issues and conclude that defendant has demonstrated

no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY

[5] Finally, defendant argues that the death sentence imposed in this case is disproportionate to the sentences imposed in similar cases, considering both the crime and the defendant. 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, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no 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.

Defendant pled guilty to first-degree murder based on premeditation and deliberation. At defendant's sentencing proceeding, the jury found one of the submitted aggravating circumstances: that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). A second aggravating circumstance was submitted to but not found by the jury: 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).

The jury found one statutory mitigating circumstance: that the murder was committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2). The catchall statutory mitigating circumstance was submitted to but not found by the jury. N.C.G.S. § 15A-2000(f)(9). Of the eight nonstatutory mitigating circumstances submitted, the jury found that two had mitigating value: (i) that defendant suffered from depression which was exacerbated by a series of events which followed his on-the-job injury, and (ii) that defendant's attempt to reconcile with his wife failed.

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 dispropor-

tionate 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 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.

Of the seven cases where we have held the death sentence to be disproportionate, only *Stokes* and *Bondurant* involved the especially heinous, atrocious, or cruel aggravating circumstance. *See State v. Spruill*, 338 N.C. 612, 664, 452 S.E.2d 279, 307 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). Significant dissimilarities between *Stokes* and the case at hand include that: (i) the defendant in *Stokes* was only seventeen years old, *see Stokes*, 319 N.C. at 11, 352 S.E.2d at 658; whereas, defendant in this case was thirty-eight; and (ii) in *Stokes* no evidence showed who was the ringleader, *id.* at 21, 352 S.E.2d at 664; whereas, defendant in this case was solely responsible for his crime. The present case is also significantly different from *Bondurant*, wherein the defendant immediately exhibited remorse and concern for the victim's life by helping him get medical treatment. *See Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. By contrast, defendant in this case led police on a car chase away from the victim and demonstrated a callous lack of concern for the victim during his conversation with the victim's co-worker.

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). Noting that this Court has held that the (e)(9) aggravating circumstance, standing alone, is sufficient to support a sentence of death, *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), we conclude that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

See, e.g., State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987) (death sentence upheld where the defendant, suffering from mental and emotional problems, threatened his ex-girlfriend, followed her to a public place, and stabbed her to death after initially being deterred by bystanders, and where the jury found that the (e)(9) aggravating circumstance existed), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984) (death sentence upheld where the defendant threatened his ex-girlfriend, stabbed her to death in a public parking lot, and showed no remorse for the crime, and where the jury found the (e)(9) aggravating circumstance to be present), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (death sentence upheld where the defendant, suffering from mental and emotional problems, threatened his estranged wife for months before following her to the crime scene and killing her and showed no remorse for the crime, and where the jury found the (e)(9) aggravating circumstance to be present), *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240 (1981).

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.

JOHN BRENT FROST AND CAROLYN FROST AND PERSONS SIMILARLY SITUATED v. MAZDA MOTOR OF AMERICA, INC.; MAZDA MOTORS OF AMERICA (EAST), INC.; PRIMUS AUTOMOTIVE FINANCIAL SERVICES, INC. D/B/A MAZDA AMERICAN CREDIT; AL SMITH BUICK CO., INC., A NORTH CAROLINA CORPORATION D/B/A AL SMITH BUICK DODGE MAZDA; AUTOMOBILES OF ASHEBORO, INC., A NORTH CAROLINA CORPORATION D/B/A ASHEBORO HONDA MAZDA; BOB KING, INC., A NORTH CAROLINA CORPORATION D/B/A BOB KING MAZDA KIA; BURLINGTON LINCOLN-MERCURY LEASING CORPORATION, A NORTH CAROLINA CORPORATION D/B/A BURLINGTON LINCOLN MERCURY/BILL INGOLD MAZDA; CITY MOTORS, INC., A NORTH CAROLINA CORPORATION T/A CITY MOTORS; CHARLES FISHER, INC., A NORTH CAROLINA CORPORATION D/B/A FISHER MAZDA; FREMA MOTORS, INC., A NORTH CAROLINA CORPORATION T/A FREMA MOTORS; GRANT BUICK, INC., A NORTH CAROLINA CORPORATION T/A GRANT BUICK MAZDA; DIEFFENBACH CHEVROLET-BUICK, INC., A NORTH CAROLINA CORPORATION D/B/A HANK DIEFFENBACH MAZDA; HENDRICK MANAGEMENT CORPORATION, A NORTH CAROLINA CORPORATION D/B/A HENDRICK MAZDA; HOLIDAY CARS, INC., A NORTH CAROLINA CORPORATION D/B/A HOLIDAY CHRYSLER PLYMOUTH MAZDA; HOWELL BUICK, INC., A NORTH CAROLINA CORPORATION

D/B/A HOWELL BUICK MAZDA; SPORTS AND IMPORTS OF HICKORY, INC., A NORTH CAROLINA CORPORATION D/B/A ROBERTS MAZDA MITSUBISHI OR SPORTS AND IMPORTS, INC.; A NORTH CAROLINA CORPORATION D/B/A ROBERTS MAZDA; SKY COUNTRY NISSAN, INC., A NORTH CAROLINA CORPORATION D/B/A SKY COUNTRY NISSAN MAZDA; SONNY HANCOCK CHEVROLET, INC., A NORTH CAROLINA CORPORATION D/B/A SONNY HANCOCK MAZDA; HMMC, INC., A NORTH CAROLINA CORPORATION D/B/A VESTER HONDA, VESTER MAZDA OF WILSON AND VESTER HONDA-MAZDA; CABARRUS AUTO INVESTORS COMPANY, A NORTH CAROLINA LIMITED PARTNERSHIP, D/B/A MAZDA OF CONCORD; ALCOKE AUTO CENTER LLC, A NORTH CAROLINA CORPORATION D/B/A NEW BERN PONTIAC MAZDA; SALISBURY LINCOLN-MERCURY, INC., A NORTH CAROLINA CORPORATION D/B/A SALISBURY LINCOLN MERCURY MAZDA; C&S MOTOR COMPANY, INC., A NORTH CAROLINA CORPORATION D/B/A LOUGHLIN AUTOMOTIVES; LOUIS F. HARRELSON, INC., A NORTH CAROLINA CORPORATION D/B/A HARRELSON MAZDA; CHARLES MONTGOMERY MOTORS, INC., A NORTH CAROLINA CORPORATION D/B/A MONTGOMERY MAZDA; PARKS AUTOMOTIVE, INC., A NORTH CAROLINA CORPORATION D/B/A PARKS MAZDA; W.R. WILLIAMSON, INC., A NORTH CAROLINA CORPORATION D/B/A WILLIAMSON MAZDA

No. 582PA99

(Filed 21 December 2000)

1. Appeal and Error— interlocutory appeals—certification of class

In an action arising from an undisclosed fee charged in the purchase of a leased car, no substantial right was involved in the trial court's determination that the case met the prerequisites for a class action, and the general rule disallowing interlocutory appeals of such orders applied. No case allowing class certification has been held to affect a substantial right such that an interlocutory appeal would be permitted.

2. Class Actions— notification of class—cost to defendant

In a class action arising from an undisclosed fee charged in the purchase of a leased automobile, the question of whether a trial court abused its discretion by ordering that defendant assume the onus of identifying and sending notice to the class was interlocutory, but was heard on appeal because the question is important to all class actions. The usual rule is that a plaintiff must bear the cost of notice to the class, but exceptions exist and the touchstone is to honor the broad discretion allowed the trial court in all matters pertaining to class certification. There was no abuse of discretion here given the nearly negligible estimated cost of the notice and the court's articulated reason for shifting the cost to defendant (defendant's unique control over the identities of the class members).

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order allowing class certification entered 19 May 1999 by Carter (Clarence W.), J., in Superior Court, Forsyth County, and the Court of Appeals' 6 December 1999 order dismissing the action. Heard in the Supreme Court 12 September 2000.

Wilson & Iseman, L.L.P., by Urs R. Gsteiger; Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellees.

Poyner & Spruill, L.L.P., by David M. Barnes; and Sutherland Asbill & Brennan LLP, by Thomas M. Byrne, pro hac vice, for defendant-appellant Primus Automotive Financial Services, Inc.

FREEMAN, Justice.

This is a class action lawsuit brought by named plaintiffs to recover a $158.50 fee charged by the Mazda dealership when plaintiffs exercised their option to buy their leased vehicle. Plaintiffs' lease agreement with the dealer (on a "Mazda American Credit" form) failed to disclose that any such fee would be charged in addition to the purchase-option price stated in the agreement.[1] The fee nevertheless appeared in a space designated "DEL. & HDLG." on the dealer's "Retail Buyer[']s Order and Invoice" executed by plaintiffs when they purchased the vehicle.

On 27 March 1998, plaintiffs filed an amended class action complaint against their Mazda dealer and, on behalf of all other lessee-purchasers of Mazda vehicles similarly situated between 1994 and 1998, against every Mazda dealer in North Carolina, two North American manufacturers of Mazdas, and PRIMUS (d/b/a Mazda American Credit). PRIMUS is a finance company that takes assignment of the lease from the dealer, buys the leased vehicle, and collects payments from the lessee. If the lessee ultimately chooses to buy the vehicle, PRIMUS sells the car back to the dealer, which then sells it to the lessee. Plaintiffs alleged their experience supported claims against all defendants of breach of contract, negligent misrepresentation, breach of warranty, fraud, and "unfair and deceptive trade practices." They further alleged that defendants' acts and omis-

1. The purchase option provision reads, in pertinent part:

"Purchase Option: The Lessee has the option to purchase the Vehicle at the end of the lease for $16[,]815.70. . . . Upon payment in cash of the purchase option price plus taxes, the Lessor shall deliver title to the Lessee."

sions, made knowingly or with willful and wanton disregard for plaintiffs' rights, supported an award of punitive damages.

The dealership defendants filed a motion to dismiss, which was granted to all but Bob King Mazda, the dealership from which plaintiffs leased, then purchased, their vehicle. Plaintiffs' claims against PRIMUS and the Mazda manufacturers remained extant.

Plaintiffs filed a notice of appeal of the dismissal, which they subsequently withdrew pursuant to a settlement agreement with all defendant dealerships, including Bob King Mazda. In accordance with the agreement's terms, plaintiffs also dismissed all claims against all dealership defendants.

This agreement was approved by a court order, which noted that the settlement included the dealerships' agreement to "pay plaintiffs' counsel the amount of $34,300.00 as reimbursement for part of the costs and attorneys' fees associated with the prosecution of this matter." In addition, in reciting plaintiffs' agreement to execute a tortfeasors' release of all (and only) the dealership defendants, the court stated it "makes no finding as to the adequacy or inadequacy of the Frosts as class representatives [and] makes no finding as to the legal effect of said release."

On 19 May 1999, the trial court granted plaintiffs' motion for class certification. The court found, *inter alia,* that a class of plaintiffs existed with an interest in the same issues of law and fact, including whether charging monies in addition to the purchase-option price plus taxes breached the lease, was an "unfair and deceptive practice" under chapter 75-1.1 of the North Carolina General Statutes, was fraudulent, and was sufficiently aggravated as to warrant the imposition of punitive damages. The court found that named plaintiffs would "fairly and adequately insure the representation of the interests of all class members," that "[t]here is no conflict of interest between the named plaintiffs and the class members," and that "named plaintiffs have a genuine personal interest in the outcome of the action." As to defendant PRIMUS, the court specifically found:

> As part of the relief granted for plaintiffs' motion to compel, defendant PRIMUS has been ordered to list the name, address, and telephone number of all persons who are potential class members; to wit: those persons who entered a net closed[-]end lease with PRIMUS doing business as Mazda American Credit

> which contained a purchase option similar to that in the representative plaintiffs' lease and were charged monies in addition to the purchase[-]option price plus taxes when they exercised their option to purchase. This information is uniquely within defendant PRIMUS' control but defendant PRIMUS withheld this information without objection and despite the fact that the parties had entered a consent confidentiality order. Under the circumstances the court finds it just and proper that defendant PRIMUS send the notice approved by the court to potential class members.

The court accordingly ordered PRIMUS to send the approved notice of the pending class action "to all potential class members by First Class United States Mail." The same day, the court entered an order on plaintiffs' motion to compel against PRIMUS, directing PRIMUS to answer designated interrogatories and produce certain named documents, but specifically deferring a ruling on plaintiffs' request for sanctions.

The Court of Appeals granted plaintiffs' motion to dismiss defendant PRIMUS' interlocutory appeal of the class certification order and dismissed as moot PRIMUS' petition for writ of certiorari. This Court granted PRIMUS' petitions for writs of certiorari and supersedeas, seeking a stay of the trial court's orders and review of the class certification order and the question whether under the circumstances of this case the order is immediately appealable.

[1] A class certification order is not a final judgment disposing of the cause as to all parties; the appeal of such orders is thus interlocutory. *See, e.g., Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E.2d 354 (1984) (court order denying class certification does not determine the controversy and is interlocutory). There is no right of immediate appeal from an interlocutory order, *e.g., Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992); but such appeals are allowed if they involve a matter of law or legal inference that affects a substantial right of the appellant, N.C.G.S. §§ 1-277(a) (1999), 7A-27(d)(1); *e.g., Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977) (interlocutory order is appealable if it affects a substantial right and will work injury to appellants if not corrected before final judgment).

The "substantial right" test for appealability of interlocutory orders is that "the right itself must be substantial and the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. American Motors*

Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990), *quoted in Travco*, 332 N.C. at 292, 420 S.E.2d at 428. The test is more easily stated than applied: "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

The *denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs. *E.g.*, *Perry v. Cullipher*, 69 N.C. App. at 762, 318 S.E.2d at 356 (if court errs in refusing to certify class action, named plaintiff may obtain judgment without other class members, but the latter will suffer an injury that cannot be corrected absent an appeal before final judgment); *see also Dublin v. UCR, Inc.*, 115 N.C. App. 209, 221, 444 S.E.2d 455, 462, *disc. rev. denied and appeal dismissed*, 337 N.C. 800, 449 S.E.2d 569 (1994).

Heretofore, however, no order *allowing* class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted. In *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, for example, the Court of Appeals granted certiorari to review an order granting class certification. The defendants contended the certification affected a substantial right because " 'trying this case as a class action . . . [would] be complex, expensive and time consuming,' and [would be] unduly burdensome on defendants given [the] contention that plaintiff Faulkenbury lack[ed] representative capacity" for the certified classes. 108 N.C. App. 357, 375, 424 S.E.2d 420, 429, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). The Court of Appeals flatly disagreed. It noted generally the trial court's broad discretion in determining whether to certify a class action. *Id.* at 376, 424 S.E.2d at 430 (citing *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987). It noted further that the trial court had made explicit findings as to the appropriateness of a class action according to criteria stated in *Crow* and reaffirmed the policy that "class actions are appropriate and should be permitted when they can 'serve useful purposes' such as preventing a multiplicity of suits or inconsistent results." *Id.* (quoting *Crow*, 319 N.C. at 284, 354 S.E.2d at 466). Finally, the court rejected the defendants' substantive contention that the named plaintiff was not sufficiently representative of the subclasses, observing that the class members were so numerous as to make individual actions impractical and a class action efficient and that the named

plaintiff's interest in the suit was "genuine and typical of the claims of the other class members." *Id.*

In this case, as in *Faulkenbury*, defendant challenges the class certification order on several grounds, among them that plaintiffs lack representative capacity for the class and that the class claims differ so greatly that they cannot be adjudicated as a class action. We conclude here as the Court of Appeals did in *Faulkenbury* that no substantial right is involved in a trial court's determination that a case meets the prerequisites to utilizing a class action as specified in *Crow*, and that the general rule disallowing interlocutory appeals of such orders applies.

[2] Defendant also contends, however, that the trial court's directing it to assume the onus of identifying class members and sending notice to the class "affects a substantial right" and that for this reason defendant is entitled to immediate appeal of the order. We disagree.

Because the cost of sending notice to plaintiff class in this case is estimated to be modest (less than $500.00), and because the assessment of such costs is reviewable upon appeal from a final judgment in this case, we fail to see how defendant's right not to bear these costs would be "lost or irremediably adversely affected," *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983), if the order is not immediately reviewed. "If appellant's rights 'would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment,' there is no right to an immediate appeal." *Howell v. Howell*, 89 N.C. App. 115, 116, 365 S.E.2d 181, 182 (1988) (quoting *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980)).

Under uncomplicated circumstances such as these, in which a court's directive to pay modest fees or costs (or denying such requests) is part of an order that is not itself immediately appealable, but which directive, if protected by exception, may be reviewed after final judgment, no substantial right is involved. Like the order certifying plaintiff class of which it is part, the directive is thus not appealable before final judgment.[2] *See, e.g., State ex rel. Martin v. Sloan*, 69

2. We note that this issue would no more be immediately appealable as a "collateral matter" under the federal test for interlocutory appeals than it is under the substantial rights doctrine. It does not " '*finally determine* [appellants'] claims of right separable from, and collateral to, rights asserted in the action, too *important* to be denied review and too independent of the cause to require that appellate consideration be deferred until the whole case is adjudicated.' " *Eisen v. Carlisle & Jacquelin*, 417

N.C. 128 (1873) (the Supreme Court will not decide a case on the question of costs alone unless some substantial right is involved). Cases holding otherwise are distinguishable by the complexity or finality of their facts. *See e.g.*, *Lowder v. All-Star Mills Inc.*, 309 N.C. 695, 309 S.E.2d 193 (1983) (interlocutory court order awarding fees to receivers' counsel appealable when employment of counsel by receivers held improper and counsel discharged before culmination of underlying action); *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (premature summary judgment for balance due on note without considering issue of set-off or credit affected plaintiff's substantial right when execution entered on judgment and lien imposed on plaintiff's funds, but procedures to stay execution would involve substantial expense); *Waldo v. Wilson*, 177 N.C. 461, 100 S.E. 182 (1919) (when plaintiffs instigated unnecessary appeal, order taxing defendant with cost of copying transcript appealable); *Horner v. Oxford Water & Elec. Co.*, 156 N.C. 494, 72 S.E. 624 (1911) (ruling on motion to apportion costs reviewable when court lacked power); *May v. Darden*, 83 N.C. 237 (1880) (although general rule is that no appeal lies from a judgment for costs only, exception in favor of executors as fiduciaries makes decision in such cases one affecting substantial rights); *Miller v. Henderson*, 71 N.C. App. 366, 322 S.E.2d 594 (1984) (order granting request for attorneys' fees from dismissed defendants was substantially same as partial judgment against plaintiff for monetary sum and as such affected substantial right).

Nonetheless, because this question is important to all class actions, we granted certiorari and so exercise our supervisory powers over the courts of this state, N.C.G.S. § 7A-32(b) (1999), to address whether it is ever proper to direct a defendant to assume the onus and costs of notifying putative members of the plaintiff class.

U.S. 156, 171-72, 40 L. Ed. 2d 732, 744-45 (1974) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 1536 (1949)) (emphasis added). Unlike the order at issue in *Eisen* or an interlocutory order granting a motion to disqualify counsel, *see Goldston*, 326 N.C. at 726, 392 S.E.2d at 736, this order is not "effectively unreviewable on appeal from a final judgment," *id.* at 727-28, 392 S.E.2d at 737; *accord Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375, 66 L. Ed. 2d 571, 579 (1981).

We note in addition that directing defendant to send notice to class plaintiffs, while stated as part of the certification order, was specifically "part of the relief granted for plaintiffs' motion to compel." As such, this directive could be viewed as having been imposed upon defendant as a discovery sanction authorized by Rule 37(b) of the North Carolina Rules of Civil Procedure. But a separate order on plaintiff's motion to compel issued the same day by the same judge, which specifically "deferred" ruling on plaintiffs' request for sanctions, makes it clear it was not.

This is a question of first impression in this jurisdiction. Our appellate courts have been careful to distinguish North Carolina's Rule 23 and its construction from its federal counterpart and commentary by federal courts. *See, e.g., Crow*, 319 N.C. at 279, 354 S.E.2d at 463 (assuming General Assembly rejected three additional subparagraphs of Rule 23 to simplify class actions and to provide greater flexibility); *Dublin*, 115 N.C. App. at 219, 444 S.E.2d at 461 (noting "substantial differences" between Rule 23 in North Carolina and its federal counterpart).[3] Nevertheless, our courts have been attentive to the interpretation of Rule 23 by the federal courts and have been guided by such interpretation when appropriate. *See, e.g., Gibbons v.*

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3. N.C. R. Civ. P. 23 provides, in pertinent part:

Rule 23. Class actions.

(a) Representation.—If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

. . . .

(c) Dismissal or compromise.—A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

N.C.R. Civ. P. 23(a), (c). Analogous provisions of Fed. R. Civ. P. 23 provide:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

. . . .

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23(a), (e). Subsection (f) of the federal rule explicitly permits the court of appeal to accept interlocutory appeal from an order of a district court granting or denying class action certification if application is made within ten days after entry of the order:

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after an entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f) (1998).

CIT Grp./Sales Fin., Inc., 101 N.C. App. 502, 506, 400 S.E.2d 104, 106 (finding "persuasive" the logic of *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 68 L. Ed. 2d 693 (1981), regarding trial court's discretion to limit communication with potential class members under Fed. R. Civ. P. 23(d), which has no analogue in North Carolina's Rule 23), *disc. rev. denied*, 329 N.C. 496, 407 S.E.2d 856 (1991).

Rule 23 does not by its terms require notice to class members, but adequate notice is dictated by "fundamental fairness and due process." *Crow*, 319 N.C. at 283, 354 S.E.2d at 466 (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968)). "The actual manner and form of the notice is largely within the discretion of the trial court," but "the . . . court should require that the best notice practical under the circumstances should be given to class members . . . includ[ing] individual notice to all members who can be identified through reasonable efforts." *Id.* at 283-84, 354 S.E.2d at 466.

Neither North Carolina's Rule 23 nor Rule 23 of the Federal Rules of Civil Procedure designates which party should properly bear the burden of notifying class members. But the Supreme Court observed in *Eisen* that the "usual rule" in a case brought under Rule 23 "is that a plaintiff must initially bear the cost of notice to the class. . . . Where the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 178, 40 L. Ed. 2d at 749; *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356, 57 L. Ed. 2d 253, 268 (1978) ("The general rule must be that the representative plaintiff should perform the tasks, for it is he who seeks to maintain the suit as a class action and to represent other members of his class."); Federal Judicial Center, *Manual for Complex Litigation* 227 (3d ed. 1995) ("[P]arties seeking class action must initially bear the cost of preparing and distributing the certification notice required by [Fed. R. Civ. P.,] 23(c)(2) and the expense of identifying the class members.").

Exceptions to this rule inevitably exist. Some federal courts have imposed the cost of notice as a sanction for defendants who demonstrate intransigence in discovery. *E.g.*, *Nagy v. Jostens, Inc.*, 91 F.R.D. 431, 433 (D. Minn. 1981); *see also Six Mexican Workers v. Arizona Citrus Growers*, 641 F. Supp. 259 (D. Ariz. 1986) (defendants, who had intentionally failed to properly maintain records and who had already been found liable, required to pay costs of notice to individual farm workers whose whereabouts were unknown). Other federal courts have recognized an exception in efficiency. When, for

example, a defendant happens to have compiled a list of putative class members in the ordinary course of its business (thus having already accepted the cost of doing so as a business expense), these courts have affirmed trial court directives that such defendants divulge or otherwise make the list available to plaintiffs. *E.g.*, *Oppenheimer*, 437 U.S. at 358, 57 L. Ed. 2d at 269 ("it may be appropriate to leave the cost where it falls because the task ordered is one that the defendant must perform in any event in the ordinary course of its business"); *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023 (10th Cir. 1993) (quoting *Oppenheimer*); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1101 & n.15 (5th Cir. 1977) (in decisions treating this question, both plaintiffs and defendants have been ordered to compile information necessary to identify absentee class members; whether one party or the other has been designated appears to have turned on which would have the easier task in gathering the information sought). In *Oppenheimer*, the Court even envisioned cases in which the expense involved would be "so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff." 437 U.S. at 358, 57 L. Ed. 2d at 269. The Court nevertheless "caution[ed] that courts must not stray too far from the principle underlying [*Eisen*, 417 U.S. 156, 40 L. Ed. 2d 732] that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." *Id.* at 359, 57 L. Ed. 2d at 270.

Beyond such guidance, however, the touchstone for appellate review of a Rule 23 order, whether it emanates from a federal or a North Carolina court, is to honor the "broad discretion" allowed the trial court in all matters pertaining to class certification, including appointing responsibility for Rule 23 notice. *See generally Crow*, 319 N.C. at 283, 354 S.E.2d at 466 (trial court has "broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in this opinion"); Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice & Procedure* § 1788, at 236 (1986) ("In general . . . the reported cases seem to indicate that the court has great discretion and flexibility in determining what is the best notice practicable under the circumstances and how it is to be given.").

We affirm our general agreement with "the principle . . . that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." *Oppenheimer*, 437 U.S. at 359, 57 L. Ed. 2d at 269. But we

note important exceptions to that principle, such as imposing those costs on the defendant as a discovery sanction, *e.g.*, *Six Mexican Workers*, 641 F. Supp. 259, and allowing the trial court the flexibility and discretion to order defendants to shoulder this burden when appropriate under the circumstances of each case. *See Manual for Complex Litigation* at 226-27 ("The problems of notice may be even more critical with classes composed of individual purchasers of goods or services, since sales records may be lacking or be incomplete and unreliable. Creativity is often needed in devising an effective means of notifying class members. On occasion, notice has been distributed with a defendant company's mailings to . . . customers, . . . but such procedures have been questioned, not only because of the administrative burden they can impose but also because of the potential of prejudice to a defendant from having to publicize against itself.").[4]

In the case before us, deference is due the trial court's exercise of discretion in assessing the questions and facts before it regarding certification of plaintiff class. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466; *Maffei v. Alert Cable TV of N.C., Inc.*, 316 N.C. 615, 617, 342 S.E.2d 867, 870 (1986). Generally, "[t]he test for abuse of discretion is whether a decision 'is manifestly unsupported by reason,' *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or 'so arbitrary that it could not have been the result of a reasoned decision[,] *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).' " *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

If in this case the trial court had ordered defendant simply to make its information available to plaintiff, clearly, this would have been within its discretion under Rule 23. *See, e.g.*, *Oppenheimer*, 437 U.S. at 359, 57 L. Ed. 2d at 270 (court acted within its authority in ordering defendants to direct transfer agent to make records available to plaintiffs, but abused its discretion in requiring defendants to bear $16,000 cost of paying agent to do so); *see also In re Nissan*, 552 F.2d at 1101 n.15 (listing cases in which plaintiffs and defendants have been ordered to compile information necessary to the identification of absentee class members). Given the nearly negligible estimated cost of notice in this case and the court's articulated reason

4. "Before such means are approved, class counsel should be required to show either a substantial cost saving, other significant advantages over the use of the mail, or the absence of reasonable alternatives. Any increased administrative costs to the defendant caused by the alternative means of notice should be taken into account." *Manual for Complex Litigation* at 227.

for shifting the cost of notice to defendant—its unique control over the identities of class members—we see no abuse of that discretion here.

In its petition for certiorari, defendant also challenges the class certification order on grounds that the trial court abused its discretion in certifying as a class members whose fraud claims would differ so widely regarding proof of reliance that those claims cannot be adjudicated in a class action. Defendant also calls into question whether plaintiffs, who accepted $34,300 as part of the settlement dismissing all dealership defendants, remained either able to "fairly and adequately insure the representation of the interests of all class members" or free of "conflict of interest [with] class members." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465. We do not address these issues because, as part of the trial court's certification order, they are interlocutory and not immediately appealable.

AFFIRMED.

STATE OF NORTH CAROLINA v. JOHN ELVIS HUGHES

No. 59A00

(Filed 21 December 2000)

Search and Seizure— investigatory stop—anonymous informant—insufficient indicia of reliability

The Court of Appeals erred by reversing the trial court's decision to grant defendant's motion to suppress evidence obtained during an investigatory stop of the taxi that defendant was riding in based on information the police received from an anonymous tip giving a physical description of a dark-skinned Jamaican whose name and clothing description could not be recalled, who was going to North Topsail Beach, who sometimes came to Jacksonville on weekends before dark, who sometimes took a taxi, who sometimes carried an overnight bag, and who might be arriving on the 5:30 p.m. bus, because: (1) the detective had never spoken with the informant and knew nothing about the informant other than the captain's claim that the informant was a confidential and reliable informant; (2) there was no indication that the informant had been previously used and had given accurate infor-

mation or that his statement was against his penal interest; (3) there was no indicia of reliability when the only evidence showing that the identity of this informant was known is the captain's conclusory statement that the informant was confidential and reliable; (4) the information provided by the tip did not contain the range of details required to sufficiently predict defendant's specific future actions and could be associated with many travelers; and (5) the police did not have reasonable suspicion resulting from their subsequent corroboration.

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. 286, 524 S.E.2d 70 (1999), reversing and remanding an order entered by Ragan, J., on 10 December 1998 in Superior Court, Onslow County. Heard in the Supreme Court 12 September 2000.

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

Edward G. Bailey and Lee E. Britt for defendant-appellant.

Clifford Clendenin O'Hale & Jones, LLP, by Walter L. Jones; and Seth H. Jaffee, Counsel, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

FREEMAN, Justice.

This is an appeal as of right based on a dissent from the Court of Appeals below, reversing the trial court's decision in a controlled substance case to grant defendant's motion to suppress evidence. We conclude that the Court of Appeals erred, and we thus reverse that opinion.

On the morning of 13 March 1998, Detective Imhoff of the Jacksonville Police Department was sitting in the office of Captain Matthews of the Onslow County Sheriff's Department when Matthews received a phone call. At the call's conclusion, Matthews told Imhoff that he had been talking to a confidential, reliable informant who said that an individual nicknamed "Markie" would be arriving that day in Jacksonville by way of a bus coming from New York City, possibly the 5:30 p.m. bus. "Markie" was described as "a dark-skinned Jamaican from New York who weighs over three hundred pounds and is approximately six foot, one inch tall or taller, between

twenty or thirty years of age[,] . . . who would be clean cut with a short haircut and wearing baggy pants," and who would have marijuana and powdered cocaine in his possession. The informant also indicated that Markie "sometimes" came to Jacksonville on weekends before it got dark, that he "sometimes" took a taxi from the bus station, that he "sometimes" carried an overnight bag, and that he would be headed to North Topsail Beach.

Later in the day, Detective Imhoff relayed this information by telephone to Detective Bryan of the Jacksonville Police Department and told him to go to the bus station, as the individual might be early. However, at the suppression hearing, Detective Bryan could not recall whether he had been given a description of defendant's clothing, nor could he recall whether he had ever been given the suspect's name. Detective Bryan further testified that he did not know what time defendant would arrive in Jacksonville or on which bus, only that he was coming in that afternoon.

When Detective Bryan and his partner, Detective McAvoy, reached the station, one bus from New York had already arrived, but a bus coming from Rocky Mount was scheduled to arrive around 3:50 p.m. Detective Bryan testified he knew that Rocky Mount was a transfer point between New York and Jacksonville, as were some other cities. When the bus arrived, it pulled in with its door facing away from the officers, blocking their view of the arriving passengers so that they could not see whether defendant stepped off of the bus. Detective Bryan testified, however, that defendant was not in the parking lot before the bus arrived and that he had stepped from behind the bus after it arrived. According to Detective Bryan, defendant matched the exact description he had been given and was carrying an overnight bag.

Defendant immediately stepped into a taxi and headed down Highway 17 South, toward an area called the Triangle, where Highway 17 splits in two directions—towards Wilmington and Topsail Beach, North Carolina, or towards Richlands, North Carolina. A person must pass through the Triangle before it can be determined in which of these directions he or she is going. However, the officers stopped defendant's taxi before it reached the Triangle area.

Upon stopping the taxi, Detective Bryan informed defendant that he was a police officer and explained why he had stopped the taxi. He then asked defendant if he would consent to a search, and defendant agreed. Detective Bryan conducted a pat-down search of defendant's

person and searched the area of the taxicab where defendant had been sitting and the small bag defendant was carrying. After these searches, Detective Bryan asked defendant to remove his shoes, revealing marijuana in the toes of each shoe. A later search at the police station revealed bags containing cocaine in the tongues of the shoes. Defendant was charged with possession with intent to sell and deliver cocaine, possession with intent to sell and deliver marijuana, manufacturing cocaine, and manufacturing marijuana.

The question raised here on appeal is whether the evidence seized from defendant was legally obtained. The determination of the legality of the stop, and subsequent search, is partly dependant on the reliability of the information relied on by arresting officers in making the stop. In order to determine the reliability of the information received, we must first determine whether the information received by the officers was obtained from an anonymous informant or a confidential and reliable informant.

The two-pronged test for probable cause to search formulated by the United States Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723 (1964), and later refined in *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637 (1969), set forth the requirements for obtaining a search warrant based on information supplied by a reliable informant. This test required, first, that the affidavit must contain sufficient information that would allow a magistrate to understand how the informant obtained the information and, second, that the affidavit must establish the reliability of the informant. Reliability could be established by showing that the informant had been used previously and had given reliable information, that the information given was against the informant's penal interest, that the informant demonstrated personal knowledge by giving clear and precise details in the tip, or that the informant was a member of a reliable group such as the clergy.

The Court later abandoned this test in favor of the "totality of the circumstances" test established in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983). Under this test, the "basis of knowledge" and "reliability" or "veracity" prongs of the *Aguilar-Spinelli* test are still relevant, but instead of being independent of each other, they are "closely intertwined issues," where "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233, 76 L. Ed. 2d at 545.

This Court adopted the reasoning of *Gates* in *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). In applying the test used in *Gates*, this Court also found the principles underlying *Aguilar* and *Spinelli*, mainly that evidence is needed to show indicia of reliability, to be important components in determining the totality of the circumstances.

Turning to the case before us, the evidence shows that Detective Imhoff had never spoken with the informant and knew nothing about the informant other than Captain Matthews' claim that he was a confidential and reliable informant. There was no indication that the informant had been previously used and had given accurate information or that his statement was against his penal interest nor, as will be discussed later, was there any other indication of reliability. Some objective proof as to why this informant was reliable and credible, other than just Captain Matthews' assertion passed to Detective Imhoff, and by him to Detectives Bryan and McAvoy, must support Detectives Bryan and McAvoy's decision to conduct a search. To hold otherwise would be to ignore the protections contained in the Fourth Amendment.

The State argues that this was a case of declaration against penal interest because, first, by his statement to Detective Imhoff, Captain Matthews indicated that he knew the informant, and second, since giving a false report to the police is a misdemeanor, the informant risked criminal charges if his information was not truthful. We are not persuaded by this argument, and we conclude that, under the circumstances, the burden of reliability was not met. Captain Matthews never testified at the suppression hearing, nor did he give any indication to Detective Imhoff or anyone else as to how he knew this informant or *why* this informant was reliable. The only evidence showing that the identity of this informant was known is Captain Matthews' conclusory statement that the informant was confidential and reliable.

Nor was this a statement against penal interest. Being held accountable for a false statement to the police necessarily requires that an individual's identity is known. Here, the record contains no evidence that the informant's identity was known to the officers directly involved in the arrest. Captain Matthews' conclusory statement, which was third-hand hearsay by the time Detectives Bryan and McAvoy relied on it, is insufficient indicia of reliability. Furthermore, making a false statement to the police, standing alone, is not against an individual's penal interest because doing so is not a

crime. To be charged with the crime of making a false report to law enforcement agencies or officers, the evidence must show that the person willfully made a false or misleading statement to a law enforcement agency or officer *for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties.* N.C.G.S. § 14-225 (1994)(emphasis added). We do not have any evidence before us indicating that all of these elements were or would have been fulfilled.

Without more than the evidence presented, we cannot say there was sufficient indicia of reliability to warrant use of the confidential and reliable informant standard. Accordingly, we analyze the anonymous tip standard in evaluating this case.

In *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990), the United States Supreme Court concluded that an anonymous tip could, under the totality of the circumstances, be sufficiently reliable to pass constitutional muster. *Id.* at 332, 110 L. Ed. 2d at 310. In *White*, a case described by the Court as "close," the anonymous caller indicated that an individual, Vanessa White, would have in her possession an ounce of cocaine in a brown attaché case. During the call, the informant told the police the precise apartment building and apartment number from which White would be leaving and the particular time she would leave, and also gave detailed information as to White's car and her final destination, Dobey's Motel. The police then observed White leave the specified apartment building, get into the car described in detail by the informant, and take the most direct route to the motel before they finally stopped White just short of her destination. *Id.* at 327, 110 L. Ed. 2d 306-07.

The Court in *White* emphasized, first, that the *Aguilar* and *Spinelli* standards for determining an informant's veracity, reliability, and basis of knowledge were important factors to consider in the context of an anonymous informant, as they were when involving a confidential, reliable informant. The Court stated that although an anonymous tip by itself rarely demonstrated the needed reliability, the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to meet this burden. " 'Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.' " *Id.* at 329, 110 L. Ed. 2d at 308 (quoting *Adams v. Williams*, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617-18 (1972)).

Second, the Court emphasized the importance that, "as in *Gates*, 'the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.' " *Id.* at 332, 110 L. Ed. 2d at 310 (quoting *Gates*, 462 U.S. at 245, 76 L. Ed. 2d at 552). Particularly significant was the fact that the informant in *White* was able to describe in detail not only existing facts such as Williams' car and apartment, but that the informant was able to predict Williams' *future behavior*, indicating "a special familiarity with respondent's affairs." *Id.* "When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop." *Id.* The Court, in *Florida v. J.L.*, 529 U.S. 266, 146 L. Ed. 2d 254 (2000), recently reiterated the importance of an informant's ability to predict the future behavior of the suspect. In that case, officers searched a young black male based on an anonymous tip stating that a young black male would be standing at a particular bus stop, wearing a plaid shirt and carrying a gun. The Court found that, aside from the tip, the officers had no independent reason to suspect J.L. of any wrongdoing, as he was just standing at the bus stop doing nothing in particular to indicate criminal activity. The Court also found that the tip itself completely lacked any prediction of future behavior and stressed its finding in *White*, that "[o]nly after police observation showed that the informant had accurately predicted the woman's movements . . . did it become reasonable to think the tipster had inside knowledge about the suspect." *Id.* at 270, 146 L. Ed. 2d at 260.

Third, the *White* Court articulated the differences between probable cause and reasonable suspicion, finding that in meeting the lesser standard of reasonable suspicion, the *Aguilar-Spinelli* factors were required to a lesser degree. *White*, 496 U.S. at 329-31, 110 L. Ed. 2d at 308-09. In so finding, however, the Court did not diminish the need for indicia of reliability, finding instead that "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.* at 330, 110 L. Ed. 2d at 309.

The case before us also involves the investigatory stop of an automobile, as defendant's taxi was stopped en route. *Terry v. Ohio* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable

suspicion of criminal activity. 392 U.S. 1, 20 L. Ed. 2d 889 (1968). An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability. *J.L.*, 529 U.S. at 270, 146 L. Ed. 2d at 260; *White*, 496 U.S. at 330, 110 L. Ed. 2d at 309. As previously stated, a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration. *J.L.*, 529 U.S. at 270, 146 L. Ed. 2d at 260 ("there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop' ") (quoting *White*, 496 U.S. at 327, 110 L. Ed. 2d at 306).

What is crucial to the determination of whether the anonymous tip in the instant case was sufficiently reliable to create reasonable suspicion justifying the stop was the information known to the officer *before* the stop was made. *J.L.*, 529 U.S. at 270, 146 L. Ed. 2d at 260 ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."). In the context of an anonymous tip, this means that a tip must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made. *White*, 496 U.S. at 329, 110 L. Ed. 2d at 308 ("This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop"; however, most tips require something more, like police corroboration, before obtaining the level needed for reasonable suspicion.). If reasonable suspicion for the stop exists before the stop is made, there is no violation of the Fourth Amendment.

In examining the case before us, our review is limited. It is the trial judge's responsibility to make findings of fact that are supported by the evidence, and then to derive conclusions of law based on those findings of fact. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Where the evidence presented supports the trial judge's findings of fact, these findings are binding on appeal. *Id.* ("[T]he scope of appellate review . . . is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law."). This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses. As we said in *State v. Smith*, "[w]here the evidence is con-

flicting, . . . the judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record." 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971). The trial court's conclusions of law, however, are fully reviewable on appeal.

As stated earlier, an anonymous tip can form the basis of reasonable suspicion as long as there is sufficient indicia of reliability either from the tip alone or after police corroboration. The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop. In this case, a review of the facts shows that Detectives Bryan and McAvoy had a physical description of a dark skinned Jamaican whose name and clothing description could not be recalled, who was going to North Topsail Beach, who "sometimes" came to Jacksonville on weekends before dark, who "sometimes" took a taxi, and who "sometimes" carried an overnight bag. The only other information the officers had was that defendant might be arriving on the 5:30 p.m. bus.

We conclude that, on its own, this tip is not sufficient to create a reasonable suspicion. Unlike the tip in *White*, wherein the informant gave specific details regarding White's apartment building (including the specific apartment number), her car (including the fact that the right taillight lens would be broken), the particular time she would be leaving, and her specific destination within the community, the informant here gave comparatively vague information. For instance, the informant here described the suspect's pants as "baggy" without giving any indication as to what color they were or any other information as to the rest of the suspect's clothing. The informant was vague regarding the time of the suspect's arrival—"possibly" the 5:30 p.m. bus—and did not specify where defendant would have the drugs in his possession. Although the informant's description of "Markie" himself was more detailed, this description alone is not enough, as it could be attributed to any number of travelers.

Even more important for purposes of its reliability, the information provided did not contain the "range of details" required by *White* and *Gates* to sufficiently predict defendant's specific future action, but was instead peppered with uncertainties and generalities. The tipster stated that "Markie" "sometimes" came to Jacksonville on weekends, "sometimes" took a taxi from the bus station, "sometimes"

carried an overnight bag, and would be headed to North Topsail Beach. As well as being vague, these statements are broad enough to be applied to many of the bus station patrons. It is highly likely that any number of weekend travelers to Jacksonville, where a large military base is located, would take a bus; that they might bring an overnight bag; and that unless they had someone pick them up from the station, they would take a taxi to their final destination, which could include North Topsail Beach. Because we find that the tip taken as a whole was insufficient to create a reasonable suspicion, we next look to see if it was made sufficient by independent police corroboration.

It appears from the record that the only items of the informant's statement actually confirmed by the officers before the stop were that they saw a man meeting the suspect's description come from around a bus that had arrived in Jacksonville at approximately 3:50 p.m., that he was carrying an overnight bag, and that he left the station by taxi. Without more, these details are insufficient corroboration because they could apply to many individuals. Furthermore, the officers did not see defendant get off the bus, and the bus arrived an hour and a half earlier than the tipster had predicted.

Likewise, reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers. As the Court stated in *J.L.*,

> [a]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

J.L., 529 U.S. at 272, 146 L. Ed. 2d at 261. Here, before stopping the taxi, the officers did not seek to establish the reliability of the assertion of illegality. They did not confirm the suspect's name, the fact that he was Jamaican, or whether the bus from Rocky Mount had originated in New York City. Moreover, because the officers stopped the taxi before it reached the Triangle area, they failed to corroborate whether the individual might be headed to North Topsail Beach, as the informant had stated, or to Wilmington, Richlands, Kinston, or some other destination.

The State argues that, as in *White*, defendant here was "at least headed in that general direction." This is simply not enough detail in an anonymous tip situation to support the reasonableness of the officers' suspicion. Unlike *White*, where the suspect had taken the most direct route to a specific destination, Dobey's Motel, and was stopped just short of the motel on the road where the motel was located, *White*, 496 U.S. at 327, 110 L. Ed. 2d at 307; the suspect here was approximately twenty miles from his supposed general destination of North Topsail Beach and was stopped before it could even be determined which of several directions he would take. Whereas *White* was considered a "close case," the case before us is not. *J.L.*, 529 U.S. at 271, 146 L. Ed. 2d at 260 ("Although the Court held that the suspicion in *White* became reasonable after police surveillance, we regarded the case as borderline. . . . We accordingly classified *White* as a 'close case.' "). Instead, this case is more akin to *J.L.*, in which the Court found that, under the totality of the circumstances, there was not enough information to amount to reasonable suspicion. Here, the trial judge found in his conclusions of law that, given the "totality of the circumstances," the officers did not have reasonable suspicion resulting from either the tip itself or their subsequent corroboration, and that the tip could be associated with many travelers. Finding that the officers acted without the requisite reasonable suspicion, the trial judge concluded that their actions were in violation of the Fourth Amendment and held the evidence inadmissible.

Our review of the transcript indicates that the trial judge's findings of fact, made by a seasoned trial judge who observed the State's witnesses and their demeanor, are amply supported by the evidence and that his conclusions of law are in accord with both the findings of fact and current Fourth Amendment case law. As the anonymous tip and police corroboration in this case do not approach the level required in *White* to be a "close case," we conclude that defendant's Fourth Amendment protections were violated. We therefore reverse the decision of the Court of Appeals and uphold the trial court's order allowing defendant's motion to suppress.

REVERSED.

STATE OF NORTH CAROLINA v. YAHWEH ALLAH ISRAEL

No. 256A99

(Filed 21 December 2000)

1. Homicide— first-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of first-degree murder for insufficient evidence where the evidence was close and circumstantial; the evidence on a motion to dismiss must be viewed in the light most favorable to the State, including none of defendant's evidence unless it is favorable to the State. Whether the trial court erred by excluding evidence tending to exonerate defendant and inculpate someone else is a different question.

2. Evidence— guilt of another--admissible

There was prejudicial error in a first-degree murder prosecution where the trial court excluded evidence which cast doubt upon the State's evidence that defendant was the perpetrator of the crime and which implicated another person beyond conjecture or mere implication. The evidence was relevant and admissible and it is apparent that there is a reasonable possibility of a different result had the trial court not erred. N.C.G.S. § 8C-1, Rule 402; N.C.G.S. § 15A-1443(a).

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Smith (W. Osmond), J., on 22 September 1998 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 October 2000.

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

James G. Exum, Jr., and Mary March Exum for defendant-appellant.

FREEMAN, Justice.

We address two questions in this appeal of defendant's conviction for murder—first, whether the State's evidence was sufficient to warrant its submission to the jury, and second, whether certain evidence tending to exonerate defendant and implicate another in this

crime was erroneously excluded from the jury's consideration. We conclude that the evidence, when viewed in the light most favorable to the State, was sufficient to warrant its submission to the jury and to sustain defendant's conviction of murder in the first degree. But no matter how ample and damning this evidence may be, when other evidence tending to show the crime was perpetrated by another is erroneously excluded from the jury's consideration, the sufficiency of the remainder is eroded, the evidentiary foundation for the conviction is unreliable, and the defendant is entitled to a new trial.

The facts of this case, presented in the light most favorable to the State, are as follows: The body of the victim, an elderly lady, was found in the bedroom of her apartment by her son on 13 December 1996. The victim had been bound and gagged, and her bedroom apparently ransacked. The mattress was on the floor; a checkbook cover and various papers apparently from the victim's purse were strewn about; the dresser drawers were awry, and such contents as jewelry, belts, and sewing articles had been dumped on the floor and on the bed. The victim's empty change purse, into which her son testified she typically put the money he gave her, was on the mattress. Only in attempting to replace the mattress did the son discover his mother's body. He called emergency personnel, who found no vital signs and did not attempt resuscitation. The victim's hands had been tightly tied behind her back with a nightgown and a shoelace apparently from her own shoe, found beside her under the mattress; her ankles had been tied with a nightgown; another was around her neck; and dried blood had collected around her mouth, into which a sock had been stuffed and tightly secured with a belt and a robe.

The bedroom was in disarray, but the remainder of the apartment was orderly, and there were no signs of forced entry. A briefcase containing a green toboggan, a chess set, and religious books was sitting open on the living room sofa.

The State's forensic pathologist testified that the victim had died of asphyxiation by strangulation and that the autopsy could not rule out the evening of Tuesday, 10 December 1996, as a time of death and as being "perfectly consistent with the degree of composition."

A neighbor from the Sir Walter Raleigh Apartments, where the victim lived, reported to an investigating officer that she had smelled cooking food coming from the victim's apartment the morning of 10 December; another neighbor testified she had last seen the victim in the apartment building that afternoon. A surveillance videocamera

mounted at the only entrance to the apartment building showed the victim entering at 7:58 that night. No portion of the videotape showed the victim leaving the building after that time.

The videotape showed defendant entering the apartment building at 9:24 p.m. on 10 December and leaving that night at 11:38. It did not show defendant entering or leaving the building thereafter. A resident of the apartment building who knew defendant recognized his image on the videotape and recalled entering the building with him the night of the 10th and greeting him. Defendant told him he was "coming to visit a friend." He knew defendant carried a briefcase.

Defendant could not be found after the warrant was issued for his arrest, but he was located six months later in Newport News, Virginia. In a statement taken there, defendant said that he knew the victim and called her "Auntie," and that he had been in her apartment and had left his briefcase and chess set there. Although he said he had been in Virginia the entire month of December, he admitted that a surveillance camera photograph taken on 10 December depicted him. The director of the Newport News shelter said that records indicated defendant had checked into the shelter on 19 December and had stayed there twenty-one nights, but that defendant had not stayed there between the 10th and the 13th of December.

A witness for the State testified that she had met defendant in September 1996 in downtown Raleigh and had permitted him to move into her apartment. He stayed there two or three weeks, but she asked him to leave because he took money from her purse twice, later admitting to her that he had done so. Defendant subsequently called the witness several times, but she immediately hung up the phone. Many hang-up calls were recorded by her answering machine during the first part of December, one being made, phone records showed, from the victim's apartment at 10:01 p.m. on December 10th.

A number of fingerprints—one from the exterior door frame of the victim's apartment; six on a pharmacy bag in the victim's kitchen trash; and four, plus a partial bloody fingerprint, on a folded piece of paper found in the victim's bedroom—were all identified as belonging to defendant. The DNA profile of the single bloody print matched defendant.

The trial court admitted some evidence offered by defendant tending to exonerate him. This included the testimony of one resi-

dent of the Sir Walter Raleigh Apartments that she had seen the victim outside her door Wednesday morning, 11 December. A second resident testified that he had seen the victim in the lobby later the afternoon or evening of the 11th. Both admitted on cross-examination that it could have been Tuesday, 10 December, not Wednesday, that they had seen the victim.

Conflicting evidence regarding the time of the victim's death was also presented by defendant and elicited on cross-examination of the forensic expert testifying for the State. In his initial report, the State's forensic expert had stated the time of death was Thursday, 12 December. This he later changed to 11 December. He testified that death occurred thirty-six to forty-eight hours before the body was refrigerated at the morgue at 6:00 p.m. on 13 December. He never opined that the murder occurred on the night of the 10th, but he stated merely that he could not rule it out as a date of death. A forensic pathologist testifying for the defense said that, although he could not "absolutely" rule out 10 December as a time of death, he believed it to be "very unlikely." His evaluation of reports and photographs of the body indicated to him the victim had more likely died "well into" Wednesday or Thursday. These included the EMT report that *rigor mortis* was present in the body when it was found; as *rigor mortis* generally leaves the body within twenty-four to thirty-six hours, its presence on 13 December indicated that the victim had probably died on Wednesday or Thursday, not on Tuesday night, 10 December.

Defendant presented evidence that he had been hospitalized from 28 November to 30 November to have a cyst removed from his neck. Defendant's treating physician opined the cyst removal could have led to minor bleeding, which defendant argues explains the bloody fingerprint. Defendant also notes that investigators had lifted 134 fingerprints from the scene but had identified only one print in the bedroom as belonging to him; of the remainder, eighty belonged to the victim. A print on the top center of the headboard was unidentifiable as either defendant's or the victim's, as were some fifty to sixty prints lifted from the bedroom, including the dresser from which the items used to strangle the victim presumably had been taken. Altogether, only eleven prints, including those on the pharmacy bag and "receipt," belonged to defendant. Two latent prints were found on a bottle of malt liquor in the victim's trash can: one belonged to the victim; the other was not defendant's but was otherwise unidentified. Likewise, a print on the right outside of the bedroom door was neither defendant's nor the victim's.

Finally, defendant's evidence revealed that the witness with whom defendant stayed for two weeks in November admitted on cross-examination that defendant always returned the money he took from her and that he had given her money he had earned, which she kept in her purse.

Other evidence that defendant sought to introduce but that was barred by the trial court's rulings implicated another person, Marvin Mitchell, as the perpetrator of this crime. According to testimony proffered by the victim's son and granddaughter, Mitchell was an ex-boyfriend of the victim's, who had a history of assaulting her and stealing from her. The victim's son moved his mother into the Sir Walter Raleigh Apartments because he feared for her safety. His mother feared Mitchell and was disillusioned with the criminal justice system because it had failed to detain Mitchell sufficiently when she brought charges against him. The victim's granddaughter would have testified that her grandmother, whom Mitchell had assaulted as recently as late summer or early fall of 1996, was afraid of him and that Mitchell took money from her "all the time." The granddaughter would have testified to Mitchell's assaults on her grandmother during the period she lived with her grandmother—from the victim's black eye to Mitchell's breaking the glass of a window in the victim's home and reaching through and grabbing her, holding her by the hair. The latter precipitated the granddaughter's decision to move out. The granddaughter would have testified that she had seen Mitchell drink forty-oz. bottles of Schlitz malt liquor, the same beverage as the bottle found in the victim's kitchen trash with her fingerprints and those of someone else who was not defendant. The granddaughter would also have testified that she had met defendant one time and that her grandmother had introduced him as their "cousin."

Other evidence the jury was not permitted to hear included officers' testimony that Mitchell had been a suspect in the city-county investigation of the victim's murder. Although he stated to investigators that he had never been to the Sir Walter Raleigh Apartments and did not even know where they were, Mitchell had been seen there before by three other residents. Mitchell gave investigators an alibi for the entire week of 9-13 December, yet he was identified on the surveillance videotape by the victim's granddaughter entering and leaving the Sir Walter Raleigh Apartments twice during the week of the murder—on 9 and 11 December. The day the victim's body was discovered, Mitchell moved to another residence.

[1] Defendant asserts on appeal that the trial court erred in denying his motion to dismiss for insufficiency of evidence to convict. We conclude the evidence of defendant's guilt as presented to the jury was sufficient as a matter of law to support its doing so. But the trial court's erroneous exclusion of evidence that tended both to exonerate defendant and implicate another perpetrator of the victim's murder so infects the evidence supporting conviction that it cannot be said the error did not affect the outcome of defendant's trial. *See* N.C.G.S. § 15A-1443(a) (1999).

When a defendant moves for dismissal based on insufficiency of the evidence,

> "the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or of a lesser offense included therein), and of the defendant['s] being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)."

State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984) (citation omitted).

> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered.

Bullard, 312 N.C. at 160, 322 S.E.2d at 387-88 (citations omitted), *quoted in McElrath*, 322 N.C. at 9-10, 366 S.E.2d at 447.

As in *McElrath*, the specific question before us is "whether, upon viewing all the evidence in the light most favorable to the State and upon granting the State every reasonable inference to be drawn from

the evidence, a reasonable juror might accept the evidence as adequate to support the conclusion this defendant was in fact the perpetrator of this . . . crime." *Id.* at 10, 366 S.E.2d at 447 (citations omitted). And, as in *McElrath*, we answer this question, "yes."

The law's bias towards the State that governs the trial court's appraisal of the evidence on defendant's motion to dismiss, including its considering none of defendant's evidence unless it is favorable to the State, supports the trial court's denial of such motions even when the evidence is close and circumstantial. *See McElrath*, 322 N.C. 1, 366 S.E.2d 442. Whether the trial court erred in excluding from the *jury's consideration* such evidence, unfavorable to the State's case, that defendant would otherwise have presented tending to exonerate him and indicating another perpetrator of this crime is, however, a different question, governed by different rules of law. Rule 401 of the North Carolina Rules of Evidence and cases construing it address this genre of question. "The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy [stated in Rule 401.]" *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987).

[2] The rule of relevancy for evidence of this nature is that it must do more than cast doubt over the defendant's guilt merely because it is possible some other person could have been responsible for the crime with which he has been charged.

> Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant.

Id. at 667, 351 S.E.2d at 279-80 (citations omitted). In *Cotton,* three sexual assaults had occurred in the vicinity where the victim lived of whose assault the defendant was convicted. One of the other victims described an assailant of the same physical type as the defendant, dressed similarly; and, most notably, a *modus operandi* so similar to the other two that "the jury reasonably could have concluded that the three attacks were committed by the same person." *Id.* at 667, 351 S.E.2d at 280. But the court excluded the other victim's positive identification of another perpetrator, even though the victim of the crime charged to defendant was equivocal in identifying him as her

assailant. Doing so, we held, was prejudicial error. *Cf. State v. Annadale*, 329 N.C. 557, 406 S.E.2d 837 (1991) (crimes committed by another person with *modus operandi* similar to offense with which the defendant charged correctly determined insufficiently similar and too remote in time).

In *State v. McElrath*, the defendant was precluded from introducing a map—evidence of a larceny scheme in which his murdered son-in-law and companions appeared to be involved. We held that the preclusion was error. Such evidence "casts doubt upon the State's evidence that defendant was the killer and suggests instead an alternative scenario for the victim's ultimate demise." 322 N.C. at 14, 366 S.E.2d at 449.

In *State v. Rose*, by contrast, a detective responding to a question whether he had an opinion as to the number of persons involved in the murders said he had believed, immediately after the murders, that a particular, named individual other than the defendant had knowledge of the murders and might have been involved. 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). We noted that, absent evidence exculpating the defendant, this opinion was "mere conjecture" of another's involvement, not evidence that another person had committed the murders. *Id.; see also State v. Hamilton*, 351 N.C. 14, 20, 519 S.E.2d 514, 518 (1999) (evidence of knife threat to victim ten years before murder did not "point directly" to guilt of that person as perpetrator), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000); *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994) (no error in excluding testimony about dark hair found under fingernail of victim when it failed to point directly to another's guilt and was not inconsistent with that of the defendant), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995); *State v. Brewer*, 325 N.C. 550, 386 S.E.2d 569 (1989) (excluded testimony concerning suspicious occupants of a car similar to another on same back road, one of which was involved in car chase and shootings, and one of which was allegedly driven by the deputy's son, gave rise to no more than speculation and conjecture), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990).

" 'Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded.' " *Brewer*, 325 N.C. at 564, 386 S.E.2d at 576, (quoting *State v. Britt*, 42 N.C. App. 637, 641,

257 S.E.2d 468, 471 (1979)). But defendant's excluded evidence in the case before us is significantly different. Here, defendant not only proffered evidence that someone other than he had the opportunity to kill the victim, but proffered the identity of that person and a history of his violent, recent dealings with her. That person had both the opportunity to kill her—pictured as he was on the surveillance videotape entering and leaving the victim's apartment the evening of 11 December—and, given his history with the victim, a possible motive. The State's evidence of defendant's own guilt was circumstantial, although ample evidence supported his recent interaction with the victim. Equally ample was excluded evidence of Marvin Mitchell's own recent interaction with her, and the history of his dealings with her point to more sinister motives than any left behind in defendant's fingerprints or personal effects. Relevant evidence is, as a general matter, admissible. N.C.G.S. § 8C-1, Rule 402 (1999). "[T]he standard [of relevance] in criminal cases is particularly easily satisfied. 'Any evidence calculated to throw light upon the crime charged' should be admitted by the trial court.' " *McElrath*, 322 N.C. at 13, 366 S.E.2d at 449 (quoting *State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985)).

Because the excluded evidence cast doubt upon the State's evidence that defendant was the perpetrator of this crime and because it implicated another person as that perpetrator beyond conjecture or mere implication, it was relevant and admissible. We hold that the trial court erred in barring its admission. Further, it is apparent from the equivocal evidence of defendant's guilt and other, excluded evidence of Marvin Mitchell's involvement with the victim that, had the trial court not so erred, "there is a reasonable possibility that a different result would have been reached at the trial out of which [this] appeal arises." N.C.G.S. § 15A-1443(a).

For these reasons, we hold that defendant is entitled to a new trial in this case.

NEW TRIAL.

GLADYS BROWN v. CAROLL M. BROWN

No. 77A00

Filed 21 December 2000

1. **Appeal and Error— deceased party—motion by administratrix to be substituted as plaintiff—appeal allowed under Rule 2**

An appeal was properly before the Supreme Court where plaintiff died shortly after filing for equitable distribution and divorce, the administratrix of her estate moved to be substituted as plaintiff, the trial court denied the motion and dismissed the action, plaintiff's counsel filed a notice of appeal, and the Court of Appeals treated this as a petition for certiorari. Utilization of a writ of certiorari is not appropriate under these facts and Rule 38 of the Rules of Appellate Procedure does not address the unusual circumstances of this case; however, in order to address the issues, the provisions of Rule 2 were used to vary the requirements of Rule 38.

2. **Divorce— equitable distribution—plaintiff deceased between filing of action and granting of judgment—abatement of claim**

The trial court correctly dismissed plaintiff's case and the Court of Appeals erred by reversing the trial court when the claim of a plaintiff in an action for divorce and equitable distribution abated when plaintiff died before the trial court entered a divorce decree or an equitable distribution judgment. A careful consideration of N.C.G.S. §§ 50-20 and -21 indicates that the General Assembly intended equitable distribution actions to be available only when there has been a divorce or when there is anticipation of the parties getting a divorce. The most recent amendment, which served as the premise of plaintiff's argument and the Court of Appeals decision, removes all limitations on the timing of an equitable distribution judgment vis-a-vis the granting of a divorce (the original version provided that a judgment for equitable distribution shall not be entered prior to the entry of a decree of absolute divorce), but there is no indication that this declaration was intended to remove the link between a divorce proceeding and a request to distribute property acquired during the marriage.

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. 331, 524 S.E.2d 89 (2000), reversing and remanding an order signed 6 August 1998 by Magee, J., in District Court, Gaston County. Heard in the Supreme Court 12 September 2000.

Max L. Childers for plaintiff-appellee.

Michelle D. Reingold for defendant-appellant.

ORR, Justice.

Defendant presents a single argument for our consideration: Did the Court of Appeals err in concluding that equitable distribution does not abate if one of the parties dies after filing for equitable distribution and divorce, but before receiving an equitable distribution judgment or an absolute divorce decree? We hold that the Court of Appeals erred in its decision.

We begin by explaining the unique procedural posture of this case. Plaintiff Gladys Brown died shortly after filing the lawsuit out of which this appeal arises. The administratrix of her estate, Martha T. Russell, moved to be "substituted as [p]laintiff" and "allowed to proceed as [p]laintiff in this matter." The trial court denied this motion and dismissed plaintiff's action on 6 August 1998.

[1] Plaintiff's counsel filed a notice of appeal on 13 August 1998, stating that "[p]laintiff, through counsel, . . . gives Notice of Appeal." The Court of Appeals treated this appeal as a petition for a writ of certiorari and allowed it so that it could review the order of the trial court. However, utilization of a writ of certiorari is not appropriate under these facts. *See Bailey v. State*, — N.C. —, —, — S.E.2d —, —, slip op. at — (Dec. 21, 2000) (No. 56PA00-2).

As a result, this Court faces a procedural dilemma in that the appeal to the Court of Appeals was made on behalf of a deceased party, and the appearance in this Court in response to defendant's appeal was likewise made on behalf of a deceased party. Therefore, in order to address the merits of the issues brought forward, we deem it necessary to use the provisions of Rule 2 of the North Carolina Rules of Appellate Procedure to vary the requirements of Rule 38 of the North Carolina Rules of Appellate Procedure.

Rule 2 allows the Court "[t]o prevent manifest injustice to a party . . . [by varying] the requirements or provisions of any of [the

North Carolina Rules of Appellate Procedure] in a case pending before it . . . upon its own initiative." N.C. R. App. P. 2.

Rule 38 provides: "If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative or if he has no personal representative, by his attorney of record . . . ." N.C. R. App. P. 38. We acknowledge that Rule 38 does not address the unusual circumstances of this case. Here, plaintiff died before she was entitled to an appeal. We believe, however, that the specific facts of this case and Rule 2 allow us to vary Rule 38 so that plaintiff may take the appeal by plaintiff's attorney of record. Therefore, we deem the appeal properly before us and proceed to address the merits.

[2] The relevant facts in this case show that plaintiff Gladys Brown and defendant Carroll M. Brown married in 1976 and separated in 1997. Six days after they separated, plaintiff filed a complaint requesting equitable distribution and related collateral relief, a divorce from bed and board, alimony *pendente lite*, and permanent alimony. Plaintiff, however, died before the trial court entered either a divorce decree or a final equitable distribution judgment. Her administratrix filed a motion on 19 February 1998 requesting "that she be substituted as [p]laintiff in the place of Gladys Brown, deceased, and that she be allowed to proceed as [p]laintiff in this matter." The trial court denied that motion and dismissed all of plaintiff's claims because it found that "[e]ach claim filed by the [p]laintiff abated upon [p]laintiff's death." Plaintiff, through counsel of record, appealed the trial court's decision, claiming in part that the trial court improperly dismissed the equitable distribution action and that the trial court should have substituted the administratrix for the plaintiff in the equitable distribution action. A divided Court of Appeals reversed the trial court on both issues. The Court of Appeals did so because the majority held that equitable distribution actions survive even if one of the parties dies before a court enters an absolute divorce decree.

It is settled law in North Carolina that the death of one of the parties abates an action for divorce. *Elmore v. Elmore*, 67 N.C. App. 661, 313 S.E.2d 904 (1984). The original version of the Equitable Distribution Act provided in N.C.G.S. § 50-21 provides that "[a] judgment for equitable distribution shall not be entered prior to the entry of a decree of absolute divorce." Thus, as held in *Caldwell v. Caldwell*, 93 N.C. App. 740, 379 S.E.2d 271, *disc. rev. denied*, 325 N.C. 270, 384 S.E.2d 513 (1989), equitable distribution and divorce were

inextricably linked, and if the possibility of divorce was eliminated by the death of a party, there was no question that the ability to continue an equitable distribution action would abate. However, as a result of an amendment to N.C.G.S. § 50-21 in 1995, plaintiff argues and the Court of Appeals majority held, an equitable distribution action would not abate, even where, as here, a party dies prior to either an equitable distribution judgment being entered or a divorce granted.

We first look to N.C.G.S. §§ 50-20 and -21 because these statutory provisions articulate the right to equitable distribution and the procedure to be followed. In fact, prior to the 1981 passage of the Equitable Distribution of Marital Property Act, North Carolina courts, quite literally, lacked the power to transfer real property, or any interest therein, upon divorce. *See* Sally Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. Rev. 195, 196-97 (1987). We therefore must look to the intent of the legislature to determine if equitable distribution is available when divorce is not. *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (holding that the cardinal principle of statutory construction is that the intent of the legislature controls). We conclude that a careful consideration of N.C.G.S. §§ 50-20 and -21 indicates that the General Assembly intended equitable distribution actions to be available only when there has been a divorce or when there is anticipation of the parties getting a divorce.

We acknowledge that the language of N.C.G.S. §§ 50-20 and -21 does not specifically address the issue before us. N.C.G.S. § 50-21(a) provides in part that "[a]t any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution *may be filed*." N.C.G.S. § 50-21(a) (1999) (emphasis added). That statute addresses the filing of an equitable distribution action but does *not* address the relationship of an equitable distribution judgment to divorce or the possibility of divorce.

The context and legislative history of N.C.G.S. §§ 50-20 and -21, however, show that equitable distribution actions invariably contemplate divorce. Courts may refer to the context of an act to infer legislative intent when the meaning of a statute is in doubt. *Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968). Discussion of equitable distribution is limited nearly completely to chapter 50 of the General Statutes, a chapter titled "Divorce and Alimony," and all issues addressed in chapter 50 concern the dissolution of marriage.

N.C.G.S. §§ 50-1 to -60 (1999). Discussion of equitable distribution is further limited to article 1 of that chapter, an article titled, "Divorce, Alimony, and Child Support, Generally." N.C.G.S. §§ 50-1 to -23. The substantive rights provided by equitable distribution are described in N.C.G.S. § 50-20, a section titled, "Distribution by court of marital and divisible property *upon divorce*." N.C.G.S. § 50-20 (emphasis added). It is reasonable to thus infer that the General Assembly intended equitable distribution to be linked with divorce and did not intend equitable distribution to proceed where there is no divorce and no possibility of a final divorce decree, such as we have in this case.

The General Assembly's intent to link equitable distribution and divorce can also be seen in the title of the act that most recently amended N.C.G.S. § 50-21(a). Although the title of an act cannot control when the text is clear, *In re Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d. 51, 55 (1974), the title is an indication of legislative intent, *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999). The General Assembly titled the act that amended N.C.G.S. § 50-21(a), "An Act to Allow Claims for Equitable Distribution to be Resolved *Either Before or After an Absolute Divorce is Granted* . . . ." Act of June 14, 1995, ch. 245, 1995 N.C. Sess. Laws 510 (emphasis added). This title makes clear that the General Assembly did not intend its amendment to completely sever equitable distribution claims from divorce proceedings; it meant only to expand the timing in which an equitable distribution action may be filed and judgment entered. This legislative history and the context of the statute convince us that equitable distribution actions are so related to divorce proceedings that when death ends all chance for divorce, any equitable distribution action then pending must abate.

N.C.G.S. § 50-20, which addresses the procedure for a court to distribute "marital and divisible property *upon divorce*," provides additional support for our conclusion. N.C.G.S. § 50-20 (emphasis added). This statute carefully describes the factors the trial court should consider, weigh, and balance when it equitably distributes marital property. In evaluating these factors, the trial court must consider the contemplated or prior divorce of the parties. Otherwise, the factors would be senseless. The trial court does not simply distribute the property between the parties, but considers, for example, their estates, income, and financial liabilities. When the court is asked to equitably distribute marital and divisible property, it must anticipate that the parties will at some time be independent, divorced indi-

viduals.[1] This responsibility reinforces our perception that the General Assembly intended to link equitable distribution and divorce so closely that the death of one party before the entry of a divorce decree requires the abatement of any pending equitable distribution action.

The premise of plaintiff's argument and the Court of Appeals' decision is that the most recent amendment of N.C.G.S. § 50-21 mandates a contrary conclusion. See ch. 245, 1995 N.C. Sess. Laws 510. In 1995, the General Assembly deleted the following text from N.C.G.S. § 50-21(a):

> A judgment for equitable distribution shall not be entered prior to entry of a decree of absolute divorce, except for a consent judgment, which may be entered at any time during the pendency of the action, or except if the parties have been separated for at least six months and they consent, in a pleading or other writing filed with the court, to an equitable distribution trial prior to the entry of the decree for absolute divorce.

Ch. 245, sec. 1, 1995 N.C. Sess. Laws at 511.

We believe the General Assembly never meant this change to remove the link between equitable distribution and divorce. The changes the General Assembly made to N.C.G.S. § 50-21 between 1981 and 1995 indicate that the legislators meant this most recent change to place no limit on the time in which a court could enter an equitable distribution judgment. The original version of N.C.G.S. § 50-21 provided that "[a] judgment for equitable distribution shall not be entered prior to the entry of a decree of absolute divorce." N.C.G.S. § 50-21(a) (1981) (amended 1989). The 1989 amendment to the statute allowed courts to enter equitable distribution judgments before a final divorce decree upon entry of a consent judgment. N.C.G.S. § 50-21(a) (1989) (amended 1991). The 1991 amendment allowed courts to enter equitable distribution judgments before entering a divorce decree, either through a consent judgment or when an incompetent spouse was involved. N.C.G.S. § 50-21(a) (1991) (amended 1995). The 1992 amendment again expanded the time in which a court could enter a judgment of equitable distribu-

1. This reasoning does not contradict *Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994), in which the Court of Appeals held that an equitable distribution action survived a party's death when the trial court had already entered a decree of absolute divorce. *Id.* at 788, 440 S.E.2d at 317. In this case, however, the trial court had not entered a divorce decree.

tion; it allowed a court to enter an equitable distribution judgment before a divorce decree through a consent judgment, when an incompetent spouse was involved, *or* when the parties were separated for six months and consented in writing to allow the court to determine equitable distribution. N.C.G.S. § 50-21(a) (1992) (amended 1995). Because each of these amendments aimed to change only when a court could enter an equitable distribution judgment in relationship to a divorce being granted, we believe the most recent amendment of N.C.G.S. § 50-21 was similarly intended.

By deleting the provision previously noted, the General Assembly eliminated the exceptions that had been engrafted over the years on the original mandate that equitable distribution could not be ordered until a divorce decree was entered. The amendment thus removes all limitations on the timing of an equitable distribution judgment, *vis-a-vis* the granting of divorce. We find no indication, however, that this deletion was intended to remove the link between a divorce proceeding and a request to the court to distribute property acquired during the marriage. Therefore, we conclude that the 1995 amendment to N.C.G.S. § 50-21 did not change the relationship between equitable distribution and divorce. Instead, the amendment continued the legislative trend for equitable distribution to occur at any time prior to or after an absolute divorce.

The Court of Appeals also relied in part on the provisions of N.C.G.S. § 50-20(k). The General Assembly passed N.C.G.S. § 50-20(k) in 1981. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184. At the same time, and *in the same act*, it also passed the original version of N.C.G.S. § 50-21(a), ch. 815, sec. 6, 1981 N.C. Sess. Laws at 1186, which provided, in pertinent part, that "[a] judgment for equitable distribution *shall not be entered* prior to the entry of a decree of absolute divorce," *see* N.C.G.S. § 50-21(a) (1981) (amended 1989) (emphasis added), and clearly indicated that equitable distribution depended on divorce, *Caldwell*, 93 N.C. App. 740, 379 S.E.2d 271. Thus, the General Assembly cannot have intended N.C.G.S. § 50-20(k) to mean that equitable distribution could proceed without divorce unless it meant to directly contradict itself in N.C.G.S. § 50-21(a). Courts, of course, presume that the General Assembly would not intend something so absurd as contradicting itself in the same statute. *In re Brake*, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997) (holding that when the Supreme Court construes statutes, it presumes that the legislature acted in accordance with reason and common sense). N.C.G.S. § 50-20(k), therefore, did not indicate that equi-

table distribution was independent of the possibility of divorce in 1981, nor does it indicate that now. N.C.G.S. § 50-20(k) does not contradict our holding that the General Assembly did not intend a trial court to be able to enter an equitable distribution judgment when there is no divorce and no possibility of divorce.

In sum, equitable distribution is a statutory right defined by N.C.G.S. §§ 50-20 and -21 and is inextricably linked with divorce proceedings. Because death ends any chance for divorce and because plaintiff in the instant case died before the trial court entered a divorce decree, plaintiff's claim for equitable distribution abated, and the trial court correctly dismissed plaintiff's case. We therefore reverse the Court of Appeals and reinstate the holding of the trial court.

REVERSED.

JUDY CAROLYN YOUNG, EMPLOYEE v. HICKORY BUSINESS FURNITURE, EMPLOYER, SELF-INSURED (ALEXSIS, INC., SERVICING AGENT)

No. 143A00

(Filed 21 December 2000)

Workers' Compensation— causation—fibromyalgia—doctor's opinion testimony

The Court of Appeals erred in concluding that competent evidence was presented to support the Industrial Commission's findings of fact with regard to the cause of plaintiff-employee's fibromyalgia based solely on the opinion testimony of one doctor, because: (1) the doctor's testimony consists of comments and responses demonstrating his inability to express an opinion to any degree of medical certainty as to the cause of plaintiff's illness; and (2) the doctor's testimony demonstrated an opinion based solely on supposition and conjecture.

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. 51, 527 S.E.2d 344 (2000), affirming an opinion and award entered 28 January 1999, by the North Carolina Industrial Commission. Heard in the Supreme Court on 13 September 2000.

Randy D. Duncan for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III, and Melissa L. McDonald, for defendant-appellant.

LAKE, Justice.

This case arises from proceedings before the North Carolina Industrial Commission (the Commission) and raises the issue of whether the Commission's findings of fact were supported by competent evidence establishing causation between an employment-related injury and the development of fibromyalgia.

On 3 March 1992, while working for employer-defendant (Hickory Business Furniture), employee-plaintiff (Young) reached across some chairs to lift another chair and felt a pop in her back and the onset of pain. The accident resulted in plaintiff's suffering a lumbo-sacral strain. Prior to this occurrence, plaintiff had experienced no significant problems with her back.

Following the injury, plaintiff was treated by Dr. Robert Hart, a family practitioner who served as defendant's physician. Dr. Hart recommended therapy for plaintiff's complaints of mid-back pain. Plaintiff's symptoms persisted, and on 31 March 1992, Dr. Hart referred plaintiff to Dr. H. Grey Winfield, an orthopedist. After examination, Dr. Winfield found plaintiff to have full range of motion in the lower extremities, with some evidence of "symptom magnification." Dr. Winfield continued to treat plaintiff through 21 May 1992, after which plaintiff did not return for a follow-up assessment. On 1 April 1992, the parties entered into a Form 21 agreement, compensating plaintiff at a rate of $226.14 per week for "necessary weeks."

On her own initiative, plaintiff sought treatment from Dr. Bruce Hilton, a chiropractor, on 9 November 1992, and on 20 July 1993, he rated her as retaining a five percent permanent partial impairment to her back. At the time of the rating, plaintiff continued to experience pain in her back and right hip and tingling in her right leg. On 19 August 1993, the parties signed a Form 26, "Supplemental Memorandum of Agreement as to Payment of Compensation," stipulating to a five percent permanent partial disability and agreeing to compensation of $226.14 for fifteen weeks, beginning 13 July 1993. Plaintiff continued to work until October 1994, when she was discharged by defendant on the basis that she was not physically able to perform her job.

In 1995, plaintiff saw a rheumatologist, Dr. Dennis Payne, for her back problems, whereupon she was diagnosed with fibromyalgia. Dr. Payne's opinion at that time was that plaintiff's condition was likely related to her 1992 work-related injury. On 10 January 1995, plaintiff filed a Form 33, requesting that the claim be assigned for hearing, on which she stated that her condition had substantially worsened and that she had been unable to work from 29 August 1994 to the date of the filing. Defendant filed a response on 29 July 1995, stating that there was no medical evidence to support plaintiff's claim.

The matter was heard by Deputy Commissioner Lorrie L. Dollar on 15 August 1995. On 18 October 1996, she entered an opinion and award concluding that plaintiff had sustained a substantial change in condition and awarding plaintiff temporary total disability compensation from 20 October 1994 and continuing until further order of the Commission. Defendant filed a formal "Application for Review" by the full Commission on 24 January 1997. The matter was reviewed by the full Commission on 7 April 1997. On 2 June 1997, the Commission, with one commissioner dissenting, entered its opinion and award, essentially affirming the deputy commissioner's opinion and award. Defendant gave notice of appeal to the Court of Appeals.

In a unanimous, unpublished decision filed 21 April 1998, the Court of Appeals held that the Commission failed to make sufficient findings of fact to support its order, vacated the Commission's opinion and award, and remanded the matter to the Commission "for definitive findings and proper conclusions therefrom, and entry of the appropriate order."

On 28 January 1999, the full Commission, with one commissioner dissenting, entered a new opinion and award, setting out additional findings of fact and conclusions of law and again awarding plaintiff temporary total disability compensation from 20 October 1994 and continuing until further order of the Commission. Once again, defendant gave notice of appeal to the Court of Appeals.

In a published, split decision, the Court of Appeals affirmed the Commission's opinion and award. Defendant appeals to this Court from the decision of the Court of Appeals on the basis of the dissent.

The issue before this Court is whether there was competent evidence presented to establish a causal connection between the original injury by accident to plaintiff's back on 3 March 1992 and her later

diagnosis of fibromyalgia. The Court of Appeals' majority determined that competent evidence was presented which was sufficient to support the Commission's findings of fact. We disagree.

Although it is well established that " '[t]he [Industrial] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony,' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)), findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them, *Saunders v. Edenton OB/GYN Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000). In the instant case, the Industrial Commission's findings of fact with regard to the cause of Ms. Young's fibromyalgia were based entirely upon the weight of Dr. Payne's opinion testimony as an expert in the fields of internal medicine and rheumatology. Therefore, the competency of that testimony is determinative in our analysis and decision in this case.

Due to the complexities of medical science, particularly with respect to diagnosis, methodology and determinations of causation, this Court has held that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. Indeed, this Court has specifically held that "an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." *Dean v. Carolina Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975); *see also Cummings v. Burroughs Wellcome Co.*, 130 N.C. App. 88, 91, 502 S.E.2d 26, 29, *disc. rev. denied*, 349 N.C. 355, 517 S.E.2d 890 (1998); *Ballenger v. Burris Indus.*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887, *disc. rev. denied*, 310 N.C. 743, 315 S.E.2d 700 (1984).

In the case *sub judice*, the Court of Appeals held that Dr. Payne's opinion regarding the etiology of plaintiff's current condition was more than mere speculation and, therefore, was sufficient to support the Commission's finding that plaintiff's reactive fibromyalgia was caused or substantially aggravated by her original injury by accident.

Young v. Hickory Bus. Furn., 137 N.C. App. 51, 56, 527 S.E.2d 344, 348 (2000). However, a review of Dr. Payne's deposition, the sole source of evidence pertaining to his opinion, reveals that his opinion as to the causative nature of Ms. Young's fibromyalgia was based entirely upon conjecture and speculation.

Early in his deposition, Dr. Payne testified on direct examination that he frequently could not ascribe a cause for fibromylagia in his patients. He stated: "I must say that a lot of times I have no idea why someone has fibromyalgia. Far and away, fibromyalgia occurs more commonly for unknown reasons." Later, Dr. Payne agreed with defense counsel's statement that fibromyalgia was an illness or condition of unknown etiology. Furthermore, Dr. Payne acknowledged that there were no physical tests that one can perform, or testing of any kind with regard to chemical abnormality in the body, which would indicate whether a person has fibromyalgia.

The speculative nature of Dr. Payne's expert opinion is reflected in his testimony that while he acknowledged that he knew of several other potential causes of Ms. Young's fibromyalgia, he did not pursue any testing to determine if they were, in fact, the cause of her symptoms. For instance, Dr. Payne conceded that he was aware of osteoarthritis in Ms. Young and that her sister was diagnosed with rheumatoid arthritis. However, when asked on cross-examination whether he had performed any tests to rule out other forms of rheumatoid disease or illness that could account for Ms. Young's symptoms, Dr. Payne testified that he had not. Indeed, when asked by defense counsel whether those tests had been conducted, Dr. Payne simply responded, "[T]hose studies need to have been done." Additionally, in response to defense counsel's questions about other potential causes of Ms. Young's symptoms, Dr. Payne admitted that he did not attempt to ascertain whether plaintiff suffered from any viral or bacterial illnesses during the time between her injury and his diagnosis of fibromyalgia. This response followed the doctor's acknowledgment of case reports suggesting that fibromyalgia could be associated with a postbacterial illness reaction or a postviral reaction.

The speculative nature of the doctor's opinion is further reflected in his testimony regarding Ms. Young's gallbladder surgery in 1994. Plaintiff's surgery took place two years after her injury and seven months before her first visit with Dr. Payne. On cross-examination, the doctor acknowledged that surgery is an "event that is thought to trigger or aggravate fibromyalgia," and that, depending on how well

Ms. Young tolerated her gallbladder surgery, it "could have aggravated [plaintiff's] fibromyalgia." The record therefore supports, through Dr. Payne's own admissions, at least three potential causes of fibromyalgia in Ms. Young other than her injury in 1992.

In reaching his conclusion, however, that plaintiff's fibromyalgia could be related to her work-related injury, Dr. Payne found it necessary to rely on the maxim "*post hoc, ergo propter hoc*," which is to say in Latin, "after this, therefore because of this." On cross-examination, Dr. Payne responded to questioning as follows:

> Q. Is there any way that one can definitively assign a cause or aggravation of fibromyalgia to any particular event other than the application of the doctrine, post hoc ergo propter hoc?
>
> A. No.
>
> Q. Okay. In other words, there's nothing you can do to test it, to look at it, other than she didn't have it before, she has it now, what intervened, I'm going to blame it on that?
>
> A. Correct.

Dr. Payne's total reliance on this premise is shown near the end of his deposition testimony wherein he states: "I think that she does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's the only piece of information that relates the two."

The maxim "*post hoc, ergo propter hoc*," denotes "the fallacy of . . . confusing sequence with consequence," and assumes a false connection between causation and temporal sequence. *Black's Law Dictionary* 1186 (7th ed. 1999). As such, this Court has treated the maxim as inconclusive as to proximate cause. *See Johnson v. Western Union Tel. Co.*, 177 N.C. 31, 32, 97 S.E. 757 (1919); *Ballinger v. Rader*, 151 N.C. 383, 385, 66 S.E. 314, 314-15 (1909). This Court has also held that "[i]t is a settled principle that the law looks to the immediate and not the remote cause of damage, the maxim being '*Causa proxima, sed non remota spectatur.*' " *Johnson*, 177 N.C. at 33, 97 S.E. at 758. In a case where the threshold question is the cause of a controversial medical condition, the maxim of "*post hoc, ergo propter hoc*," is not competent evidence of causation.

The Court of Appeals made no mention of Dr. Payne's reliance on the aforementioned maxim as the basis for his opinion. It did, how-

ever, acknowledge the speculative nature of Dr. Payne's medical opinion, pointing out that "Dr. Payne conceded that fibromyalgia is controversial 'because there's difficulty in objectively studying [the condition].' " *Young*, 137 N.C. App. at 56, 527 S.E.2d at 348. Nonetheless, the Court of Appeals concluded that Dr. Payne gave an opinion, "to a reasonable degree of medical certainty, that plaintiff's compensable 'injury could have or would have aggravated or caused the fibromyalgia.' " *Id.* This Court has allowed "could" or "might" expert testimony as probative and competent evidence to prove causation. *See Mann v. Virginia Dare Transp. Co.*, 283 N.C. 734, 747-48, 198 S.E.2d 558, 567-68 (1973); *Lockwood v. McCaskill*, 262 N.C. 663, 668, 138 S.E.2d 541, 545 (1964). However, this Court has also found "could" or "might" expert testimony insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation. *See Maharias v. Weathers Bros. Moving & Storage Co.*, 257 N.C. 767, 767-68, 127 S.E.2d 548, 549 (1962).

Based on the foregoing analysis, we conclude that Dr. Payne's testimony, throughout both direct and cross-examination, consists of comments and responses demonstrating his inability to express an opinion to any degree of medical certainty as to the cause of Ms. Young's illness. Dr. Payne's responses were forthright and candid, and demonstrated an opinion based solely on supposition and conjecture. We therefore hold that this evidence, the sole evidence as to causation, was incompetent and insufficient to support the Industrial Commission's findings of fact. The opinion of the Court of Appeals, affirming the Industrial Commission's findings of fact, is, therefore, 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.

STATE OF NORTH CAROLINA v. STEVEN CLARENCE LEAZER

No. 175PA00

(Filed 21 December 2000)

Homicide— first-degree murder—evidence of premeditation and deliberation—instruction on second-degree murder not given

The Court of Appeals erred in a first-degree murder case by holding that the trial court should have instructed on the lesser-included offense of second-degree murder where there was evidence of malice in that defendant, an inmate, punched another inmate in the chest with an eight-and-a-half inch shank; the evidence did not demonstrate provocation by the decedent and there was no evidence of an argument between the two; there was evidence that defendant anticipated a confrontation in that he entered the recreation area carrying a shank and waited until the guard turned away before striking; and defendant inflicted three stab wounds on the victim, with over ten seconds between the first and the fatal blows. No matter what defendant's intent may have been before he inflicted the first wound, there was adequate time between each blow for defendant to have premeditated his actions. The case was remanded to the Court of Appeals with instructions to address the remaining assignments of error.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 137 N.C. App. 385, 533 S.E.2d 307 (2000), holding that the trial court erred by not instructing on the lesser-included offense of second-degree murder, thus vacating the judgment entered 9 January 1997 by Bullock, J., in Superior Court, Wake County, and ordering a new trial. Heard in the Supreme Court 17 October 2000.

Michael F. Easley, Attorney General, by Ronald M. Marquette, Special Deputy Attorney General, for the State-appellant.

Nora Henry Hargrove for defendant-appellee.

MARTIN, Justice.

On 21 May 1996 Steven Clarence Leazer (defendant) was indicted for the murder of Bobby Ray Holloman (Holloman). Defendant was

tried capitally at the 2 December 1996 Criminal Session of Superior Court, Wake County. The jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation. Following a capital sentencing proceeding, the jury recommended a sentence of life imprisonment without parole, and the trial court entered judgment in accordance with that recommendation.

On appeal to the Court of Appeals, defendant argued the state had presented insufficient evidence to sustain his conviction for murder on the basis of premeditation and deliberation. Defendant also alleged the trial court erred by failing to instruct on second-degree murder.

In an unpublished opinion, the Court of Appeals concluded the evidence was sufficient to convince a reasonable jury that defendant had committed first-degree murder. Nonetheless, the Court of Appeals held the trial court should have instructed the jury on second-degree murder because the evidence gave rise to "conflicting inferences" concerning premeditation and deliberation. On 15 June 2000 we allowed the state's petition for discretionary review.

At trial, the state presented evidence that on 3 April 1996 defendant and Holloman were housed in the same cell block at Central Prison in Raleigh, North Carolina. The cell block housed sixteen inmates on two levels. Defendant was housed in cell 101, and Holloman was assigned next door in cell 102. Their cells were located on the extreme right-hand side of the lower level, as seen from an entranceway known as a "sally port." The sally port consisted of two electronically controlled doors enclosing a three-foot section of hallway. When one door opened, the other would not open until the first door closed completely. The process of opening and closing the sally port doors took at least ten to fifteen seconds.

The cells bordered one side of a central recreation area. The recreation area consisted of a raised floor furnished with tables and chairs. Two steps connected the lower level cells to the recreation area. Only four inmates were allowed into the recreation area at a time. On the other side, opposite the cells, were the sally port entranceway and a control booth. The control booth was enclosed in Plexiglas, allowing the guard inside to view the entire cell block area.

On 3 April 1996 defendant, Holloman, and two other inmates were in the recreation area. Defendant and Holloman sat at a table in

the recreation area. They appeared to be having a normal conversation. Defendant faced the control booth, which was manned by Officer Hopkins. Holloman sat with his back to the booth.

During the recreation period Officer Hopkins briefly turned from watching the inmates. He walked to the side of the control booth to reach switches necessary to let a nurse pass through a nearby hallway. As he did so, he noticed an unusual arm movement reflected in the Plexiglas. He stepped back and saw defendant standing between two tables. Holloman was not visible.

Officer Hopkins tapped on the Plexiglas and motioned to three officers in an adjoining section of the cell block. The officers immediately went to the sally port entranceway. While they waited for the sally port doors to open and shut behind them, they saw defendant and Holloman standing a few feet apart in the corridor between their two cells. Defendant faced the officers with a pointed object protruding from his right fist. Holloman faced defendant with his hands in the air.

As the final sally port door opened to allow the officers into the cell block, Holloman turned his head and looked towards them. At that moment, defendant threw a punch with his right hand that hit Holloman in the upper chest. Holloman turned towards the officers, mounted the stairs to the recreation floor, and collapsed. The officers ordered defendant to drop his weapon. Defendant moved as if to throw something down. Officers later found a shank, a type of homemade weapon, on the floor of Holloman's cell. The shank was eight and a half inches of thick metal, sharpened into the form of an ice pick.

An autopsy showed Holloman suffered three stab wounds. The wounds were located on the back of his right shoulder, on the left side of his back, and on his upper chest. The blow to his chest punctured both his heart and aorta, causing a fatal hemorrhage.

Later in the day, while defendant was in a holding cell, he told an officer, "he guessed the stabbing had been turned into a killing, into a murder and they would probably seek the death penalty but that [sic] wouldn't get it." Defendant and Holloman had no known history of ill will between them.

Defendant did not present evidence during the guilt-innocence phase of trial.

This Court allowed the state's petition for discretionary review to examine whether the Court of Appeals erred in concluding that defendant was entitled to an instruction on second-degree murder.

Defendant is "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973). This rule enhances the reliability of the fact-finding process and provides a "necessary additional measure of protection for the [capital] defendant." *Beck v. Alabama*, 447 U.S. 625, 645, 65 L. Ed. 2d 392, 407 (1980). However, "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence." *Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982); *see also State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40, *cert. denied*, — U.S. —, 148 L. Ed. 2d 100 (2000). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Spaziano v. Florida*, 468 U.S. 447, 455, 82 L. Ed. 2d 340, 349 (1984); *see also State v. Lampkins*, 286 N.C. 497, 504, 212 S.E.2d 106, 110 (1975), *cert. denied*, 428 U.S. 909, 49 L. Ed. 2d 1216 (1976).

"First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505, *cert. denied*, — U.S. —, 145 L. Ed. 2d 388 (1999). "Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Second-degree murder is a lesser included offense of first-degree murder. *State v. Larry*, 345 N.C. 497, 517, 481 S.E.2d 907, 918, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997). "If the [s]tate'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." *Flowers*, 347 N.C. at 29, 489 S.E.2d at 407; *see also State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

In the present case, the evidence presented by the state is positive and uncontradicted as to each element of first-degree murder. First, "[m]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). At trial, the state introduced positive evidence of malice by showing that defendant punched Holloman in the chest with an eight-and-a-half-inch shank made of thick, sharpened metal. The blow punctured Holloman's heart and aorta, causing his death.

The evidence is similarly positive and uncontradicted as to premeditation and deliberation. "Premeditation means that the act was thought over beforehand for some length of time," however short. *State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 178, 191 (1998), *cert. denied*, — U.S. —, 145 L. Ed. 2d 80 (1999). "Deliberation means an intent to kill, carried out in a cool state of blood, . . . and not under the influence of a violent passion" or a sufficient legal provocation. *Thomas*, 350 N.C. at 347, 514 S.E.2d at 506. "Premeditation and deliberation are ordinarily not susceptible to proof by direct evidence and therefore must usually be proven by circumstantial evidence." *State v. Alston*, 341 N.C. 198, 245, 461 S.E.2d 687, 713 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). Premeditation and deliberation can be inferred from many circumstances, some of which include:

> "(1) absence of provocation on the part of deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."

State v. Sierra, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994) (quoting *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992)).

The evidence presented at trial failed to demonstrate provocation on the part of decedent. When Officer Hopkins turned to let the nurse through the hallway, defendant and Holloman were talking at a table in the recreation room. Holloman was unarmed. There was no evidence of any argument between the two. *See State v. Rose*, 339 N.C. 172, 195, 451 S.E.2d 211, 224 (1994) (where one victim was seated

when he was shot, "there was no evidence—only conjecture—supporting defendant's theory that he shot the victims spontaneously during an altercation"), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995); *cf. State v. Love*, 296 N.C. 194, 204, 250 S.E.2d 220, 227 (1978) (evidence that defendant pulled up beside victim and without provocation shot into the car at least two times before driving away was sufficient to show that defendant had "formed a fixed purpose to kill the deceased and thereafter accomplished that purpose").

Defendant entered the recreation area carrying a shank, knowing he would be joined by only three other inmates. Further, he waited until the guard had turned away before striking. This was evidence "that he had anticipated a possible confrontation . . . and that he had given some forethought to how he would resolve that confrontation." *State v. Ginyard*, 334 N.C. 155, 159, 431 S.E.2d 11, 13 (1993).

The nature and number of the victim's wounds is another indicator of premeditation and deliberation. "[T]he premise of the 'felled victim' theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one [blow] to the next." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). In *Austin*, the defendant shot three people with a semiautomatic rifle "capable of firing up to fifteen rounds within seconds." *Id.* There, we noted that "[e]ven though the rifle is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger." *Id; see also Larry*, 345 N.C. at 514, 481 S.E.2d at 917.

In the present case, defendant inflicted three stab wounds on Holloman. Over ten seconds passed between the time defendant first stabbed Holloman in the back, Officer Hopkins called the guards, the sally port doors opened to let them in to the recreation area, and defendant inflicted the fatal blow. No matter what defendant's intent may have been before he inflicted the first wound, there was adequate time between each blow for defendant to have premeditated and deliberated his actions. *See Ginyard*, 334 N.C. at 159, 431 S.E.2d at 13 (substantial evidence to show premeditation and deliberation; defendant stabbed victim four times); *State v. Zuniga*, 320 N.C. 233, 259, 357 S.E.2d 898, 915 (evidence sufficient to show premeditation and deliberation; defendant stabbed victim in neck, partially removed the knife, then stabbed again), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *State v. Fisher*, 318 N.C. 512, 518, 350 S.E.2d 334,

338 (1986) (premeditation and deliberation found; defendant stabbed victim multiple times).

The Court of Appeals determined the evidence supported an instruction on second-degree murder because "conflicting inferences" could be drawn concerning premeditation and deliberation. We disagree. Because there was positive, uncontradicted evidence of each element of first-degree murder, an instruction on second-degree murder was not required. *See State v. Cintron*, 351 N.C. 39, 519 S.E.2d 523 (1999) (per curiam), *cert. denied*, —— U.S. ——, 146 L. Ed. 2d 498 (2000). "A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the [s]tate's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). Further, "mere speculation [as to the rationales for defendant's behavior] is not sufficient to negate evidence of premeditation and deliberation." *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998).

When viewed as a whole, the evidence in this case did not support the submission of second-degree murder to the jury. The state presented positive and uncontradicted evidence of each element of first-degree murder. Accordingly, we reverse the decision of the Court of Appeals. This case is remanded to that court with instructions to address defendant's remaining assignments of error.

REVERSED.

DANIEL M. HLASNICK AND DARLENE HLASNICK v. FEDERATED MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 78PA00

(Filed 21 December 2000)

Insurance— automobile—UIM—fleet policy—two-tiered coverage

The Court of Appeals correctly concluded that a two-tiered UIM coverage endorsement was valid and enforceable where the purchaser of a fleet policy paid additional premiums to provide higher limits of UIM coverage to certain persons insured in excess of the statutory floor. The Financial Responsibility Act nowhere mandates that UIM coverage be equivalent for all per-

sons insured under an automobile policy and the Act expressly permits the insured to select a higher limit of UIM coverage than the minimal floor required by the statute.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 136 N.C. App. 320, 524 S.E.2d 386 (2000), affirming in part and reversing and remanding in part a judgment entered 3 November 1998 by Ellis (B. Craig), J., in Superior Court, Wake County. Heard in the Supreme Court 12 September 2000.

Thompson, Smyth & Cioffi, L.L.P., by Theodore B. Smyth, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by Mallory T. Underwood, for defendant-appellee Federated Mutual Insurance Company.

DeBank & Honeycutt, by Douglas F. DeBank, for defendant-appellant State Farm Mutual Automobile Insurance Company.

MARTIN, Justice.

On 18 August 1996 Daniel Hlasnick and his wife, Darlene Hlasnick (collectively the Hlasnicks), were injured in an automobile accident in Granville County. Mr. Hlasnick was driving a 1994 Dodge pickup truck carrying Mrs. Hlasnick as a passenger. The accident occurred when a vehicle owned and operated by Norman Smith (Smith) rear-ended the pickup truck. The pickup truck carrying Mr. and Mrs. Hlasnick was owned by Mr. Hlasnick's employer, RPM Lincoln Mercury, Inc. (RPM). Mr. Hlasnick worked for RPM as a general manager and was allowed to use RPM vehicles for personal errands without permission. Mr. and Mrs. Hlasnick were on a personal errand at the time of the accident.

Smith tendered the $25,000 limit of his liability insurance policy. Additionally, the Hlasnicks were covered by two personal auto policies issued by State Farm Mutual Automobile Insurance Company (State Farm). The State Farm policies provided $100,000 per person and $300,000 per accident of underinsured motorist (UIM) coverage. Federated Mutual Insurance Company (Federated) insured RPM as an additional insured on a commercial package or fleet policy issued to Glen Burnie Nissan, LLC (Glen Burnie). The policy contained an endorsement provision establishing two levels of UIM coverage:

$500,000 to any RPM director, officer, partner, or owner, and his or her family member; and $50,000 to other persons insured.

On 25 July 1997 the Hlasnicks brought a declaratory judgment action to determine the amount of UIM coverage under the Federated policy. On 3 November 1998 the trial court granted Federated's motion for summary judgment. The trial court concluded the Hlasnicks were entitled to $50,000 in UIM coverage from Federated and $200,000 in UIM coverage under each of the two State Farm policies. The trial court further concluded State Farm's coverage was primary and Federated's coverage was excess.

The Court of Appeals affirmed the trial court's conclusion that the Hlasnicks were entitled to $50,000 in UIM coverage under the fleet policy. *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 322, 524 S.E.2d 386, 388 (2000). The Court of Appeals determined there was "no reason either in the Act or in public policy to prevent an insured from obtaining underinsured motorist coverage in excess of the statutory minimum for employees it consider[ed] particularly valuable." *Id.* at 326, 524 S.E.2d at 390. Additionally, the Court of Appeals reversed the trial court's determination that State Farm's coverage was primary.

This Court allowed discretionary review to consider (1) whether Federated's two-tiered UIM coverage is valid under the North Carolina Motor Vehicle Financial Responsibility Act; (2) whether Federated met the minimum requirements of the North Carolina Motor Vehicle Financial Responsibility Act in gaining Glen Burnie's selection of UIM coverage; and (3) whether Daniel Hlasnick was an RPM officer as defined within the Federated policy.

The Hlasnicks contend the Court of Appeals erroneously determined that Federated's UIM coverage endorsement provision was valid under the North Carolina Motor Vehicle Safety and Financial Responsibility Act. See N.C.G.S. §§ 20-279.1 to .39 (1993) (the Financial Responsibility Act). More particularly, the Hlasnicks argue the policy violates the Financial Responsibility Act because, although the UIM provision provides the statutorily mandated "floor" of UIM coverage to all persons insured, it impermissibly grants $500,000 in UIM coverage to RPM directors, officers, partners, and owners. We disagree and affirm the Court of Appeals on this issue.

At the outset we note that the parties to a contract of insurance generally "have the right to limit or expand their liability by writing

policies with narrow or broad coverage." 4 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d* § 22.1, at 352 (1998) [hereinafter *Holmes*]. Indeed, our state's legal landscape recognizes that, unless contrary to public policy or prohibited by statute, freedom of contract is a fundamental constitutional right. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 350, 338 S.E.2d 92, 98 (1986); *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 93, 194 S.E.2d 834, 838 (1973); *Stephens v. Hicks*, 156 N.C. 239, 244, 72 S.E. 313, 316 (1911).

Within the context of automobile insurance, however, the Financial Responsibility Act prohibits the issuance of UIM coverage in limits "less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5." N.C.G.S. § 20-279.21(b)(4) (1993) (amended 1997). Section 20-279.5 sets forth the minimal limits for liability insurance coverage as follows:

> if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident . . . .

N.C.G.S. § 20-279.5(c) (1993) (amended 1999).

Thus, automobile insurance policies subject to the Financial Responsibility Act must provide a minimal "floor" of UIM coverage. The issue in the present case is therefore whether, once Glen Burnie provided the statutorily required floor of UIM coverage to all persons insured, it was entitled, upon payment of additional premiums, to provide additional UIM coverage for RPM directors, officers, partners, and owners.

The Financial Responsibility Act expressly permits the insured to select a higher limit of UIM coverage than the minimal floor of coverage required by the statute. *See* N.C.G.S. § 20-279.21(b)(4). Indeed, the insured is permitted under the statute to categorically reject *any* UIM coverage. *Id.* Moreover, it is generally accepted that the insured should be able to negotiate for a "policy provision which is more favorable than that prescribed by statute." 4 *Holmes* § 22.1, at 363. This Court has held that the purchase of insurance coverage in excess of the minimal requirements of the Financial Responsibility Act is voluntary and allowed under the Act. *See Nationwide Mut.*

Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. at 93, 194 S.E.2d at 838; *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 289, 134 S.E.2d 654, 658 (1964). *See also Nationwide Mut. Ins. Co. v. Massey*, 82 N.C. App. 448, 450, 346 S.E.2d 268, 270 (1986); *Government Employees Ins. Co. v. Herndon*, 79 N.C. App. 365, 367, 339 S.E.2d 472, 473 (1986).

The Financial Responsibility Act nowhere mandates that UIM coverage be equivalent for all persons insured under an automobile insurance policy. Appellants suggest the absence of *authorizing* language means the legislature did not intend to allow multiple levels of UIM coverage in the same policy. We disagree. In the absence of statutory proscription or public policy violation, it is beyond question that parties are free to contract as they deem appropriate—enabling legislation is not required. *Cf. Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. at 93, 194 S.E.2d at 838. As we have stated, " '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and *limitations* not contained therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong's North Carolina Index 2d *Statutes* § 5 (1968)) (emphasis added). Put simply, it is within the province of the legislature, not this Court, to place any new or additional restrictions on the issuance of UIM coverage not mandated by the Financial Responsibility Act.

Appellants nonetheless argue that section 20-279.21(b)(4)'s definition of "underinsured highway vehicle" prohibits the issuance of multi-tier UIM coverage. N.C.G.S. § 20-279.21(b)(4) provides:

> An "uninsured motor vehicle" as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle" which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident *is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279.21(b)(4) (emphasis added).

Appellants assert this statutory language shows the legislature contemplated UIM coverage for "vehicles" rather than "persons."

Although the statutory scheme for *liability* insurance is vehicle-oriented, *UIM insurance* is *person-oriented* under the Financial Responsibility Act. *Harrington v. Stevens*, 334 N.C. 586, 590, 434 S.E.2d 212, 214 (1993); *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 148, 400 S.E.2d 44, 50 (1991). In *Smith* we stated that the *liability* provisions of N.C.G.S. § 20-279.21(b)(2) require a policy to insure people " 'using any such motor vehicle or motor vehicles . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of *such motor vehicle or motor vehicles*.' " *Smith*, 328 N.C. at 148, 400 S.E.2d at 50 (quoting N.C.G.S. § 20-279.21(b)(2) (1993) (amended 1997)) (alterations in original). In contrast, "the [uninsured motorist] (and by incorporation, the UIM) coverage is offered 'for the protection of *persons insured* who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.' " *Id.* (quoting N.C.G.S. § 20-279.21(b)(3) (1993) (amended 1997)) (alteration in original).

The validity of multi-tier UIM coverage is an issue of first impression in North Carolina. Although there is a paucity of decisions generally addressing this question, our research has located appellate decisions affirming the principle of multi-tier coverage. *See, e.g.*, *Preferred Risk Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 611 N.W.2d 283 (Iowa 2000); *Allstate Ins. Co. v. United Farm Bur. Mut. Ins. Co.*, 618 N.E.2d 31 (Ind. Ct. App. 1993); *Auto-Owners Ins. Co. v. United Farm Bur. Mut. Ins. Co.*, 560 N.E.2d 549 (Ind. Ct. App. 1990); *Cullum v. Farmers Ins. Exch.*, 857 P.2d 922 (Utah 1993).

In *Preferred Risk Mut. Ins. Co. v. Federated Mut. Ins. Co.*, Thomas and Holly Peterson were injured in an automobile accident with an uninsured motorist. 611 N.W.2d at 283. The Petersons were operating an automobile insured by Thomas' corporate employer through Federated Mutual Insurance Company. *Id.* at 284. The policy provided uninsured motorist (UM) coverage of $100,000 to corporate directors, officers, partners or owners but no UM coverage to all other insureds. *Id.* The Iowa Supreme Court affirmed "the practice of providing different limits of uninsured motorist coverage for different categories of insureds." *Id.* at 285. The Court further held that, because the named insured did not decline coverage, UM coverage was required at the minimum level established by Iowa statute. *Id.* Consequently, the Court concluded the Petersons were entitled to UM coverage equal to the statutory minimum. *Id.* at 284.

Similarly, courts in other jurisdictions have upheld multi-tier *liability* coverage. For example, in *Allstate Ins. Co. v. United Farm*

Bur. Mut. Ins. Co., Joseph Lubovich insured his car with United Farm Bureau Mutual Insurance Company. 618 N.E.2d at 32. Although the policy provided liability coverage to the insured, his employees, and members of his household, among others, of $100,000 per person and $300,000 per accident, the policy contained a clause that reduced the amount of liability coverage for permissive users to the minimum level mandated by Indiana's financial responsibility law, $25,000. *Id.* at 32-33. The Indiana Court of Appeals held, among other things, that the policy's multi-tier coverage did not violate public policy and was otherwise valid. *Id.* at 33-36.

In the present case, the Federated policy provided UIM coverage meeting the minimum statutory requirements. Glen Burnie, the purchaser of the fleet policy, paid additional premiums to provide higher limits of UIM coverage to certain persons insured in excess of the statutory floor. Because the provision of additional or supplemental UIM coverage in excess of the statutory floor is permissible under North Carolina law, we affirm the Court of Appeals' conclusion that Federated's two-tiered UIM coverage endorsement provision is valid and enforceable. As to the remaining issues briefed by the parties before this Court, we conclude discretionary review was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

DOUGLAS D. ROBERTS v. CARROLL E. SWAIN, JR., J.B. McCRACKEN AND ALANA M. ENNIS

No. 572PA99

(Filed 21 December 2000)

Costs— Rule 68—costs and fees after judgment

The trial court correctly applied N.C.G.S. § 1A-1, Rule 68 in an action arising from an unlawful arrest where defendants made an offer of $50,000 prior to trial, inclusive of costs and attorney's fees accrued to that date; plaintiff refused the offer of judgment and the jury awarded plaintiff $18,100 in damages; the trial court added plaintiff's attorney's fees and costs incurred before and after the offer of judgment for a total of $87,334.69; and, as that

sum exceeded the tender of judgment, awarded plaintiff all costs (including attorney's fees) under 42 U.S.C. § 1988. Under *Poole v. Miller*, 342 N.C. 349, "judgment finally obtained" was defined as the verdict modified by any applicable costs and such adjustments were not limited to pre-offer costs; costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained" under Rule 68, even where attorney's fees are awarded under a federal statute.

Justice PARKER concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 135 N.C. App. 613, 521 S.E.2d 493 (1999), reversing and remanding an order and judgment entered 21 September 1998 and a judgment entered 16 October 1998 by Spencer (James C., Jr.), J., in Superior Court, Orange County. On 6 April 2000, the Supreme Court allowed defendants' conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court 14 September 2000.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for plaintiff-appellant and -appellee.

Michael F. Easley, Attorney General, by Bruce S. Ambrose, Assistant Attorney General, for defendant-appellant and -appellee McCracken; Isaac T. Avery III, Special Deputy Attorney General, and Reuben F. Young, Assistant Attorney General, for defendant-appellant and -appellee Swain; and Christine Ryan, Assistant Attorney General, for defendant-appellant and -appellee Ennis.

FRYE, Chief Justice.

According to the Court of Appeals, N.C.G.S. § 1A-1, Rule 68 provides that "a plaintiff who rejects a defendant's offer of judgment must bear the costs and attorney fees incurred after the offer of judgment if the 'judgment finally obtained' is less favorable than the offer of judgment." *Roberts v. Swain*, 135 N.C. App. 613, 614, 521 S.E.2d 493, 494 (1999). The question plaintiff raises in his petition for discretionary review is whether costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained." We hold that they should and therefore reverse the Court of Appeals.

The facts of this case are not in dispute. On 18 January 1995, three police officers employed by the University of North Carolina at Chapel Hill (defendants) unlawfully arrested and detained Douglas D. Roberts (plaintiff) when plaintiff attempted to sell two basketball tickets outside the Dean E. Smith Center in Chapel Hill, North Carolina. Defendants handcuffed plaintiff, took him to the police station, and questioned him. Plaintiff resisted the unlawful detention, and defendants subdued him, causing injury to his shoulder. Defendants charged plaintiff with solicitation; resisting, delaying, and obstructing an officer; and assault on a government officer. All three charges were subsequently dismissed.

On 3 July 1995, plaintiff filed an action against defendants, alleging assault and battery, false imprisonment, malicious prosecution, negligent supervision, intentional deprivation of plaintiff's Fourth and Fourteenth Amendment rights, violation of 42 U.S.C. § 1983 by excessive force and unreasonable search and seizure, and intentional infliction of emotional distress. Based on his claim under 42 U.S.C. § 1983, plaintiff sought an award of reasonable attorney's fees under 42 U.S.C. § 1988.

On 20 November 1997, prior to trial, defendants made an offer of judgment under Rule 68 of the North Carolina Rules of Civil Procedure in the amount of $50,000, inclusive of costs and attorney's fees accrued at the time the offer was filed. Plaintiff refused the offer of judgment.

Following trial, the jury awarded plaintiff $18,100 in damages. The trial court added plaintiff's attorney's fees incurred before and after the offer of judgment in the sum of $58,755 and costs incurred before and after the offer of judgment in the amount of $10,479.69. The total sum awarded plaintiff was $87,334.69. As the sum for judgment finally obtained exceeded the tender of judgment for $50,000, the trial court awarded plaintiff all costs including attorney's fees under 42 U.S.C. § 1988. Defendants appealed.

In a unanimous, published opinion, the Court of Appeals reversed on the grounds that the trial court improperly included costs incurred after the offer of judgment when calculating the "judgment finally obtained." In its opinion, the Court of Appeals held: "In calculating the 'judgment finally obtained' under N.C.G.S. § 1A-1, Rule 68, the court should not include any costs incurred after the offer of judgment." *Roberts*, 135 N.C. App. at 617, 521 S.E.2d at 496. In light of this holding, the Court of Appeals determined that the "judgment finally

obtained" in the instant case was actually less favorable than the offer of judgment and that the trial court erred in its award of costs and attorney's fees. *Id.* On 6 April 2000, this Court allowed plaintiff's petition for discretionary review and defendants' conditional petition for discretionary review as to an additional issue.

Rule 68 of the North Carolina Rules of Civil Procedure provides in pertinent part: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." N.C.G.S. § 1A-1, Rule 68(a) (1999). Otherwise stated, if the "judgment finally obtained" is less favorable than the offer of judgment, a plaintiff who has rejected the offer of judgment must bear the costs and attorney's fees incurred after the offer of judgment. *Cf. Purdy v. Brown*, 307 N.C. 93, 96, 296 S.E.2d 459, 462 (1982) (for purposes of Rule 68, "costs then accrued" include attorney's fees recovered under 42 U.S.C. § 1988).

The phrase "judgment finally obtained" was defined by this Court in *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995):

> Thus, we construe the legislature's choice of the phrase "judgment finally obtained" as indicative of the legislature's intent that it is the amount ultimately and *finally* obtained by the plaintiff from the court which serves as the measuring stick for purposes of Rule 68. For these reasons, we conclude that, within the confines of Rule 68, "judgment finally obtained" means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict.

Applying this definition to the facts, this Court determined that the trial court properly included attorney's fees and costs, a portion of which accrued after the offer of judgment had been made, in calculating the "judgment finally obtained."

> [D]efendant tendered a valid offer of judgment pursuant to Rule 68 for $6,000, together with costs accrued, which offer plaintiff failed to accept. The case proceeded to trial, and the jury returned a verdict in favor of plaintiff for $5,721.73. The trial court granted plaintiff's motion for recovery of reasonable attorney's fees in the amount of $2,000 and additionally taxed as costs against defendant filing and service fees, expert witness's fees and interest from the date of filing. Final judgment was then

> entered in plaintiff's favor for the sum of $9,058.21, *portions of which reflect costs accrued after the offer of judgment.* The "judgment finally obtained" then, in this case, is the final judgment of $9,058.21 entered by the trial court. It is this sum, pursuant to the dictates of Rule 68, which must be compared to the amount of the offer of judgment to determine whether plaintiff is required to pay the costs incurred after the date the offer of judgment was tendered.

Id. at 354, 464 S.E.2d at 412 (emphasis added).

In spite of the disposition in *Poole*, in the case *sub judice*, the Court of Appeals held: "In calculating the 'judgment finally obtained' under N.C.G.S. § 1A-1, Rule 68, the court should not include any costs incurred after the offer of judgment." *Roberts*, 135 N.C. App. at 617, 521 S.E.2d at 496. In so holding, the Court of Appeals improperly adopted the reasoning of the dissent in *Poole*, which would have excluded post-offer costs in calculating the "judgment finally obtained."

The Court of Appeals reasoned that its holding was not inconsistent with this Court's holding in *Poole* because this Court narrowly held in *Poole* that the "judgment finally obtained" was not equal to the jury verdict. We note, however, that in *Poole* this Court broadly defined the "judgment finally obtained" as "the jury's verdict as modified by *any* applicable adjustments," *Poole*, 342 N.C. at 353, 464 S.E.2d at 411 (emphasis added), and did not limit such adjustments to pre-offer costs. Furthermore, as stated above, this Court in *Poole* approved the calculations performed by the trial court where the trial court had included post-offer costs in calculating the "judgment finally obtained."

In support of its holding, the Court of Appeals cited *Marryshow v. Flynn*, 986 F.2d 689 (4th Cir. 1993). In light of the precedent of *Poole*, it was unnecessary for the Court of Appeals to look to federal case law for guidance. Admittedly, a federal statute, 42 U.S.C. § 1988(b), provided the basis for awarding attorney's fees in the present case. However, this Court's holding in *Poole* was not limited to cases involving an award of attorney's fees and other costs under state statutes. North Carolina courts should not apply the federal approach to offers of judgment merely because a federal statute authorizes the award of attorney's fees. Rather, the meaning of Rule 68 of the North Carolina Rules of Civil Procedure is the same for all cases brought in North Carolina courts. As such, we hold that costs

incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained," even where attorney's fees are awarded under a federal statute. We therefore reverse the Court of Appeals in order that the judgments of the Superior Court, Orange County, shall be reinstated.

As in *Poole*, defendants argue that including costs and attorney's fees incurred after an offer of judgment in calculating the "judgment finally obtained" discourages the settlement of cases. Plaintiff, citing examples, contends otherwise. In view of the precedent of *Poole*, including the dissenting opinion therein, we believe defendants' argument would be better addressed to the legislative branch of government. We thus reverse the decision of the Court of Appeals as to this issue.

Finally, having determined that defendants' conditional petition for discretionary review was improvidently allowed, we decline to address it.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice PARKER concurring.

The result reached by the majority is consistent with this Court's decision in *Poole v. Miller*, 342 N.C. 349, 464 S.E.2d 409 (1995). I dissented from the decision of the majority in *Poole*, and I continue to believe that the reasoning of my dissent in that case was correct. *Id.* at 355-57, 464 S.E.2d at 413-14. (Parker, J. dissenting, joined by Whichard, J.). However, the doctrine of *stare decisis*, which impels courts to abide by established binding precedent except in the most extraordinary circumstance, requires that I now accept *Poole* as authoritative and concur in the decision of the majority in the present case.

WILLIE B. TART v. JAMES L. MARTIN AND PEGGY H. MARTIN

No. 174PA00

(Filed 21 December 2000)

1. **Motor Vehicles— negligent entrustment—insufficient evidence of vehicle ownership**

The Court of Appeals erred by reversing a summary judgment arising from an automobile accident as to defendant Peggy Martin where the Court of Appeals reversed on the issue of negligent entrustment, but Ms. Martin's name was not on the title to the vehicle and there is no document that would support the contention that she was the owner.

2. **Motor Vehicles— negligent entrustment—summary judgment—insufficient evidence of careless driver**

The Court of Appeals erred in an action arising from an automobile accident by reversing the trial court's summary judgment for defendant James Martin on the theory of negligent entrustment. One moving violation by the driver of the car (defendant's son, Jonathan) more that two years prior to the collision and his no-fault involvement in three accidents one to two years prior to the collision do not support a conclusion that Jonathan was so likely to cause harm to others that entrusting a motor vehicle to him amounted to negligent entrustment.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 137 N.C. App. 371, 527 S.E.2d 708 (2000), affirming in part and reversing in part an order for summary judgment entered by Eagles, J., on 10 February 1999, in Superior Court, Guilford County. Heard in the Supreme Court 16 October 2000.

Schlosser, Neill & Brackett, by Jan Elliott Pritchett, for plaintiff-appellee.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Paul A. Daniels, for defendant-appellants.

WAINWRIGHT, Justice.

This appeal involves the theory of negligent entrustment, which imposes liability upon the owner of a motor vehicle for a third party's

negligent operation of the vehicle. On 5 October 1998, plaintiff Willie B. Tart filed suit against defendants James L. Martin and Peggy H. Martin, alleging that defendants were liable for their son's negligence in an automobile accident under the family purpose doctrine and the theory of negligent entrustment. Defendants answered denying their liability and thereafter filed a motion for summary judgment. On 10 February 1999, the trial court entered an order granting defendants' motion for summary judgment as to all claims. Plaintiff appealed to the Court of Appeals, which affirmed summary judgment as to the family purpose doctrine but reversed summary judgment as to the theory of negligent entrustment. *Tart v. Martin*, 137 N.C. App. 371, 527 S.E.2d 708 (2000). On 15 June 2000, this Court allowed defendants' petition for discretionary review.

On 6 October 1995, Jonathan Wayne Martin (Jonathan), defendants' son, drove a 1984 Ford vehicle through a stop sign and collided with a vehicle driven by plaintiff. As a result of the collision, Jonathan was killed and plaintiff was injured. At the time of the accident, Jonathan was eighteen years old and a member of defendants' household. The vehicle driven by Jonathan was titled in the name of his father, James Martin. At the time of the purchase of the vehicle, Jonathan was unable to contract for its purchase because he was a minor. Because of this limitation, as is often the practice in our society, Jonathan reimbursed his parents for the automobile's purchase and maintenance. Jonathan made regular payments to his father and paid all repair, maintenance, insurance, and operating costs. Jonathan was the only person who drove the vehicle, and he kept both sets of keys to the vehicle. In sum, Jonathan kept the vehicle for his own pleasure and convenience and had actual and exclusive control of the vehicle. Neither James nor Peggy Martin drove the vehicle, as both defendants had their own automobiles.

Defendants, in their affidavits, admitted their prior knowledge of Jonathan's prior conviction for a moving violation of driving fifty miles per hour in a thirty-five miles per hour zone (reduced from a charge of seventy-five miles per hour in a thirty-five miles per hour zone). This conviction was entered on 17 September 1993, more than two years prior to the collision in the instant case. Defendants acknowledged that Jonathan had been involved, but was not at fault, in three automobile accidents between 15 March 1993 and 27 November 1994. Defendants stated in their affidavits that the first accident was caused by the driver of a truck running a stop sign and colliding with Jonathan; the second accident was caused by Jonathan

swerving into a ditch to avoid a collision with a car which suddenly stopped in front of him; and the third accident occurred when Jonathan collided with a motorcyclist who was stopped in the roadway on a dark, rainy night without headlights or signal lights. The record in this case further reveals that Jonathan was a licensed driver since age sixteen and that his license had never been suspended or revoked.

[1] At the outset, the parties agree that the Court of Appeals erred in reversing summary judgment as to defendant Peggy Martin. Her name is not on the title to the vehicle, and there is no document that would support the contention that she was the owner. We agree and therefore reverse the Court of Appeals on this issue.

[2] As a result of the foregoing, the remaining question is whether the Court of Appeals erred in reversing the trial court's order granting summary judgment to defendant James Martin on the issue of negligent entrustment.

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that any party is entitled to a judgment *as a matter of law*." N.C.G.S. § 1A-1, Rule 56(c) (1999) (emphasis added); *accord Fordham v. Eason*, 351 N.C. 151, 159, 521 S.E.2d 701, 706 (1999).

Negligent entrustment is established when the owner of an automobile " 'entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver[,]' [*Heath v. Kirkman*, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954),] who is 'likely to cause injury to others in its use[,]' [*Bogen v. Bogen*, 220 N.C. 648, 650, 18 S.E.2d 162, 163 (1942)]." *Swicegood v. Cooper*, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995). Based on his own negligence, the owner is "liable for any resulting injury or damage proximately caused by the borrower's negligence." *Id.*; *see also Roberts v. Hill*, 240 N.C. 373, 377, 82 S.E.2d 373, 377 (1954).

Plaintiff contends, and the Court of Appeals agreed, that the trial court improperly granted summary judgment on the issue of negligent entrustment because, as a matter of law, Jonathan's only moving violation more than two years prior to the collision and his no-fault involvement in three accidents support a conclusion that he

was an incompetent or reckless driver likely to cause injury to others. We disagree.

This Court has previously addressed the requisite evidence that warrants submission of the issue of negligent entrustment to the jury. In *Swicegood*, for example, we held that the issue of negligent entrustment was properly submitted to the jury where the driver had accumulated three safe-movement violations and six speeding convictions in a span of six years. *Swicegood*, 341 N.C. at 179, 459 S.E.2d at 206. Also, in *Dinkins v. Booe*, 252 N.C. 731, 114 S.E.2d 672 (1960), this Court approved submission of negligent entrustment to the jury where the owner of the automobile knew that the driver had a "very serious" automobile accident a few years earlier, had another accident two years later, and had a conviction for driving without a license from several years before. *Id.* at 735, 114 S.E.2d at 675; *see also Boyd v. L.G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405 S.E.2d 914 (submission to jury proper where driver had received two convictions for driving under the influence of alcohol, three convictions for reckless driving, and six convictions for speeding), *disc. rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991).

In the instant case, notwithstanding the issue of ownership, or whether this was an entrustment arrangement, we hold that the trial court's granting of summary judgment was proper. Jonathan's only moving violation more than two years prior to the collision and his no-fault involvement in three accidents one to two years prior to the collision will not, as a matter of law, support a conclusion that Jonathan was so likely to cause harm to others that entrusting a motor vehicle to him amounted to negligent entrustment.

Having determined that summary judgment was proper, we need not determine any other issues. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

THE KNIGHT PUBLISHING COMPANY, INC. v. THE CHASE MANHATTAN BANK, N.A. AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA

No. 523A98-2

(Filed 21 December 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. 27, 527 S.E.2d 80 (2000), affirming an order and a modified final order and judgment entered 19 September 1997 by Saunders, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 16 October 2000.

Smith Helms Mulliss & Moore, L.L.P., by Jonathan E. Buchan and T. Jonathan Adams, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by William L. Rikard, Jr.; Jack L. Cozort; and Kiah T. Ford IV, for defendant-appellants.

PER CURIAM.

AFFIRMED.

TED F. CASH v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 203PA00

(Filed 21 December 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 137 N.C. App. 192, 528 S.E.2d 372 (2000), affirming an order entered by Caviness, J., on 29 October 1998 in Superior Court, Cleveland County, and a judgment entered by Doughton, J., on 19 January 1999 in Superior Court, Cleveland County. Heard in the Supreme Court 17 October 2000.

The Cerwin Law Firm, by Todd R. Cerwin, for plaintiff-appellant.

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

PER CURIAM.

AFFIRMED.

DIALYSIS CARE OF NORTH CAROLINA, LLC, D/B/A DCNC, LLC, D/B/A DIALYSIS CARE OF ROWAN COUNTY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC. D/B/A BMA OF KANNAPOLIS D/B/A METROLINA KIDNEY CENTER OF KANNAPOLIS (LESSEE) AND METROLINA NEPHROLOGY ASSOCIATES, P.A. (LESSOR), RESPONDENT-INTERVENORS

No. 252A00

(Filed 21 December 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. 638, 529 S.E.2d 257 (2000), affirming a final agency decision entered by the Division of Facility Services of the North Carolina Department of Health and Human Services on 9 December 1998. Heard in the Supreme Court 18 October 2000.

Poyner & Spruill L.L.P., by William R. Shenton, Thomas R. West, and Pamela A. Scott, for petitioner-appellant.

Michael F. Easley, Attorney General, by James A. Wellons, Special Deputy Attorney General, for respondent-appellee; and Law Office of Joy H. Thomas, by Joy H. Thomas, for respondent-intervenor-appellees.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. TIMOTHY EARL BLACKWELL

No. 567A99

(Filed 21 December 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. 729, 522 S.E.2d 313 (1999), vacating and remanding judgments entered 17 April 1998 by Hudson, J., in Superior Court, Durham County. Heard in the Supreme Court 18 April 2000.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Jonathan P. Babb, Assistant Attorney General, for the State-appellant.

Robert Brown, Jr., Public Defender, and Shannon A. Tucker and C. Scott Holmes, Assistant Public Defenders, for defendant-appellee.

PER CURIAM.

In *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), decided today, this Court held that culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge under the felony murder rule. We remand this case to the Court of Appeals for reconsideration in light of *Jones*.

REMANDED.

STATE OF NORTH CAROLINA v. ALFRED LEE COOPER

No. 289A00

(Filed 21 December 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 138 N.C. App. 495, 530 S.E.2d 73 (2000), vacating a judgment entered 21 April 1998 by Smith (W. Osmond), J., in Superior Court, Wake County, and remanding for entry of appropriate judgment and sentence. Heard in the Supreme Court 17 October 2000.

Michael F. Easley, Attorney General, by Angel E. Gray, Associate Attorney General, for the State-appellant.

Carlton E. Fellers for defendant-appellee.

PER CURIAM.

AFFIRMED.

ALLEN v. ROBERTS CONSTR. CO.

No. 358P00

Case below: 138 N.C. App. 557

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Motion by plaintiff to dismiss petition for discretionary review dismissed as moot 20 December 2000.

BRUGGEMAN v. MEDITRUST ACQUISITION CO.

No. 397P00

Case below: 138 N.C. App. 612

Motion by plaintiffs to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant (Meditrust Company, LLC.) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

BRYANT v. BRYANT

No. 444P00

Case below: 139 N.C. App. 615

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

CARPENTER v. BROOKS

No. 477P00

Case below: 139 N.C. App. 745

Petition by plaintiffs (Carpenter and Carson) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

DEMERY v. CONVERSE, INC.

No. 401P00

Case below: 138 N.C. App. 243
130 N.C. App. 610

Petition by plaintiff to withdraw petition for discretionary review or petition for writ of certiorari allowed 7 December 2000.

DONALDSON v. DONALDSON

No. 391P00

Case below: 139 N.C. App. 206

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

EASTOVER RIDGE LLC. v. METRIC CONSTRUCTORS, INC.

No. 455P00

Case below: 139 N.C. App. 360

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

FORMYDUVAL v. BUNN

No. 318P00

Case below: 138 N.C. App. 381

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

GAUNT v. PITTAWAY

No. 472P00

Case below: 135 N.C. App. 442

Motion by defendants (Pittaway, Crain, Whitesides, Wing, Coulam and The Nalle Clinic) to dismiss the appeal by plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) for lack of substantial constitutional question allowed 21 December 2000. Petition by plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) for discretionary review pursuant to G.S. 7A-31 denied 21 December 2000.

HANKINS v. MERCY HOSP.

No. 476P00

Case below: 139 N.C. App. 835

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

HANSEN v. CRYSTAL FORD-MERCURY, INC.

No. 403P00

Case below: 138 N.C. App. 369

Joint petition by April Hansen, Crystal Ford-Mercury, Inc. and Pennsylvania National Insurance Company for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Petition by defendants (Crystal Ford-Mercury, Inc. and Pennsylvania National Insurance Company) for writ of supersedeas and motion for temporary stay denied 20 December 2000.

HARRISON v. TOBACCO TRANSP., INC.

No. 446P00

Case below: 139 N.C. App. 561

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

HARTER v. VERNON

No. 433P00

Case below: 139 N.C. App. 85

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-32 denied 20 December 2000.

HORACE MANN INS. CO. v. EDGE

No. 407P00

Case below: 139 N.C. App. 449

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

HUNTLEY v. PANDYA

No. 441P00

Case below: 136 N.C. App. 848

Petition by defendants (Elkins, Cartee and Housing) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

HYLTON v. KOONTZ

No. 296P00

Case below: 138 N.C. App. 511

Petition by defendants for writ of supersedeas and motion for temporary stay denied 20 December 2000. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 20 December 2000.

IN RE APPEAL OF WALLIN

No. 362PA00

Case below: 137 N.C. App. 207

Petition by respondent for discretionary review pursuant to G.S. 7A-31 allowed 20 December 2000.

IN RE LONG

No. 386P00

Case below: 139 N.C. App. 449

Petition by respondent (Mary Elizabeth Long) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

IN RE MERRITT

No. 493PA00

Case below: 140 N.C. App. 151

Motion by respondent for temporary stay allowed 25 October 2000 pending determination of further proceedings, if any, by this court. Petition by respondent for writ of supersedeas allowed 20 December 2000. Notice of appeal by respondent pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 20 December 2000. Petition by respondent for discretionary review pursuant to G.S. 7A-31 allowed 20 December 2000. Petition by respondent for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 20 December 2000.

JAY GRP., Ltd. v. GLASGOW

No. 445P00

Case below: 139 N.C. App. 595

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

JOHNSON v. TRUSTEES OF DURHAM TECH. CMTY. COLL.

No. 474P00

Case below: 139 N.C. App. 676

Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 20 December 2000.

JONES v. WAINWRIGHT

No. 457P00

Case below: 139 N.C.App. 450

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

KEITH v. FRIEND

No. 447P00

Case below: 139 N.C. App. 635

Petition by defendants (Clarence Friend and Flaminio Malaguti) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

KIKENDALL v. JONES

No. 475P00

Case below: 139 N.C. App. 835

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Conditional Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 20 December 2000.

KILGO v. WAL-MART STORES, INC.

No. 359P00

Case below: 138 N.C. App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

LOVEKIN v. LOVEKIN & INGLE

No. 517P00

Case below: 140 N.C. App. 244

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

LUPTON v. BCBS OF N.C.

No. 413P00

Case below: 139 N.C. App. 421

Petition by plaintiffs (Lupton and Giduz, and all persons similarly situated) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

LYNN v. BURNETTE

No. 418PA99-2

Case below: 134 N.C. App. 731

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 20 December 2000. Motion by plaintiff to strike defendant's petition for discretionary review denied 20 December 2000. Motion by plaintiff to dismiss denied 20 December 2000.

McINTYRE v. FORSYTH CTY. DSS

No. 349P00

Case below: 138 N.C. App. 327

Petition by respondent for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

MOSTELLER v. ALEX LEE, INC.

No. 85P00

Case below: 136 N.C. App. 232

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

N.C. STATE BAR v. HARRIS

No. 464PA00

Case below: 137 N.C. App. 207

Motion by defendant pro se to set aside the order for temporary stay denied 20 December 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 20 December 2000. Petition by plaintiff for writ of supersedeas allowed 20 December 2000. Conditional petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

PATEL v. STONE

No. 400P00

Case below: 138 N.C. App. 693

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

PEACOCK v. SHINN

No. 442P00

Case below: 139 N.C. App. 487

Motion by respondents to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

PISGAH OIL CO. v. WESTERN N.C. REG'L AIR POLLUTION CONTROL AGENCY

No. 406P00

Case below: 139 N.C. App. 402

Petition by petitioner (Pisgah Oil Company, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

PRICE v. BREEDLOVE

No. 257P00

Case below: 138 N.C. App. 149

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

RAGAN v. WHEAT FIRST SEC., INC.

No. 478P00

Case below: 138 N.C. App. 453

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

RED HILL HOSIERY MILL, INC. v. MAGNETEK, INC.

No. 273P00

Case below: 138 N.C. App. 70

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

SMITH v. SMITH

No. 409P00

Case below: 139 N.C. App. 450

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. ALDRIDGE

No. 372P00

Case below: 134 N.C. App. 185

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. ALDRIDGE

No. 469P00

Case below: 139 N.C. App. 706

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. ALLEN

No. 70A86-7

Case below: Halifax County Superior Court

Application by defendant for writ of habeas corpus denied 20 December 2000.

STATE v. BITTING

No. 393P00

Case below: 132 N.C. App. 823

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. CALDERON

No. 286P00

Case below: 134 N.C. App. 186

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. CARTER

No. 160A92-3,-4

Case below: Wayne County Superior Court

Application filed by defendant for writ of habeas corpus denied 14 November 2000. Motion by defendant for stay of execution denied 20 November 2000.

STATE v. DAY

No. 344P00

Case below: 129 N.C. App. 265

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. DURHAM

No. 420P00

Case below: 139 N.C. App. 451

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. ENNIS

No. 458P00

Case below: 136 N.C. App. 668

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. EVANS

No. 490P00

Case below: 140 N.C. App. 151

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. FRANKLIN

No. 544P00

Case below: 140 N.C. App. 387

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. FULLER

No. 295P00

Case below: 138 N.C. App. 481

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. HAITH

No. 421P00

Case below: 139 N.C. App. 207

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. HARRIS

No. 381P00

Case below: 139 N.C. App. 153

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. HARRIS

No. 514P00

Case below: 140 N.C. App. 208

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Motion by Attorney General to deny petition for discretionary review dismissed 20 December 2000.

STATE v. HEATWOLE

No. 119A89-3

Case below: Moore County Superior Court

Motion by defendant to amend petition for writ of certiorari allowed 20 December 2000 for remand to the Superior Court of Moore County for a determination of matters pursuant to the order entered 20 November 2000 by the Honorable Russell G. Walker, Jr. All other matters pending before this Court are hereby dismissed without prejudice to refile after ruling by the Superior Court. Defendant's motion to amend petition for writ of certiorari was allowed and, therefore, his original petition for writ of certiorari to review the order of the Superior Court is dismissed 20 December 2000 without prejudice to refile after the ruling by the Superior Court.

STATE v. HERRING

No. 408P00

Case below: 139 N.C. App. 451

Joint motion by defendant and plaintiff to withdraw notice of appeal and petition for discretionary review allowed 19 October 2000. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question dismissed as moot 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 20 December 2000.

STATE v. HILL

No. 505P00

Case below: 138 N.C. App. 711

Petition by defendant for writ of certiorari to review the decision of the North Carolina court of appeals denied 20 December 2000.

STATE v. HOLLOWAY

No. 294P00

Case below: 138 N.C. App. 554

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Second petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. HUTCHINGS

No. 384P00

Case below: 139 N.C. App. 184

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. LYONS

No. 238A94-3

Case below: Forsyth County Superior Court

Application by defendant for writ of habeas corpus denied 20 December 2000.

STATE v. MANNING

No. 439A00

Case below: 139 N.C. App. 454

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 20 December 2000. Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 20 December 2000.

STATE v. MAY

No. 467P00

Case below: 139 N.C. App. 835

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. McCROREY

No. 487P00

Case below: 140 N.C. App. 151

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. McDONALD

No. 451P00

Case below: 136 N.C. App. 849

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. McKINNON

No. 506P00

Case below: 140 N.C. App. 387

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. McLAUGHLIN

No. 637A84-5

Case below: Bladen County Superior Court

Application by defendant for writ of habeas corpus denied 20 December 2000.

STATE v. McNEILL

No. 484A95-3

Case below: Cumberland County Superior Court

Application by defendant for writ of habeas corpus denied 20 December 2000.

STATE v. MONTFORD

No. 414P00

Case below: 137 N.C. App. 495

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. MOODY

No. 64A96-2

Case below: Davidson County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Davidson County, denied 20 December 2000.

STATE v. MOSS

No. 343P00

Case below: 139 N.C. App. 106

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. OVERTON

No. 465P00

Case below: 138 N.C. App. 555

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. PERKINS

No. 60A94-3

Case below: Pitt County Superior Court

Application by defendant for writ of habeas corpus denied 29 November 2000.

STATE v. PIGFORD

No. 510P00

Case below: 140 N.C. App. 388

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. PURCELL

No. 438P00

Case below: 139 N.C. App. 636

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Motion by defendant to hold petition for discretionary review in abeyance denied 20 December 2000.

STATE v. SCHLAEPFER

No. 483P00

Case below: 140 N.C. App. 150

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. SEXTON

No. 499A91-5,-6,-7

Case below: Wake County Superior Court

Application by defendant for writ of habeas corpus denied 16 October 2000. Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County, denied 1 November 2000. Motion by defendant for stay of execution denied 2 November 2000.

STATE v. SMITH

No. 515P00

Case below: 140 N.C. App. 385

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. SMITH

No. 404A00

Case below: 139 N.C. App. 209

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000.

STATE v. STEWART

No. 479P00

Case below: 134 N.C. App. 733

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

STATE v. STRICKLAND

No. 466P00

Case below: 139 N.C. App. 835

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. TUCKER

No. 113A96-2

Case below: Forsyth County Superior Court

Motion by defendant to stay execution of death sentence allowed 28 November 2000. Motion by defendant for stay of execution dismissed as moot 28 November 2000 (see order re 6 November motion for stay of execution).

Defendant petitioner's co-counsel, David B. Smith, having asserted in an affidavit presented to this Court that he deliberately

sabotaged his representation of defendant, Russell William Tucker, on post-conviction review, defendant's petition for writ of certiorari is allowed for the limited purpose of vacating the 1 November 2000 orders of Superior Court Judge Larry Ford and this matter is remanded to Judge Ford for the appointment of two new attorneys to serve as co-counsel for defendant; for reconsideration of defendant's motion for appropriate relief and first amended motion for appropriate relief; and for consideration of any subsequent amendments to the motion for appropriate relief or other motions that may be filed by new counsel. New counsel are allowed up to and including 120 days after appointment to file any subsequent amendments or motions with the trial court. The State of North Carolina is thereafter allowed up to and including sixty days in which to respond. The trial court shall hold a hearing and make such findings of fact and conclusions of law as are necessary to resolve all factual and legal issues raised by the motion for appropriate relief and all amendments and motions with respect thereto. By order of the Court in conference, this 28th day of November 2000.

STATE v. TURNER

No. 326P00

Case below: 138 N.C. App. 556

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. UMBEHANT

No. 495P00

Case below: 140 N.C. App. 151

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. WARD

No. 158A92-5

Case below: Pitt County Superior Court

Motion by Attorney General to lift stay of execution denied 25 October 2000. Defendant must file any subsequent motion for appropriate relief on or before 18 December 2000.

STATE v. WILEY

No. 440P00

Case below: 139 N.C. App. 636

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

STATE v. WILKINSON

No. 465A94-2

Case below: Cumberland County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 20 December 2000.

STATE v. WILSON

No. 437P00

Case below: 139 N.C. App. 544

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Motion by defendant to hold petition in abeyance dismissed 20 December 2000.

STATE v. WORTHEY

No. 280P00

Case below: 138 N.C. App. 168

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 20 December 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

SUN SUITES HOLDINGS, LLC. v. BOARD OF ALDERMEN OF TOWN OF GARNER

No. 394P00

Case below: 139 N.C. App. 269

Petition by respondent for writ of supersedeas denied 20 December 2000. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Temporary stay dissolved 20 December 2000.

WADE v. N.C. REAL ESTATE COMM'N

No. 496P00

Case below: 140 N.C. App. 152

Petition by respondent (North Carolina Real Estate Commission) for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000. Petition by respondent (North Carolina Real Estate Commission) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 December 2000.

WELCH v. LEE

No. 434P00

Case below: 139 N.C. App. 636

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 20 December 2000.

PETITION TO REHEAR

NORTHFIELD DEV. CO. V. CITY OF BURLINGTON

No. 63A00

Case below: 352 N.C. 671

Petition by defendant to rehear pursuant to Rule 31 denied 20 December 2000.

STATE OF NORTH CAROLINA v. DANIEL CUMMINGS, JR.

No. 510A99

(Filed 6 April 2001)

1. Jury— selection—qualifications—alleged unrecorded private bench discussions—subject matter reconstructed for record

The trial court did not commit prejudicial error in a capital trial by dismissing prospective jurors after unrecorded private bench discussions with those jurors concerning their qualifications to serve on the jury, because: (1) the subject matters of the ex parte discussions at the bench were reconstructed in open court for the record for four of the prospective jurors who were excused prior to voir dire; (2) the record establishes that another juror was dismissed based on his disqualification under N.C.G.S. § 9-3, and defendant has not met his burden to show any alleged ex parte discussion with this juror occurred; and (3) failure to record ex parte communications with prospective jurors under N.C.G.S. § 15A-1241 was harmless for the reasons already stated.

2. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court committed prejudicial error in a capital trial by failing to call jurors randomly for voir dire and by proceeding in the absence of four prospective jurors who failed to appear for jury service, defendant failed to preserve this issue because: (1) with regard to the constitutional right to a fair and impartial jury, defendant never objected to either the selection or organization of the jury panels; and (2) with regard to an alleged statutory violation under N.C.G.S. § 15A-1214, 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.

3. Indigent Defendants— capital trial—expert assistance

The trial court did not abuse its discretion in a capital trial by denying defendant's motion for the expert services of an optometrist to demonstrate that defendant could not read his rights waiver form at the time he signed it when he was not wearing glasses, because: (1) the record reveals that each time a detective questioned defendant about the victim's murder, the

detective orally advised defendant of his Miranda rights and showed him a written rights waiver form; (2) on each occasion, defendant agreed to talk with the detective and initialed a rights waiver form; and (3) defendant never complained to the authorities that he was unable to read the rights waiver form.

4. Confessions and Incriminating Statements— motion to suppress—absence of intoxication or impairment—no coercion—voluntary

The trial court did not commit prejudicial error in a capital trial by denying defendant's motion to suppress his confession, because: (1) defendant has not demonstrated that he was impaired or intoxicated at the time he made the challenged statements; and (2) the record supports the trial court's findings of fact and conclusions of law that defendant's statements were made in the absence of police coercion and were voluntary.

5. Criminal Law— first-degree murder—jury instruction—admissions

The trial court did not err in a capital trial by instructing the jury in accordance with the pattern jury instruction that defendant had admitted facts related to the charge of first-degree murder through the testimony of an investigating officer, because: (1) the admissions instruction made it clear that even though there was evidence tending to show that defendant had made an admission, it was solely for the jury to determine whether defendant in fact had made any admission; and (2) it was not required for defendant to admit in open court to the conduct alluded to in the instruction when the trial court did not use the phrase "or it is admitted" while the pattern instructions on murder were given.

6. Criminal Law— prosecutor's argument—capital trial—defendant's admission of intent to kill victim

The trial court did not err in a capital trial by failing to intervene ex mero motu to prevent an alleged improper argument by the prosecutor during closing arguments that characterized statements made by defendant to a detective as an admission of intent to kill the victim, because: (1) the prosecutor's argument did not affect the jury's verdict when the jury convicted defendant based on the felony murder rule, and intent to kill is not an element of felony murder; and (2) the prosecutor's argument was a permissible inference from defendant's statement to the detective.

7. Criminal Law— prosecutor's argument—capital trial—defendant's confession

The trial court did not err in a capital trial by failing to intervene ex mero motu to prevent an alleged improper argument by the prosecutor during closing arguments that represented that defendant confessed to the murder, because: (1) a review of the prosecutor's entire closing argument reveals that the prosecutor made it clear to the jury that defendant had not actually confessed to the murder; and (2) considered also in the context of the evidence in the record, the challenged statements were permissible inferences.

8. Criminal Law— prosecutor's argument—capital trial—defendant's untruthful statements

The trial court did not err in a capital trial by failing to intervene ex mero motu to prevent an alleged improper argument by the prosecutor during closing arguments that defendant had been untruthful in statements he made to a detective because based on the inconsistencies in defendant's statement, the prosecutor's challenge to defendant's truthfulness constitutes a reasonable inference.

9. Criminal Law— prosecutor's argument—capital trial—defendant went into hiding

The trial court did not err in a capital trial by failing to intervene ex mero motu to prevent an alleged improper argument by the prosecutor during closing arguments that defendant in essence went into hiding for four days after 19 April 1994, because it was a permissible inference based on the evidence.

10. Sentencing— capital—evidence of defendant's death sentence for a different murder—course of conduct aggravating circumstance

The trial court did not err during a capital sentencing proceeding by allowing the jury to hear evidence that defendant received a death sentence for a different murder, because: (1) the evidence was relevant to support the N.C.G.S. § 15A-2000(e)(11) course of conduct aggravating circumstance when the murders occurred two days apart and in both instances defendant robbed and killed elderly victims to obtain money to purchase cocaine; (2) the evidence demonstrated there existed in the mind of defendant a plan, scheme, or design involving the murders of

both victims; and (3) defendant was not prejudiced when the evidence was introduced only in the sentencing proceeding.

11. Sentencing— capital—aggravating circumstance—pecuniary gain

The trial court did not err during a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(6) pecuniary gain aggravating circumstance, because defendant was convicted of felony murder where robbery, larceny, or burglary served as the underlying felony.

12. Sentencing— capital—mitigating circumstances—defendant's confession

The trial court did not err by failing to submit several requested mitigating circumstances including that he cooperated with officers regarding his burglary, that he confessed freely and voluntarily to the murder of a different victim, and that he cooperated with officers in the investigation of the murder of a different victim, because: (1) a defendant who has repudiated his incriminatory statement is not entitled to the submission of mitigating circumstances that he confessed; and (2) defendant in this case repudiated his incriminating statements.

13. Homicide— first-degree murder—short form indictment—constitutionality

Although the short-form murder indictment used to charge defendant with first-degree murder did not allege all the elements of first-degree murder and did not allege aggravating circumstances upon which the State intended to rely to support imposition of the death penalty, the trial court did not err in concluding the indictment was constitutional.

14. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence in a first-degree murder case because: (1) defendant was convicted of felony murder; (2) the jury found the three aggravating circumstances that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), and the murder was part of a course of conduct, N.C.G.S. § 15A-2000(e)(11); and (3) defendant badly beat a defenseless elderly woman in her home and left her there to die.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Vosburgh, J., on 24 March 1999 in Superior Court, Robeson County, upon a jury verdict finding defendant guilty of first-degree murder. On 9 March 2000, 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 February 2001.

Roy A. Cooper, III, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

WAINWRIGHT, Justice.

On 8 August 1994, Daniel Cummings, Jr. was indicted on one count of first-degree murder of Lena Hales, one count of first-degree burglary, and one count of felonious larceny. Defendant was capitally tried before a jury at the 1 March 1999 Criminal Session of Superior Court, Robeson County. On 16 March 1999, the jury found defendant guilty of first-degree murder under the felony murder rule, and of first-degree burglary and felonious larceny. On 24 March 1999, after a capital sentencing proceeding, the jury recommended death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to a term of ten years' imprisonment for the larceny conviction and arrested judgment in the burglary conviction.

The State's evidence tended to show that Lena Hales (the victim) was eighty years old at the time of her death. The victim was five feet three inches tall and weighed approximately 117 pounds. She lived alone in her home on Shannon Road in an area of Red Springs, North Carolina, commonly known as the Pecan Orchard. At the time she was killed, the victim had lived at this residence for over fifty-seven years. On the morning of 20 April 1994, Barbara Kinlew, the victim's daughter, received a telephone call from one of her mother's friends, who was worried because she had not heard from the victim. Thereafter, Barbara Kinlew and her son, Gregory Kinlew, went to the victim's house. Upon arriving at the victim's home, Barbara saw that the window to her mother's bedroom was broken, with jagged glass all around it. She and her son raised the window and crawled through it. The victim's bed was on the other side of the window. The bed covers were pulled back, and there was broken glass on the bed.

Barbara saw her mother sitting in her recliner in the living room with her head down. Her mother was wearing her pajamas and her housecoat. She had been badly beaten; the side of the victim's head was bruised and appeared black and blue. In addition, her heavily blood-stained dentures were hanging out of her mouth. The recliner in which the victim was sitting was stained with feces and blood. After Barbara sat down in distress, Gregory stated that he believed he saw the victim move. When Barbara shouted at her, the victim moved her foot. The victim was airlifted to Duke Medical Center, where she was kept alive by machine until the family had the life support removed later that day. Police and Barbara Kinlew later noted that the victim's pocketbook, which she kept on a wardrobe shelf in her bedroom, was on the bed with the victim's change purse on top of the pocketbook. In addition, the wardrobe door was standing open.

Dr. Deborah Radisch, who was accepted at trial as an expert in forensic pathology, performed the autopsy on the victim on 21 April 1994. The autopsy revealed a great deal of external injury to the victim's body, including multiple purple and red bruises with pinpoint areas of bleeding around her face; a torn and bruised lip; blue and purple bruising on her collarbone, left and right shoulders, left ankle, left and right arms, and back; and multiple lacerations and tears in the skin. The victim suffered from a fractured hyoid (neck) bone, apparently as a result of direct trauma, as well as multiple fractured ribs. The victim's brain contained large areas of bruising and swelling, as well as a very large blood clot, or subdural hematoma, which was pressing down on the left side of the brain and affected the victim's ability to breathe. The victim sustained multiple injuries consistent with multiple strikes, blows, or blunt-force inflictions, possibly inflicted by a human fist.

At trial, the State offered the testimony of several witnesses who had seen defendant in the vicinity of the victim's house looking for money in the late evening and early morning of 18 and 19 April 1994. A man fitting defendant's description went to Mary Francis Hughs' front door at approximately 12:05 a.m. on 19 April 1994, asking if a certain person lived on the street. Ms. Hughs responded that no such person lived on the street and slammed the door because defendant began to "look weird" and "inch around." Defendant beat on her door for three minutes until Ms. Hughs' son walked toward her house. Ms. Hughs' son saw defendant walk toward the victim's house, weaving in and out of the neighborhood houses. When Ms. Hughs was shown a

picture of defendant, she stated that it looked like the man who had knocked on her door.

James Teague lived approximately three blocks from the victim's house, and he testified that he knew the victim. Teague also knew defendant from performing mechanical work on defendant's car. Defendant went to Teague's house at approximately 2:00 a.m. on 19 April 1994 and asked him for twenty dollars, stating he "needed it bad." When Teague told defendant that he did not have twenty dollars, defendant walked across Teague's property toward Shannon Road in the direction of the victim's home.

Red Springs law enforcement authorities interviewed defendant on three separate occasions, during which time he made three contradictory statements. When police investigated defendant's first two statements, they determined that the statements were not completely truthful. During the third interview, defendant admitted to breaking into the victim's home and robbing her, but did not admit to harming the victim. Defendant described in detail how he broke into the victim's home, using details that the police had not previously disclosed.

During the sentencing proceeding, the State presented evidence that defendant had admitted that, on 22 April 1994, he shot and killed Burns Babson while robbing the convenience store Babson operated twenty-five feet from Babson's home. On 16 December 1994, defendant was convicted of the first-degree murder of Babson and was sentenced to death. On appeal, this Court found no error. *See State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

Mrs. Julie Babson, Burns' wife, testified during the sentencing proceeding that, in the case noted above, she had run into the yard after hearing shots fired and had seen defendant leaving the store. Tom Hunter, a detective with the Major Crimes Unit of Brunswick County, testified during the sentencing proceeding that he interviewed defendant and that defendant admitted to shooting Babson while robbing his store. During one of these interviews, defendant made reference to Hales' murder by admitting that he had broken into a house in Red Springs to rob it but that there was an old lady home. Defendant told Detective Hunter that he had to strike the old lady in self-defense and that she was still alive when he left.

[1] By assignments of error, defendant contends the trial court committed reversible error under the Sixth Amendment to the United

States Constitution and Article I, Section 23 of the North Carolina Constitution when it dismissed six prospective jurors after unrecorded, private bench discussions with them. Defendant also contends the private bench discussions violated his statutory right to recordation under N.C.G.S. § 15A-1241(a).

A review of the jury selection process for this capital trial reveals that, after some jurors had been selected, the trial court asked a new group of prospective jurors questions regarding their qualifications to serve on a jury. Throughout the entire process, defendant and his counsel were present in the courtroom. Specifically, the trial court asked whether any prospective juror: (1) lived outside of Robeson County, (2) was under the age of eighteen, (3) had served on a jury within the last two years, or (4) had been convicted of a felony or been declared mentally incompetent without having his or her citizenship status restored by law. The trial court's questions to the prospective jurors were "obviously designed to insure that the new prospective jurors were qualified to serve under N.C.G.S. § 9-3." *State v. Payne*, 328 N.C. 377, 388, 402 S.E.2d 582, 588 (1991). N.C.G.S. § 9-3 provides as follows:

> **§ 9-3. Qualifications of prospective jurors.**
>
> 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, who are 18 years of age or over, who are physically and mentally competent, who can hear and understand the English language, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony . . . , and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause.

N.C.G.S. § 9-3 (1999).

After each of the first three statutory inquiries with regard to residency, age, and prior jury service, the trial court asked the jurors to indicate, by raising their hands, whether the specified disqualification applied to them. After conducting the fourth inquiry regarding prior felony convictions and mental competency, however, the trial court stated, "Is there anyone who has been through any of those proceedings who would like to speak to me quietly or privately about it up at the bench?" The record reveals that five prospective jurors re-

sponded to the trial court's inquiry and, after private discussions at the bench, were excused prior to *voir dire* by counsel.

It is well settled that the Confrontation Clause of the North Carolina Constitution guarantees the right of every accused to be present at every stage of his trial. N.C. Const. art. I, § 23; *State v. Nobles*, 350 N.C. 483, 491, 515 S.E.2d 885, 891 (1999); *State v. Hartman*, 344 N.C. 445, 454, 476 S.E.2d 328, 333 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). In a capital case, there is a heightened need for strict adherence to the constitutional mandate that the defendant be personally present at all critical stages of the prosecution. This right, as it pertains to communications of substance between the trial court and a prospective juror, is based on the principle that a defendant should be permitted an opportunity to evaluate and be heard as to whether the proposed judicial action is appropriate under the circumstances. Moreover, defendant's right to be present at every stage of his capital trial is unwaivable. *Nobles*, 350 N.C. at 491, 515 S.E.2d at 891; *State v. Pittman*, 332 N.C. 244, 253, 420 S.E.2d 437, 442 (1992). Jury selection is a stage of a capital trial "at which defendant must be present, and it is 'error for the trial court to exclude the defendant, counsel, and the court reporter from its private communications with the prospective jurors at the bench *prior to excusing them*.' " *State v. Williams*, 339 N.C. 1, 28-29, 452 S.E.2d 245, 262 (1994) (quoting *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990)) (citation omitted) (alteration in original), *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995).

A violation of defendant's right to presence is, however, "subject to harmless error analysis, the burden being upon the State to demonstrate the harmlessness beyond a reasonable doubt." *Id.* at 29, 452 S.E.2d at 262; *accord Hartman*, 344 N.C. at 454, 476 S.E.2d at 333. We have held such error harmless where " 'the transcript reveals the substance of the conversations, or the substance is adequately reconstructed by the trial judge at trial.' " *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 763 (1994) (quoting *State v. Boyd*, 332 N.C. 101, 106, 418 S.E.2d 471, 474 (1992)); *see also State v. Ali*, 329 N.C. 394, 405, 407 S.E.2d 183, 190 (1991). In conducting harmless error review in this context, we have stated:

> Whether this kind of error is harmless depends, we conclude, on whether the questioning of prospective jurors in defendant's absence might have resulted in a jury composed differently from one which defendant might have obtained had he been present and participated in the process. We are satisfied here beyond a

> reasonable doubt that defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily.

Payne, 328 N.C. at 389, 402 S.E.2d at 589; *accord Williams*, 339 N.C. at 29-30, 452 S.E.2d at 262.

Under the rationale of our decision in *Payne*, we conclude that the State has met its burden of establishing that the trial court's violation of defendant's right to presence was harmless beyond a reasonable doubt. With regard to prospective jurors McLain, Pierce, Sweat, and Gonzales, the record reveals that the subject matters of the *ex parte* discussions at the bench were reconstructed in open court for the record. Prospective juror McLain was excused after the trial court expressed concerns regarding his competency. The trial court also noted for the record that prospective juror McLain requires daily injections. Prospective jurors Pierce and Sweat were excused because each had "served as jurors during the preceding two years." N.C.G.S. § 9-3. Prospective juror Gonzales was excused based on his inability to "hear and understand the English language." *Id.* The record reveals that prospective juror Gonzales was accompanied by an interpreter when he spoke privately with the trial court.

With respect to prospective juror Kenny Locklear, the record reveals that, like prospective juror McLain, he apparently responded to the trial court's fourth statutory inquiry regarding whether any prospective juror had been convicted of a felony or declared mentally incompetent. Immediately after the trial court dismissed prospective juror McLain based on the fourth statutory inquiry, the clerk of court stated, "Judge, there's another one." Although the trial court did not state for the record the nature of its discussion with Kenny Locklear, the record clearly establishes that the trial court excused him based on his disqualification under N.C.G.S. § 9-3. Indeed, immediately after excusing Kenny Locklear, the trial court stated, "I'm only talking to people right now who have some serious question as to whether or not they're qualified to serve on the jury."

Because prospective jurors McLain, Pierce, Sweat, Gonzales, and Kenny Locklear were not qualified to serve under N.C.G.S. § 9-3, the trial court's private discussions with these prospective jurors did not "result in the rejection of any juror whom defendant was entitled to have on the panel." *Payne*, 328 N.C. at 389, 402 S.E.2d at 589. Rather,

these prospective jurors were dismissed for "manifestly unobjectionable reasons regardless of what defendant might have observed or desired." *Id.*; *accord Adams*, 335 N.C. at 409, 439 S.E.2d at 764. Accordingly, the State has met its burden of demonstrating that the trial court's *ex parte* communications with prospective jurors were harmless beyond a reasonable doubt.

With respect to prospective juror Wayne Locklear, the record does not support defendant's assertion that the trial court improperly excused him after a private communication at the bench. "It is defendant's burden on appeal to demonstrate in the first place that error occurred." *Williams*, 339 N.C. at 30, 452 S.E.2d at 263. Moreover, "[i]t is not enough for defendant to assert that there may have been other impermissible *ex parte* communications. The record must reveal that such communications in fact occurred." *Adams*, 335 N.C. at 410, 439 S.E.2d at 764. " '[W]hatever incompleteness may exist in the record precludes defendant from showing that error occurred as to any [prospective] juror other than those the trial judge excused or deferred on the record.' " *Nobles*, 350 N.C. at 494, 515 S.E.2d at 892 (quoting *Adams*, 335 N.C. at 410, 439 S.E.2d at 764) (second alteration in original). Defendant has not met his burden in this case because he has not demonstrated, and the record does not otherwise reveal, that the alleged *ex parte* discussion with prospective juror Wayne Locklear occurred.

Defendant further points out that N.C.G.S. § 15A-1241 requires complete recordation of jury selection in capital proceedings. N.C.G.S. § 15A-1241 (1999). Thus, the trial court also erred in failing to record its *ex parte* communications with prospective jurors under section 15A-1241. *See Nobles*, 350 N.C. at 494, 515 S.E.2d at 892. We conclude, however, that this failure was harmless for the reasons stated above. Accordingly, these assignments of error are overruled.

[2] By assignments of error, defendant contends the trial court erred by failing to call jurors randomly for *voir dire* and by proceeding in the absence of four prospective jurors who failed to appear for jury service. Defendant concedes the trial court randomly placed prospective jurors into separate panels prior to *voir dire*. However, defendant contends the panels were organized in such a manner that jurors were not called for individual *voir dire* in a random manner. Defendant argues the trial court's actions violated the randomness requirement of N.C.G.S. § 15A-1214(a), the purpose of which is to

protect a defendant's state and federal constitutional rights to a fair and impartial jury.

Constitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 797 (2001); *accord Nobles*, 350 N.C. at 495, 515 S.E.2d at 893. In the present case, defendant contends the trial court violated his constitutional rights to a fair and impartial jury. The record reveals, however, that defendant never objected to either the selection or the organization of the jury panels. Therefore, defendant has waived review of the constitutionality of the trial court's conduct in this regard. *See Braxton*, 352 N.C. at 173, 531 S.E.2d at 436-37.

With regard to the alleged statutory violation, N.C.G.S. § 15A-1214 provides in pertinent part:

> (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). A defendant's challenge to the jury must satisfy N.C.G.S. § 15A-1211, which provides that a challenge: (1) "[m]ay be made only on the ground that the jurors were not selected or drawn according to law," (2) "[m]ust be in writing," (3) "[m]ust specify the facts constituting the ground of challenge," and (4) "[m]ust be made and decided before any juror is examined." N.C.G.S. § 15A-1211(c) (1999); *see also 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); *State v. Workman*, 344 N.C. 482, 498-99, 476 S.E.2d 301, 310 (1996).

In the present case, defendant failed to comply with N.C.G.S. § 15A-1211(c). As in *Braxton*, defendant here "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." *Braxton*, 352 N.C. at 177, 531 S.E.2d at 439. Because 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," *Atkins*, 349 N.C. at 103, 505 S.E.2d at 122, we conclude that defendant failed to preserve this issue for appellate review. Accordingly, these assignments of error are overruled.

By assignments of error, defendant contends the trial court erred by denying his motion for expert services and his motion to suppress his confession. Defendant argues that he needed the services of an optometrist to demonstrate that he could not read his rights waiver form at the time he signed it because he was not wearing glasses. Defendant also contends his confession was involuntary because of the "coercive atmosphere" surrounding his statements, his below-average intellect, and his impaired judgment and impulse control, and because he engaged in a "days-long cocaine binge" prior to his arrest. Defendant argues the trial court's errors violated his constitutional and statutory rights and entitle him to a new trial. We disagree.

[3] In order to obtain state-funded expert assistance, a defendant must make " 'a particularized showing that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case.' " *State v. McNeill*, 349 N.C. 634, 650, 509 S.E.2d 415, 424 (1998) (quoting *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992)), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *see also* N.C.G.S. § 7A-450(b) (1999). Moreover, " '[t]he trial court has discretion to determine whether a defendant has made an adequate showing of particularized need.' " *State v. Anderson*, 350 N.C. 152, 161, 513 S.E.2d 296, 302 (quoting *State v. Page*, 346 N.C. 689, 697, 488 S.E.2d 225, 230 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998)), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999).

In the present case, the record reveals that, after hearing evidence from the State and defendant, the trial court entered an order containing findings of fact and concluded that defendant's motion for the expert services of an optometrist should be denied. In its order, the trial court found in pertinent part:

> That at the time of the *Miranda* warnings initially in the Sampson County jail, or an office adjacent thereto, regardless of the vision of the defendant, the defendant indicated verbally to the officer that he understood his rights. And on April 23rd, 1994, he wrote the answers to each of the questions and entered his initials thereon in the correct place without assistance[.]
>
> In addition to providing the answers and his initials in the proper places, the defendant signed the forms in the proper place, and along the lines that were provided for the presentation of his signature[.]

After a thorough review of the record, we hold that the trial court's findings in this regard are supported by the evidence. Indeed, the record reveals that each time Detective Edward Ben Smith questioned defendant about the victim's murder, he orally advised defendant of his *Miranda* rights and showed him a written rights waiver form. On each occasion, defendant agreed to talk with Smith and initialed a rights waiver form. Moreover, defendant never complained to the authorities that he was unable to read the rights waiver forms.

Based on this record, we do not believe defendant has demonstrated that the services of an optometrist would have " 'materially assist[ed] him in the preparation of his case.' " *McNeill*, 349 N.C. at 650, 509 S.E.2d at 424 (quoting *Parks*, 331 N.C. at 656, 417 S.E.2d at 471). Because Smith read defendant his *Miranda* rights, defendant's ability to read the waiver forms himself is irrelevant. Moreover, we note that defendant signed the rights waiver forms in 1994 and did not request the services of an optometrist until 1999. Therefore, we conclude the trial court did not abuse its discretion in denying defendant's motion for the expert assistance of an optometrist.

[4] We likewise conclude the trial court did not err by denying defendant's motion to suppress his confession. At the outset, we note that "the United States Supreme Court has declined to create a constitutional requirement that defendants must confess their crimes 'only when totally rational and properly motivated,' in the absence of any official coercion by the State." *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999) (quoting *Colorado v. Connelly*, 479 U.S. 157, 166, 93 L. Ed. 2d 473, 484 (1986)), *cert. denied*, —— U.S. ——, 147 L. Ed. 2d 965 (2000). Moreover, we have consistently held "that 'police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily,' and without police coercion, the question of voluntariness does not arise within the meaning of the Due Process Clause of the Fourteenth Amendment." *State v. Morganherring*, 350 N.C. 701, 722, 517 S.E.2d 622, 635 (1999) (quoting *State v. McKoy*, 323 N.C. 1, 21-22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990)), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000); *accord Cheek*, 351 N.C. at 63, 520 S.E.2d at 554.

In the present case, defendant has not demonstrated that he was impaired or intoxicated at the time he made the challenged statements. Moreover, the record supports the trial court's findings of fact

and conclusions of law that defendant's statements were made in the absence of police coercion and were voluntary.

These assignments of error are overruled.

By assignments of error, defendant contends the trial court erred by instructing the jury, in accordance with the pattern jury instruction, that defendant had admitted facts related to the charge of first-degree murder. Defendant further argues the trial court erred in failing to intervene *ex mero motu* to prevent improper argument by the prosecutor during closing arguments. We disagree.

[5] During his charge to the jury, the trial court instructed the jury in accordance with North Carolina Pattern Instructions 104.60 and 104.70, respectively, as follows:

> There is evidence which tends to show that the defendant has admitted a fact or facts relating to the crimes charged in these cases. If you find that the defendant has made those admissions, then you should consider all of the circumstances under which they were made in determining whether they were truthful admissions and the weight that you will give to them.
>
> There is evidence which tends to show that the defendant confessed that he committed the crimes of burglary and larceny in this case. If you find that the defendant made those confessions, then you should consider all of the circumstances under which it [sic] was made in determining whether it was a truthful confession and the weight that you will give to it.

See N.C.P.I.—Crim. 104.60, 104.70 (1970).

The record reveals that the trial court's admission instruction was based, in part, on testimony from Smith. When Smith questioned defendant on 23 April 1994, he described the victim to defendant as "a frail 80 year old female." In response, defendant stated: "A man meant to kill the lady because all you would have had to do was to push her down." During the charge conference, the State characterized defendant's response to Smith's description of the victim as "admissions with regard to the more serious charge of homicide" and requested that the trial court submit to the jury the pattern instruction on admissions.

This Court has previously found no error in the submission of an identical admission instruction where, as here, the alleged admission was introduced into evidence through the testimony of an investigat-

ing officer. *See State v. McKoy*, 331 N.C. 731, 733-34, 417 S.E.2d 244, 246 (1992). In *McKoy*, we noted that the admissions instruction "made it clear that even though there was evidence tending to show that the defendant had made an admission, it was solely for the jury to determine whether the defendant in fact had made any admission." *Id.* at 734, 417 S.E.2d at 246-47.

Nonetheless, defendant contends North Carolina law is "clear" that the admissions instruction, N.C.P.I.—Crim. 104.60, should not be submitted to the jury unless defendant admits in open court to the conduct alluded to in the instruction. Defendant cites this Court's decisions in *State v. Shuford*, 337 N.C. 641, 447 S.E.2d 742 (1994), and *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981), in support of his argument.

Contrary to defendant's argument, however, our holdings in *McCoy* and *Shuford*, do not support his position. Rather, in both *Shuford* and *McCoy*, this Court held that the phrase " 'or it is admitted' " should not be included in the pattern instruction on murder " 'where the defendant does not in open court admit to an intentional [killing].' " *Shuford*, 337 N.C. at 646-47, 447 S.E.2d at 745 (quoting *McCoy*, 303 N.C. at 29, 277 S.E.2d at 535). The pattern instruction on murder that defendant references provides in pertinent part:

> If the State proves beyond a reasonable doubt, (*or it is admitted*) that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.

N.C.P.I.—Crim. 206.10 (1998).

In the present case, the trial court did not use the phrase "or it is admitted" when the pattern instruction on murder was given. Accordingly, our holdings in *Shuford* and *McCoy* are not implicated in this case. Because the admissions instruction, N.C.P.I.—Crim. 104.60, was supported by the evidence in this case, the trial court did not err in submitting the instruction to the jury.

We turn now to defendant's argument that the trial court failed to intervene *ex mero motu* to prevent improper closing argument by the prosecutor. When, as here, a 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." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). " '[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. Davis*, 353 N.C. 1, 31, 539 S.E.2d 243, 263 (2000) (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)).

" '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. Hyde*, 352 N.C. 37, 56, 530 S.E.2d 281, 294 (2000) (quoting *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)), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 775 (2001). This Court will not disturb the trial court's exercise of discretion over the latitude of counsel's argument 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*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). "We further emphasize that 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " *Guevara*, 349 N.C. at 257, 506 S.E.2d at 721 (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)).

[6] Defendant first argues that the prosecutor improperly characterized statements made by defendant to Smith as an admission of intent to kill the victim. The prosecutor stated in pertinent part:

> And then [defendant told Detective Smith], "You know, whoever did that meant to kill that woman because all you have to do is push her down to get her money." And that's important. That statement is very important. That whoever did it meant to kill Lena Hales. And why is that important? Because one of the things the Judge will talk to you about when he explains the law to you is that the State has to show, in order for you to find someone guilty of first-degree murder under the theory of premeditation and deliberation, the State has to show that the individual intended to kill.

> When you look back over all the evidence, look back at the things that [defendant] said, and the things that the evidence shows you, *I would argue to you, ladies and gentlemen, that amounts to—that amounts to an admission by the defendant of what his intention was on the morning of April the 19th, that whoever did this intended to kill [the victim] because, in his words, all you had to do was push her down.*

(Emphasis added.)

At the outset, we note that the jury did not convict defendant of first-degree murder based on a theory of premeditation and deliberation. Rather, the jury convicted defendant of first-degree murder based on the felony murder rule. Because intent to kill is not an element of felony murder, *see State v. York*, 347 N.C. 79, 97, 489 S.E.2d 380, 390 (1997), the prosecutor's argument that defendant intended to kill the victim did not affect the jury's verdict, *see McNeil*, 350 N.C. at 685, 518 S.E.2d at 503. Moreover, the prosecutor's argument in this regard was a permissible inference from defendant's statements to Smith. Assuming *arguendo* the prosecutor's argument was improper, it 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 argument, though not supported by the evidence, was not so grossly improper as to warrant *ex mero motu* intervention by the trial court), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

[7] Defendant next argues the prosecutor improperly misrepresented in his final summation to the jury that defendant confessed to the murder. The prosecutor concluded as follows:

> He should be found guilty on all three counts. That's what the evidence says and that's what the law says, and that's what [defendant] told you when he talked to [Detective] Ben Smith on April the 26[th], 1994, when he confessed to the murder and admitted to the murder of Lena Hales. The evidence, both direct and circumstantial, supports that.

As previously noted, closing remarks should not be " 'placed in isolation,' " but must be examined in "'the context in which the remarks were made and the overall factual circumstances to which they referred.' " *Guevara*, 349 N.C. at 257, 506 S.E.2d at 721 (quoting *Green*, 336 N.C. at 188, 443 S.E.2d at 41). Our review of the prosecutor's entire closing argument reveals that the prosecutor made it clear to the jury that defendant had not actually confessed to murder.

Rather, the prosecutor merely suggested that the jury should infer from defendant's statements to Smith that defendant committed the murder. During other portions of his argument to the jury, the prosecutor argued as follows:

> For the third time the defendant waives those rights and is willing to answer questions. The result is that the defendant begins to tell the truth about what really happened. *But he doesn't tell the whole truth because he stops short. Because if he tells the whole truth, he then confesses to a murder.*

(Emphasis added.)

> At another time, the prosecutor argued as follows:
>
> But yet he's left part of the story untold, and that's the part that hurts the most. The part where he really did something.
>
> Now, don't get me wrong, burglary is a very serious offense. First-degree burglary is the most serious property crime there is. . . . But there is nothing, nothing more serious than killing another person in a manner that is cruel, a manner that was brutal, and in a manner that showed a callous disregard for a person's life or their rights or their safety.
>
> There's nothing more serious than first-degree murder. . . . [N]o one has the right to unlawfully take the life of another person and that's what [defendant] did. *He doesn't want to tell you that, and he didn't want to tell Smith that when he was interviewed because I would argue to you, ladies and gentlemen, he knows what would happen.*
>
> So he tells part of the story and leaves the worse part untold. *But the evidence tells the remaining part of the story.* Why? Because no one saw Lena Hales until Barbara Kinlew and Greg Kinlew crawled in that window April the 20th. Mrs. Hales was physically unable to call for help because the defendant had left her in such a condition that she couldn't do anything. She was barely alive when they found her. She had been sitting there in that chair for more than 24 hours. She didn't have any way of helping herself. She couldn't get to the phone.
>
> (Emphasis added.)

The record further reveals that defendant did confess to Smith that he kicked in a window at the victim's residence, entered the

residence, then grabbed the victim by the arm and demanded money from her. Defendant also told Smith that he left the victim's home without harming her after she gave him all the money from her pocketbook.

Considered in the context of the evidence in the record and the prosecutor's entire argument to the jury, the challenged statements were permissible inferences based on the evidence and were not grossly improper. Accordingly, the trial court did not err in failing to intervene *ex mero motu*.

[8] Defendant next argues the prosecutor improperly argued that defendant had been untruthful in statements he made to Smith. The prosecutor argues as follows:

> What does Smith do? "Daniel, you know what you told me the other day? Well, I went and talked to these people and what you're saying and what they're saying just doesn't match up." Now, you read between the lines, ladies and gentlemen, of what he's telling them and what they're finding out don't match up. Somebody is not telling the truth about what they did and what went on.

The record reveals that in his first two statements to Smith, defendant gave various details about his activities on the night in question, but defendant did not admit to breaking into the victim's home. In his third statement, however, defendant confessed to breaking into the victim's home and taking money from her. In addition to this inconsistency, on one occasion defendant told Smith that on the night in question he had never been at the Pecan Orchard—the area where the victim's residence was located. However, in the same statement, defendant told Smith that he had visited James Teague on the night in question, an individual whose residence was located in the Pecan Orchard area.

Based on the inconsistencies in defendant's statement, the prosecutor's challenge to defendant's truthfulness constitutes a reasonable inference from the evidence. Assuming *arguendo* that the prosecutor's argument was improper, we conclude the challenged argument was not so "grossly improper" as to require the trial court to intervene *ex mero motu*.

[9] Finally, defendant argues the prosecutor's assertion, that defendant went into hiding for four days after 19 April 1994, was not based on the evidence. The prosecutor argued in pertinent part as follows:

> The defendant wasn't located until two days—excuse me, let me get my math figured out—four days, four days had passed from the time that this occurred until he was located in Sampson County in jail. What he's done between then and when they find him? No one knows. Is he cleaned up? Has he washed his hands? We don't know that. . . . [Defendant], in essence, went into hiding for four days. No one could find him in Red Springs. No one had seen him in Red Springs. Then he, low [sic] and behold, ends up in jail in Sampson County is where they locate him.

The record reveals that on 20 April 1994, Smith began investigating the murder of the victim. After questioning individuals who had seen defendant late at night, in the early morning hours of 19 April 1994, Smith began a search for defendant. Smith drove by defendant's residence and did not observe any vehicles. He then searched for defendant around Red Springs, North Carolina, but did not locate him. Smith questioned several individuals concerning defendant's whereabouts, but was unable to locate defendant. On 23 April 1994, Smith located defendant in the Sampson County jail. Based on this record evidence, the prosecutor's argument that defendant, "*in essence*, went into hiding for four days" constitutes a permissible inference based on the evidence. (Emphasis added.) Assuming *arguendo* that the prosecutor's argument was improper, we conclude it was not so grossly improper as to warrant *ex mero motu* action by the trial court.

These assignments of error are overruled.

[10] By assignments of error, defendant contends the trial court committed constitutional error by allowing the jury in the sentencing proceeding to hear evidence that defendant received a death sentence for the murder of Babson. We disagree.

During the sentencing proceeding, the prosecutor introduced evidence of a different murder of which defendant had been convicted and for which he had received a death sentence, in order to support the submission of the (e)(11) aggravating circumstance. The (e)(11) aggravating circumstance provides that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (1999).

> Submission of this aggravating circumstance is proper when there is evidence that the victim's murder and other violent

crimes were part of a pattern of intentional acts establishing that there existed in defendant's mind a plan, scheme, or design involving both the murder of the victim and other crimes of violence.

State v. Gregory, 340 N.C. 365, 414, 459 S.E.2d 638, 666 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996); *see also State v. Cummings*, 332 N.C. 487, 508, 422 S.E.2d 692, 704 (1992).

In the present case, the evidence of defendant's conviction for Babson's murder was clearly relevant to support submission of the (e)(11) aggravating circumstance. The murder of Babson occurred two days after the murder of the victim in this case. In both instances, defendant robbed and killed elderly victims to obtain money to purchase cocaine. Therefore, evidence regarding defendant's murder of Babson was properly admitted to demonstrate that there existed in the mind of defendant a plan, scheme, or design involving the murders of both Hales and Babson. *See Cummings*, 346 N.C. at 329, 488 S.E.2d at 572-73; *see also State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (evidence of a murder that defendant committed less than one month before committing the crimes at issue in the case was properly admitted during the sentencing proceeding to support the (e)(11) aggravating circumstance that the murder was part of a course of conduct including other crimes of violence against other persons), *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998).

We likewise reject defendant's contention that the challenged evidence prejudiced him. Defendant relies on our decision in *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), to support his argument. In *Britt*, we held that it was prejudicial error for the prosecutor to elicit on cross-examination of defendant the fact that defendant had been previously convicted of, and had received a death sentence for, the same murder for which he was being retried. *Id.* at 713, 220 S.E.2d at 292. We concluded that introducing such information during the *guilt phase* of the trial was "highly improper and incurably prejudicial." *Id.* The case at hand is clearly distinguishable from *Britt*. At the outset, we note that, unlike the defendant in *Britt*, defendant here was not retried for the same murder. In addition, the prosecution introduced evidence of defendant's conviction for Babson's murder only in the *sentencing proceeding*. The jury had already determined that defendant was guilty of Hales' murder before any evidence of Babson's murder was introduced. Therefore, unlike the defendant in *Britt*, defendant was not prejudiced in the present case. *See also Romano v. Oklahoma*, 512 U.S. 1, 129 L. Ed. 2d 1 (1994) (no due process viola-

tion in allowing into evidence, at the sentencing hearing for defendant of one murder, a judgment showing that he had received a death sentence in another murder, which was offered solely to support the existence of an aggravating circumstance). These assignments of error are overruled.

[11] By an assignment of error, defendant contends that the trial court violated defendant's statutory and constitutional rights by submitting the (e)(6) aggravating circumstance. We disagree.

The (e)(6) aggravating circumstance states that "[t]he capital felony was committed for pecuniary gain." N.C.G.S. § 15A-2000(e)(6) (1999). We have consistently upheld the submission of the pecuniary gain aggravating circumstance for purposes of sentencing a defendant convicted of felony murder where robbery, larceny, or burglary served as the underlying felony. *See, e.g., State v. Chandler*, 342 N.C. 742, 755, 467 S.E.2d 636, 644, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996); *State v. Taylor*, 304 N.C. 249, 288-89, 283 S.E.2d 761, 785 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983); *State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981).

In *Oliver*, we stated that

> robbery constitutes an essential element of felony murder. . . . The circumstance that the capital felony was committed for pecuniary gain, however, is not such an essential element. . . . While [defendant's] motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence.

Oliver, 302 N.C. at 62, 274 S.E.2d at 204. In *Chandler*, we held that this same reasoning applies to felony murder where, as here, burglary serves as the underlying felony, in that "[b]urglary is an essential element of felony murder[,] [but] [p]ecuniary gain is not such an essential element." *Chandler*, 342 N.C. at 756, 467 S.E.2d at 644. We find *Oliver* and its progeny to be dispositive of this issue, and defendant has given us no reason to depart from our prior decisions. Therefore, this assignment of error is overruled.

[12] By an assignment of error, defendant contends the trial court violated his statutory and constitutional rights by failing to submit requested mitigating circumstances. We disagree.

Defendant filed a written request with the trial court for both statutory and nonstatutory mitigating circumstances. The trial court

agreed to submit defendant's requested mitigating circumstances, with the exception of four:

3. The defendant cooperated with Red Springs Law Enforcement officers regarding his burglary of the home of Lena Hales prior to arrest.

4. The defendant's culpability for the burglary of the home of Lena Hales in Red Springs could not have been attributed to this defendant without his confession which he provided to law enforcement officers freely and voluntarily.

. . . .

17. The defendant voluntarily confessed to Brunswick County Law Enforcement officers with respect to the murder of Burns Babson.

18. The defendant cooperated with Brunswick County Law Enforcement officers in the investigation of the murder of Burns Babson.

We have consistently held that a defendant who has repudiated his incriminatory statement is not entitled to the submission of mitigating circumstances that he confessed. *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. Hayes*, 314 N.C. 460, 474, 334 S.E.2d 741, 749 (1985). "[W]hen a defendant moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove this mitigating circumstance." *State v. Smith*, 321 N.C. 290, 292, 362 S.E.2d 159, 160 (1987).

In this case, defendant gave false alibis in his first two interviews with police from Red Springs with regard to the murder of the victim in this case. During the third interview, defendant confessed only to breaking and entering the victim's residence during the night, but did not admit to hurting her. During a series of interviews with Brunswick County law enforcement officers about Babson's murder, defendant first stated that another man robbed Babson. Thereafter, defendant admitted to killing Babson and attacking Hales in Robeson County. Defendant later filed a pretrial motion in which he moved to suppress all of his statements to law enforcement officers from Red Springs, Sampson and Brunswick counties, claiming the statements were "made involuntarily." During pretrial motion hearings, defendant, under oath, denied being in Babson's store and denied breaking

into Hales' home. Because defendant repudiated his incriminating statements, the trial court did not err by denying his motion to submit the requested mitigating circumstances. This assignment of error is overruled.

[13] By assignments of error, defendant contends the short-form murder indictment violated his state and federal constitutional rights, as it failed to allege all elements of first-degree murder and failed to allege aggravating circumstances upon which the State intended to rely to support imposition of the death penalty. In support of his position, defendant cites the United State Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999).

We have repeatedly addressed and rejected defendant's argument. *See Braxton*, 352 N.C. 158, 531 S.E.2d 428. In *Braxton*, this Court examined the validity of short-form indictments in light of the Supreme Court's decisions in *Jones*, 526 U.S. 227, 143 L. Ed. 2d 311, and *Apprendi*, 530 U.S. 466, 147 L. Ed. 2d 435, and concluded that nothing in either case altered prior case law on these matters. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 437-38. Defendant has presented no compelling basis for this Court to revisit the issue in the present case. Accordingly, these assignments of error are overruled.

PRESERVATION ISSUES

Defendant raises nine additional issues that he concedes this Court has previously decided contrary to his position: (1) the trial court violated defendant's statutory and constitutional rights by admitting into evidence illegally obtained statements; (2) the trial court violated defendant's statutory and constitutional rights by excusing fourteen prospective jurors for cause on the ground that they would be unable to return a sentence of death; (3) the trial court committed reversible constitutional error by failing to instruct jurors that they "must" rather than "may" consider mitigating circumstances when deciding Issues Three and Four during their jury deliberations; (4) the trial court committed reversible constitutional error by placing the burden of proof on defendant to satisfy the jury with respect to mitigating circumstances and refusing to instruct jurors that proof by the preponderance of the evidence is proof which indicates that it is more likely than not that a mitigating circumstance exists; (5) the trial court committed reversible constitutional error by erroneously

instructing jurors that they could find a mitigating circumstance exists and simultaneously find that the mitigating circumstance has no mitigating value; (6) the trial court committed plain error by erroneously instructing the jury that unanimity is required to answer "no" to Issues One, Three, and Four on the issues and recommendation sentencing form; (7) the trial court committed plain error by failing to instruct the jury that unanimity is required to answer "yes" to Issue Four on the issues and recommendation sentencing form; (8) the trial court committed reversible constitutional error by instructing the jury on the (e)(9) aggravating circumstance; and (9) the trial court committed reversible constitutional error by instructing the jury on the (e)(11) aggravating circumstance. Defendant makes these arguments in order to allow this Court to reexamine its prior holdings and to preserve these issues for any possible further judicial review. We have thoroughly considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, these assignments of error are overruled.

PROPORTIONALITY REVIEW

[14] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we are required to review and determine: (1) whether the evidence supports the jury's finding of any aggravating circumstances upon which the sentence of death was based; (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 under the felony murder rule. Following a capital sentencing proceeding, the jury found three aggravating circumstances: (1) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (2) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (3) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11).

Three statutory mitigating circumstances were submitted for the jury's consideration: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) the capacity of the defendant to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); and (3) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence that any juror deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of these statutory mitigating circumstances, the jury found only (f)(2) to exist. Of the twelve nonstatutory mitigating circumstances submitted by the trial court, the jury found none to exist or have mitigating value.

After thoroughly examining the record, transcript, briefs, and oral arguments in this case, we conclude that the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn then to our final statutory duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

We have found the death sentence 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 badly beat a defenseless, elderly lady and left her to die. Moreover, the conduct of defendant that led to the victim's death

was carried out in the victim's own 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 compare this case with the cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that 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 support a sentence of death. *State v. Warren*, 347 N.C. 309, 328, 492 S.E.2d 609, 619 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). The N.C.G.S. § 15A-2000(e)(9) and (e)(11) statutory aggravating circumstances, both of which the jury found here, are among those four. *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 the sentence of death proportionate than to those in which we have found it 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.

Accordingly, we conclude that defendant received a fair trial, free from 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.

STATE OF NORTH CAROLINA v. MARCUS DECARLOS MITCHELL

No. 217A99

(Filed 6 April 2001)

1. Jury— selection—capital trial—challenge for cause—reservations about death penalty

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excusing for cause three prospective jurors who expressed general reservations about their ability to impose the death penalty under the reasonable doubt standard of proof.

2. Jury— selection—capital trial—reference to separate sentencing jury

The trial court did not err during jury selection in a first-degree murder prosecution by referring to the possibility that the separate sentencing proceeding could be before a different jury. The better practice would be for the trial court to make no mention of a different jury at the preliminary stage of the trial; however, the comment in this case was made before jury selection during the court's explanation of the manner in which the trial would be conducted and did not impermissibly dilute the jury's responsibility. The jurors knew they had been death qualified and had no reason to believe they would not be making the sentencing recommendation if defendant were found guilty of first-degree murder.

3. Jury— selection—capital trial—Bible teachings

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by not allowing defendant to ask a potential juror about her understanding of the Bible's teachings on the death penalty after she had stated that she followed what the Bible said about the death penalty. The court permitted defendant to inquire into her religious affiliation, her views on capital punishment, her ability to consider mitigating circumstances, her willingness to impose a sentence of life imprisonment, and whether any teachings of her church would interfere with her ability to perform her duties as a juror.

4. Jury— selection—capital trial—stake-out questions

The trial court did not abuse its discretion during jury selection for a first-degree murder prosecution by not allowing

defendant to ask a potential juror questions which were an attempt to determine the kind of mitigating circumstances that would be sufficient to outweigh aggravating circumstances not yet in evidence.

5. Jury— selection—capital trial—religious beliefs

The trial court did not abuse its discretion during jury selection for a first-degree murder prosecution by not allowing defendant to ask whether God's law addresses aggravating and mitigating circumstances after the potential juror stated that she believed that capital punishment was not outlawed because Jesus had accepted capital punishment. Defendant was permitted to inquire into her religious affiliation, views on capital punishment, ability to consider mitigating circumstances, willingness to impose a life sentence, and whether her religious beliefs concerning accountability and blame would interfere with her ability to perform her duties as a juror. Moreover, the questions were an attempt to determine the verdict the potential juror would render under certain circumstances not yet in evidence and amounted to an improper stakeout.

6. Jury— selection—capital trial—challenge for cause—rehabilitation—impasse between defendant and counsel

The trial court did not err during a first-degree murder prosecution by excusing a prospective juror for cause and honoring defendant's personal decision not to attempt rehabilitation where the court properly found that defendant and his counsel had reached an absolute impasse over the tactical decision of whether to attempt to rehabilitate the prospective juror, defense counsel made a proper record of the circumstances, and defendant was fully informed and understood the potential consequences of his actions.

7. Criminal Law— prosecutor's argument—defense attorney's belief in defendant's guilt

The trial court did not err by not intervening ex mero motu in a prosecutor's closing argument in a first-degree murder prosecution where defendant contended that the prosecutor implied that even defendant's own attorneys believed him guilty, but the prosecutor's comment merely highlighted the defense strategy of creating holes in the State's case rather than arguing innocence. Rather than implying that defense counsel believed defendant to be guilty, the comment pointed out the defense

strategy and argued that there was no reason to doubt the State's investigation.

8. Criminal Law— prosecutor's argument—defendant's objection to evidence

The trial court did not err in a first-degree murder prosecution by not intervening ex mero moto in the prosecutor's argument concerning the connection of the murder weapon to defendant. Although defendant argued on appeal that the prosecutor's contention was that defendant admitted guilt by objecting to the admission of certain evidence, thus penalizing him for objecting to an unconstitutional search, defendant could have reminded the jury that he withdrew his objection to the evidence. Furthermore, the evidence connecting defendant to the weapon was overwhelming.

9. Criminal Law— prosecutor's argument—defendant's failure to testify

The trial court did not err in a first-degree murder prosecution by not intervening ex mero motu in the prosecutor's argument concerning defendant's failure to testify. The prosecutor's slightly veiled, indirect comment on defendant's failure to testify was harmless beyond a reasonable doubt. However, it was noted that prosecutors have a duty as officers of the court and as advocates for the people to conduct trials in accordance with due process and the fair administration of justice and should thus refrain from arguments that unnecessarily risk being violative of a defendant's fundamental constitutional rights.

10. Confessions and Other Incriminating Statements— Miranda warnings—not stale

The trial court did not err by denying a first-degree murder defendant's motion to suppress his statements to sheriff's investigators where defendant was read his Miranda rights at approximately 9:00 a.m.; waived those rights at 10:00 a.m.; confessed at approximately 12:00 p.m. to an unrelated robbery; questioning resumed after lunch at 2:30 p.m.; and defendant confessed to these murders at about 3:30 p.m. Although defendant contended that the original Miranda warnings had grown stale, the N.C. Supreme Court considered the totality of the circumstances, including the factors in *State v. McZorn*, 288 N.C. 417, and was not persuaded that the initial warnings were so remote as to create a substantial possibility that

defendant was unaware of his constitutional rights at the time of his second confession.

11. Homicide— first-degree murder—short-form indictments

The short-form first-degree murder indictments are constitutional.

12. Sentencing— death—proportionate

Sentences of death for three first-degree murders were proportionate where the record supports the aggravating circumstances found by the jury, there was no suggestion that the sentences were imposed under the influence of passion, prejudice, or any other arbitrary consideration and, given the astonishingly callous disregard for human life evidenced by defendant's actions resulting in multiple murders, the present case is more similar to cases in which death was found proportionate than to those in which it was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Allen (J.B., Jr.), J., on 4 November 1997 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of three counts of first-degree murder. Heard in the Supreme Court 14 February 2001.

Roy A. Cooper, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Marcus DeCarlos Mitchell was indicted on 1 April 1997 for three counts of first-degree murder in the killing of victims Dameon Armstrong, Dewayne Rogers, and Robin Watkins. Defendant was tried capitally and found guilty of all three counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for each murder conviction; and the trial court entered judgments accordingly.

The State's evidence tended to show that defendant, along with Antonio Mitchell, Durron Ray, and Tildren Hunter, drove to Rogers'

home in Zebulon, North Carolina, on the night of 3 March 1997 to steal firearms. Defendant, Mitchell, Ray, and Hunter were each dressed in black and wearing ski masks and gloves. Defendant had a .45-caliber handgun in his possession, while Hunter carried a .40-caliber handgun, and Ray carried a .380-caliber handgun.

Once the group arrived near Rogers' home, Mitchell remained in the car while defendant, Ray, and Hunter approached the house. Defendant knocked on the door, and Ray and Hunter hid from view. When Armstrong, a fourteen-year-old boy, answered the door, defendant pulled him onto the porch. Ray and Hunter came out from their hiding places, and defendant directed Hunter to kick in the door of the house. Defendant and Hunter then entered the house, and Ray stayed on the porch with Armstrong.

Defendant discovered Rogers and Watkins in a bathroom as he and Hunter were searching the house for firearms. Defendant forced Rogers and Watkins to lie on the floor in the living room. Defendant and Hunter then forced Armstrong to assist them in searching for firearms. At the conclusion of the search, Armstrong was brought into the living room and forced to lie on the floor with Rogers and Watkins.

After taking the keys to Watkins' car, defendant indicated to Ray and Hunter that they should kill the victims. Ray took Armstrong to the back of the house while defendant stayed in the living room and shot Rogers and Watkins. Immediately after defendant shot Rogers and Watkins, Ray shot Armstrong five times. Defendant, Ray, and Hunter then took Watkins' car and drove to the location where Mitchell was waiting with the getaway car. Defendant, Ray, and Hunter got into the car with Mitchell. After taking Mitchell home, defendant, Ray, and Hunter drove to Raleigh, North Carolina.

Meanwhile, Armstrong's uncle, Gabriel Miles, heard the gunshots from his nearby home and went to investigate. Once inside Rogers' house, Miles discovered the bodies of Rogers, Watkins, and Armstrong. Miles then called 911 from a neighbor's home.

On 8 March 1997 Raleigh police officers searched a hotel room occupied by defendant. The officers discovered a money bag, two walkie-talkies, several "hoodies" or items that may be worn over the top of the head and pulled down over the face, several gloves, a .380-caliber Lorcin handgun, and a .45-caliber Ruger handgun. Officers found a .40-caliber Smith and Wesson handgun in another room in the

same hotel. The State's ballistics expert later matched the bullets that killed Watkins and Rogers and the shell casings in the living room to the .45-caliber Ruger handgun found in defendant's hotel room. The ballistics expert also matched the bullets that killed Armstrong and the shell casings in the back bedroom to the .380-caliber Lorcin handgun found in defendant's hotel room. Investigators from the Wake County Sheriff's Department questioned defendant later that day, and defendant confessed to shooting Rogers and Watkins.

The pathologist who performed the autopsies on the victims determined that Watkins and Rogers each died from a gunshot wound to the back of the head. The pathologist found that Armstrong suffered gunshot wounds to the chest, head, buttocks, back, and right knee. The bullet wound to Armstrong's chest penetrated his lung and caused massive hemorrhaging that would have caused the victim to lose consciousness in two to five minutes. The chest wound caused Armstrong's death within two to ten minutes.

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

JURY SELECTION

[1] In his first assignment of error, defendant contends that the trial court erred in excusing for cause prospective jurors Ann Cole, Mark Perisich, and Marlene Lombardo. The test for determining when a juror may be excused for cause is whether his or her views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The decision as to whether a juror's views would prevent or substantially impair the performance of the juror's duties is within the trial court's broad discretion. *See State v. Gregory*, 340 N.C. 365, 394, 459 S.E.2d 638, 655 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). The fact that a prospective juror "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" is not sufficient to support an excusal for cause. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 785 (1968). Here, defendant maintains that the excusal of prospective jurors Cole, Perisich, and Lombardo violated the standard in *Wainwright* in that these prospective jurors expressed general reservations about their ability to impose the death penalty under the reasonable doubt standard of proof. Defendant further argues that appli-

cation of the "beyond a reasonable doubt" standard is subjective with each juror. We disagree.

First, prospective juror Cole testified that she was opposed to the death penalty in most, but not all, cases. Cole further testified that she would require the State to satisfy a higher burden than beyond a reasonable doubt before she would recommend the death sentence. The prosecutor then asked clarifying questions, and Cole unequivocally stated that she could follow the law during the sentencing proceeding and that her views of the death penalty would not substantially impair her ability to serve as a juror. However, in response to additional questioning from the prosecutor, defendant, and the trial court, Cole consistently stated that she would require a higher standard of proof than beyond a reasonable doubt and that she would apply her standard of proof during the sentencing proceeding. On this record defendant has failed to demonstrate that the trial court abused its discretion in concluding that prospective juror Cole's views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.

Second, prospective juror Perisich testified that, while he was not opposed to the death penalty as a general principle, he was unsure about his ability to recommend the death sentence. Perisich explained that the thought of imposing the death penalty gave him "a sick feeling" and that he was concerned about the long-term effects on him of recommending the death penalty. In response to the prosecutor's questions, Perisich stated that his views on the death penalty would impair his ability to perform his duties as a juror and that he would require a higher standard of proof than reasonable doubt during the sentencing proceeding. The trial court then asked some additional questions; and Perisich ultimately stated that he would not impose the death penalty unless he was "absolutely, positively sure" that defendant committed the murder. On this record we cannot conclude that the trial court abused its discretion in allowing the State's challenge for cause as to prospective juror Perisich.

Finally, prospective juror Lombardo initially indicated that she could consider both possible punishments, life imprisonment or the death penalty, and that she did not have strong feelings about the death penalty. However, after the prosecutor explained the capital sentencing process, Lombardo expressed reservations about the finality of the death sentence; and Lombardo testified that her concerns about the possibility that defendant was innocent might sub-

stantially impair her ability to perform her duties as a juror during the sentencing proceeding. The trial court asked some additional questions, Lombardo indicated that she would always vote for life imprisonment, and defendant declined the opportunity to attempt to rehabilitate Lombardo. On this record defendant has again failed to demonstrate an abuse of the trial court's discretion in allowing the State's challenge for cause as to prospective juror Lombardo. This assignment of error is, therefore, overruled.

[2] Defendant next assigns error to the trial court's informing prospective jurors during *voir dire* that a separate jury might be impaneled for the sentencing proceeding. Defendant argues that the trial court's misleading reference to the possibility of a separate sentencing jury violated his 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). We disagree.

Before jury selection began, the trial court in its remarks orienting the prospective jurors as to procedure made the following statement:

> [I]n the event that the Defendant is convicted of murder in the first degree, the Court will conduct a separate sentencing proceeding to determine whether the Defendant should be sentenced to death or life imprisonment without parole.
>
> This proceeding may be conducted before the trial jury or another jury. It will be conducted, if necessary, as soon as practical after the verdict of first degree murder is returned.

Following this statement, the trial court explained the capital sentencing process and the jury's duty to find and weigh aggravating and mitigating circumstances. The trial court then proceeded with jury selection, which included death-qualifying questions from the prosecutor.

Defendant's reliance on cases in which this Court has found error where a prosecutor's argument suggested that the jury's decision would be reviewed by an appellate court is misplaced. *See State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979); *State v. White*, 286 N.C. 395, 211 S.E.2d 445 (1975).

N.C.G.S. § 15A-2000(a)(2) provides that the capital sentencing proceeding "shall be conducted by the trial judge before the trial jury

as soon as practicable after the guilty verdict is returned." N.C.G.S. § 15A-2000(a)(2) (1999). Only if the trial jury which determined guilt is unable to reconvene for a hearing on sentencing shall a new jury be impaneled to determine the issue of punishment. *See id.* The better practice, therefore, would be for the trial court to make no mention of a different jury at the preliminary stage of the trial.

However, in this case the trial court's brief comment, made before jury selection and during the trial court's explanation of the manner in which the trial would be conducted, did not impermissibly dilute the jury's responsibility by implying that another jury would be impaneled for defendant's sentencing proceeding. The main thrust of the trial court's comments was to inform the jury that in the event defendant was convicted of first-degree murder, a separate sentencing proceeding would be conducted and that defendant would face the possibility of the death penalty. Immediately after the trial court's reference to the possibility of a separate sentencing jury, the trial court fully explained the capital sentencing proceeding to the prospective jurors; and later, the prosecutor extensively questioned the jurors about their views on the death penalty. The jurors knew they had been death qualified and had no reason to believe they would not be making the sentencing recommendation if defendant were found guilty of first-degree murder. Thus, in context, the trial court's statement did not mislead the jury or relieve the jury of its responsibility. This assignment of error is overruled.

[3] In his next assignment of error, defendant asserts that the trial court abused its discretion during *voir dire* by not allowing him to ask several prospective jurors about their ability to consider mitigating evidence. Defendant contends that he should have been permitted the opportunity to explore the jurors' religious beliefs or willingness to consider certain types of mitigating evidence. Defendant argues that his questions were permissible under *Morgan v. Illinois*, 504 U.S. 719, 733, 119 L. Ed. 2d 492, 505 (1992), in that the questions "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 of error to be without merit.

First, prospective juror Linda Phillips testified that she could consider any mitigating circumstances presented, that she could con-

sider the punishment of life imprisonment, and that she could follow the law. Defendant then asked Phillips about her religious beliefs; and Phillips explained that, as a Free Will Baptist, she followed what the Bible said about the death penalty. Defendant attempted to ask Phillips about her understanding of the Bible's teachings on the death penalty. However, the prosecutor objected to defendant's question; and the trial court sustained the prosecutor's objection. Defendant subsequently exercised a peremptory challenge to remove Phillips.

In *State v. Laws*, 325 N.C. 81, 109, 381 S.E.2d 609, 625-26 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), this Court held that the trial court did not abuse its discretion by sustaining the State's objection when the defendant asked a prospective juror whether she believed in a literal interpretation of the Bible. The Court noted that the defendant was given wide latitude to question prospective jurors about their beliefs, attitudes, and biases. *Id.* However, the Court emphasized that "[c]ounsel's right to inquire into the beliefs of prospective jurors to determine their biases and attitudes does not extend to all aspects of the jurors' private lives or of their religious beliefs." *Id.* at 109, 381 S.E.2d at 625.

Similarly, in this case the trial court permitted defendant to inquire into prospective juror Phillips' religious affiliation, views on capital punishment, ability to consider mitigating circumstances, and willingness to impose a sentence of life imprisonment. Defendant also asked Phillips whether any teachings of her church would interfere with her ability to perform her duties as a juror. Phillips gave unequivocal answers to each of defendant's questions indicating that she could follow the law. Thus, defendant was given wide latitude to inquire into Phillips' beliefs, attitudes, and biases; and defendant has not shown any abuse of discretion in the trial court's ruling on this one particular question.

[4] Second, defendant explained mitigating circumstances to prospective juror Dr. Rick Phillips, mentioned several types of evidence that might be submitted as mitigating circumstances, and then asked the following question:

> With three murder charges facing him, if the State is able to prove to you that [defendant] did each and every one of them, killed three separate individual people in cold blood premeditatedly deliberately intended the result and killed all three people intending that result, would you be able to consider fairly things like

> sociological background, the way that he grew up, if he had an alcoholic problem, things like that in weighing whether or not he should get the death penalty or whether or not he should get life without parole.

The prosecutor objected, and the trial court sustained the objection. Defendant then asked Dr. Phillips whether he could consider whatever evidence the trial court might submit as mitigating circumstances, and Dr. Phillips indicated that he could consider mitigating evidence. Defendant immediately attempted to ask Dr. Phillips the following question:

> Assuming that the State proves that [defendant] committed three murders cold blooded first degree premeditated deliberate murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a penalty less than death.

The prosecutor objected again, and the trial court sustained the objection. Defendant subsequently exercised a peremptory challenge to remove Dr. Phillips.

"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. Braxton*, 352 N.C. 158, 179, 531 S.E.2d 428, 440 (2000), *cert. denied*, — U.S. —-, — L. Ed. 2d — (Jan. 22, 2001) (No. 00-7359); *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). The questions posed in this case do 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 questions are an attempt to determine what kind of mitigating evidence would be sufficient to outweigh aggravating circumstances not yet in evidence if defendant were convicted of three counts of first-degree murder based on premeditation and deliberation. *See Braxton*, 352 N.C. at 179, 531 S.E.2d at 440; *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 Braxton*, 352 N.C. at 179, 531 S.E.2d at 440; *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). Thus, defendant has not shown any abuse of discretion in the trial court's rulings as to prospective juror Phillips.

[5] Finally, prospective juror Billie Whitfield stated that she believed capital punishment was not outlawed because Jesus had accepted capital punishment. Defendant asked Whitfield the following question:

> So if the State of North Carolina were to prove to you beyond a reasonable doubt that [defendant] was guilty of first degree cold blooded premeditated murder with aggravating circumstances, would your feelings about the death penalty be so strong in that instance that you would not be able to consider mitigating circumstances.

The prosecutor objected to defendant's question, and the trial court instructed defendant to explain "the whole law" before asking such detailed questions. Defendant then explained mitigating circumstances to prospective juror Whitfield, mentioned several types of evidence that might be submitted to show mitigation, and asked whether she could consider whatever evidence might be submitted to support mitigating circumstances. Whitfield responded as follows:

> I guess that I believe that we each are accountable for what we do and we cannot point our finger to blame someone else for our decisions, the way that we are today.

The trial court then asked some clarifying questions, and Whitfield indicated that she could consider mitigating circumstances in determining whether life imprisonment or the death penalty was the appropriate punishment. Defendant resumed questioning Whitfield as follows:

> [DEFENDANT]: Okay. If there is a difference between what . . . God's law is and what the State's law is to you, can you follow the State's law.
>
> JUROR: I do not believe that the State's law is going to be different.
>
> [DEFENDANT]: Well, the State's law specifically says to address aggravating and mitigating circumstances.
>
> JUROR: Yes.

[DEFENDANT]: Okay. And you understand that.

JUROR: Yes.

[DEFENDANT]: And is it your belief that God's law also addresses aggravating and mitigating circumstances.

The prosecutor objected to defendant's question, and the trial court sustained the prosecutor's objection. Defendant continued questioning Whitfield, and the following exchange occurred:

[DEFENDANT]: In view of your religious beliefs can you follow the State's law as to the instructions on capital punishment.

JUROR: I have not been faced with that question before.

[DEFENDANT]: Well, of course not.

JUROR: And—

[DEFENDANT]: I do not mean to be—

JUROR: If the aggravating circumstances or evidence is so strong, today, not knowing anything about anything here, I believe that I would have to—the aggravating circumstance would be so strong, the mitigating circumstances, would not carry that kind of staying power in my beliefs.

[DEFENDANT]: If the State were to prove to you first degree murder, cold blooded premeditated deliberated first degree murder beyond a reasonable doubt and then prove to you the first part of the sentencing phase beyond a reasonable doubt the existence of aggravating circumstance, are you then saying that the mitigating circumstance . . . would have to be so strong as to outweigh that.

[PROSECUTOR]: Objection.

THE COURT: Sustained, and I do not believe that she said that. I will let you repeat the exact law and see if she can follow the law.

[DEFENDANT]: Going back to that question—in my earlier questions, on some of these matters—I promise you there will not be many more.

If the State were to prove to you, as I said, a cold blooded premeditated first degree murder, all three counts of this, and then to

> prove to you that there were beyond a reasonable doubt the existence of aggravating circumstance[s], would you be able to consider as mitigating circumstances such things as—

The prosecutor objected to defendant's question, and the trial court sustained the prosecutor's objection. Defendant subsequently exercised a peremptory challenge to remove Whitfield.

As stated earlier, "[c]ounsel's right to inquire into the beliefs of prospective jurors to determine their biases and attitudes does not extend to all aspects of the jurors' private lives or of their religious beliefs." *Laws*, 325 N.C. at 109, 381 S.E.2d at 625. Here, the trial court permitted defendant to inquire into prospective juror Whitfield's religious affiliation, views on capital punishment, ability to consider mitigating circumstances, and willingness to impose a sentence of life imprisonment. Defendant also asked Whitfield whether her religious beliefs concerning accountability and blame would interfere with her ability to perform her duties as a juror. Whitfield gave unequivocal answers to each of defendant's questions indicating that she could follow the law. Thus, defendant was given wide latitude to inquire into Whitfield's beliefs, attitudes, and biases; and defendant has not shown any abuse of discretion in the trial court's ruling on the question about whether God's law addresses aggravating and mitigating circumstances.

Similarly, as stated earlier, "[j]urors should not be asked what kind of verdict they would render under certain named circumstances." *Phillips*, 300 N.C. at 682, 268 S.E.2d at 455. Here, the questions posed to Whitfield about mitigating circumstances do 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 questions were an attempt to determine what kind of verdict Whitfield would render under certain circumstances not yet in evidence. *See Braxton*, 352 N.C. at 179, 531 S.E.2d at 440. Thus, defendant's questions amount to improper "stake out" questions; the trial court permitted defendant wide latitude to inquire into Whitfield's ability to consider mitigating circumstances; and the trial court did not abuse its discretion by sustaining the prosecutor's objections. *See id.* This assignment of error is overruled.

[6] Next, defendant contends that the trial court erred in ordering defense counsel to defer to defendant's wishes not to rehabilitate prospective juror Mynawati Katwaru. We disagree.

Prospective juror Katwaru testified that she would decide the case based on emotional sympathy for the victims and, thus, would not be a fair and impartial juror. The trial court indicated that Katwaru could be removed for cause, and defense counsel conferred with defendant. Defense counsel subsequently informed the trial court that defendant, against counsel's advice, wanted to remove Katwaru for cause without any attempt to rehabilitate. The trial court inquired into defense counsel's position that rehabilitation questions might reveal that emotional mitigating evidence would persuade Katwaru to vote for life imprisonment, and the trial court discussed defense counsel's position with defendant. When defendant adamantly insisted that he wished to remove Katwaru for cause without additional questioning, the trial court questioned defendant on the record about his desire to remove Katwaru for cause against counsel's advice. The trial court then removed Katwaru for cause without permitting defense counsel an opportunity for rehabilitation.

In general, the responsibility for tactical decisions, such as which jurors to accept or strike, "rests ultimately with defense counsel." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991). "However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991). Further, when such impasses arise, defense counsel should make a record of the circumstances, the advice given to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. *Id.*

After reviewing the transcript in this case of the discussion among the trial court, defendant, and defense counsel, we conclude that the trial court properly found that defendant and his counsel had reached an absolute impasse over the tactical decision of whether to attempt to rehabilitate prospective juror Katwaru. Defense counsel made a proper record of the circumstances, including their advice to defendant and the reasons for their decision to continue questioning Katwaru. From these statements of defense counsel and defendant's answers to questions directed to him by the trial court, we conclude that defendant was fully informed of and understood the potential consequences of his decision. Thus, we hold that the trial court did not err in excusing the prospective juror for cause and honoring defendant's personal decision not to attempt rehabilitation.

GUILT-INNOCENCE PHASE

In his next assignment of error, defendant contends that the trial court committed 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." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

[7] Here, following defense counsel's argument that the State's evidence was incomplete and lacked corroboration, the prosecutor stated:

> [Defense counsel] stood up here and talked to you for I don't know how many minutes. I wasn't timing him. I think the judge was. But not one time did he say to you that man's not guilty. He didn't tell you that. If you recall, he didn't say that. He talked about the investigation. He talked about why don't we have any fingerprints. If you wear stuff like this (indicating) and you rub something like that, you don't leave fingerprints. Don't be fooled by the question of the investigation. There's not one shred of evidence that [the investigating officer] has lied to you.

Defendant argues that this comment implied that even defendant's own attorneys believed he was guilty. However, the prosecutor's comment merely highlighted that defense counsel's strategy was to create holes in the State's case rather than to argue evidence of innocence. In light of that strategy, the prosecutor then argued that there was no reason to doubt the validity of the investigation. The comment did not imply that defense counsel believed defendant was guilty; rather, it pointed out defense counsel's strategy and urged that there was no

reason to doubt the State's method of investigation. Therefore, we decline to hold that this comment was so grossly improper as to warrant intervention *ex mero motu*.

[8] The prosecutor also referred to defendant's objection to the admission of some physical evidence, stating:

> [Defendant is] connected by this gun . . . being found in his room. . . . This is the murder weapon. And where was it found? [Defendant's hotel room]. No connection? No connection, [defendant]? It was found with [defendant's] driver's license and his identification cards that I passed to you. I didn't pass everything in that wallet, over the defendant's objection. He didn't want you to see this, obviously.

Defendant contends that the prosecutor improperly argued that defense counsel admitted guilt by objecting to the introduction of certain evidence. Defendant further asserts that, under *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961), this argument burdened defendant's right to suppress evidence resulting from an unconstitutional search by penalizing defendant for making the objection.

Assuming *arguendo* that it was improper for the prosecutor to argue that evidence was admitted over defendant's objections in an effort to bolster the credibility and importance of that evidence, we conclude that this statement was not so grossly improper as to render defendant's trial fundamentally unfair and thereby warrant intervention *ex mero motu*. Defendant withdrew his objection to the admission of this evidence and could have so reminded the jury in his own closing argument. Furthermore, the evidence connecting defendant to the weapon was overwhelming in that defendant was in the room where authorities found the weapon; defendant was seen carrying a .45-caliber handgun at the time of the murders; and the ballistics testing revealed that the spent shells and casings found at the crime scene were fired from the .45-caliber Ruger handgun located in defendant's hotel room. In light of this evidence the alleged error, if any, was harmless beyond a reasonable doubt. Thus, we overrule this assignment of error.

[9] Finally, in concluding his closing argument, the prosecutor stated:

> We've given this man his day in court. That's part of our justice system. In this democracy we have a justice system and we say to [defendant], you have a right not to one lawyer, but two lawyers.

> He can say anything he wants to. He has a right to testify. And that's part of our jobs to do that. Whatever your feelings may be about that, for justice to be done, this is the way we do it. It's not a speedy process, sometimes. But what we're searching for is the truth.

Defendant contends that the prosecutor improperly commented on defendant's exercise of his constitutional right not to testify at trial.

A defendant has the right to refuse to testify under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, *see Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 110 (1965), and under Article I, Section 23 of the North Carolina Constitution, *see State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). A defendant's exercise of this right may not be used against him, and any reference by the State to a defendant's failure to testify violates that defendant's constitutional rights. *See State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). A statement that may be interpreted as commenting on a defendant's decision not to testify is improper if the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify. *See State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). However, a prosecutor's reference to a defendant's failure to testify does not mandate an automatic reversal but requires the court to determine whether the error is harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1999); *State v. Reid*, 334 N.C. at 557, 434 S.E.2d at 198.

Assuming *arguendo* that the prosecutor's comment in the present case was error, we conclude, in light of the overwhelming evidence of defendant's guilt, that the prosecutorial error and the trial court's failure to intervene *ex mero motu* were harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 401, 364 S.E.2d 341, 347 (1988). In addition to defendant's confession as to his participation in the murders, the State presented the testimony of an accomplice corroborating defendant's involvement and evidence connecting defendant to the murder weapon. On this record the prosecutor's slightly veiled, indirect comment on defendant's failure to testify was harmless beyond a reasonable doubt. Finally, we note that district attorneys and assistant district attorneys have a duty as officers of the court and as advocates for the people to conduct trials in accordance with due process and the fair administration of justice and should

thus refrain from arguments that unnecessarily risk being violative of a defendant's fundamental constitutional rights, thereby necessitating new trials.

[10] By another assignment of error, defendant contends that the trial court erred in denying his motion to suppress statements he made to investigators from the Wake County Sheriff's Department. At the hearing on defendant's motion to suppress, the trial court made the following findings of fact: Defendant was read his *Miranda* rights at approximately 9:00 a.m. on 8 March 1997; and defendant knowingly, voluntarily, and understandingly signed a waiver of those rights at 10:00 a.m. that same morning. After questioning by Raleigh police officers, defendant confessed at approximately 12:00 p.m. to an unrelated robbery. Defendant was then provided with lunch, and an investigator from the Wake County Sheriff's Department began questioning defendant at 2:30 p.m. about these murders. At approximately 3:30 p.m. on 8 March 1997, defendant confessed to the murders. The trial court concluded that the original *Miranda* warnings given at 9:00 a.m. had not grown stale before the confession to the murders and denied defendant's motion to suppress the statement.

Defendant contends that the trial court erred in finding that the original *Miranda* warnings were not stale by the time of the second interrogation. Defendant asserts that a change in the subject matter of the interrogation should require fresh *Miranda* warnings under the United States and North Carolina Constitutions.

This Court must consider the totality of the circumstances in determining "whether the initial warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogation." *State v. McZorn*, 288 N.C. 417, 434, 219 S.E.2d 201, 212 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *see also State v. Smith*, 328 N.C. 99, 113, 400 S.E.2d 712, 719 (1991); *State v. Fisher*, 318 N.C. 512, 522-23, 350 S.E.2d 334, 340 (1986).

In reviewing the totality of circumstances, the following five factors, among others, should be considered:

> (1) the length of time between the giving of the first warnings and the subsequent interrogation, (2) whether the warnings and the subsequent interrogation were given in the same or different places, (3) whether the warnings were given and the subsequent

> interrogation conducted by the same or different officers, (4) the extent to which the subsequent statement differed from any previous statements, and (5) the apparent intellectual and emotional state of the suspect.

McZorn, 288 N.C. at 434, 219 S.E.2d at 212 (citations omitted).

Here, consideration of the *McZorn* factors weighs against a finding that the warnings had grown stale. First, the confession occurred only six and one-half hours after the warnings; and defendant was allowed rest-room breaks and a two and one-half hour lunch during that time. Second, the evidence shows that defendant was given his *Miranda* warnings and was interrogated in the exact same location. Third, the warnings were given and the subsequent interrogation was conducted by different officers, a fact which weighs in favor of defendant's position. Fourth, defendant's statement did not differ substantially from the initial statements. Shortly after the warnings were given, defendant confessed to the unrelated robbery while the warnings were fresh in his mind. Moreover, the murders were connected to another robbery. Hence, the likelihood that defendant had forgotten the *Miranda* warnings is *de minimis*. Fifth, the evidence does not suggest that defendant's intellectual or mental state would affect his awareness of his rights at the time of the second confession. Thus, considering the totality of the circumstances, including that four of the five *McZorn* factors weigh against defendant's position, this Court is unpersuaded that the initial warnings were so remote as to create a substantial possibility that defendant was unaware of his constitutional rights at the time of his second confession. This assignment of error is overruled.

[11] Defendant next contends that the short-form murder indictments authorized by N.C.G.S. § 15-144 and utilized in this case are unconstitutional under *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). Defendant argues that the indictments are unconstitutional for the following reasons: (i) the indictments do not allege the elements of first-degree murder that distinguish it from second-degree murder, (ii) there is no indication as to which theory of first-degree murder the grand jury found the evidence to support, (iii) the short form indictment statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and (iv) the indictments do not list aggravating circumstances. In light of *Jones* and *Apprendi*, this Court has recently held that the short-form indictment alleges all necessary elements of first-

degree murder, *State v. Holman*, 353 N.C. 174, 179, 540 S.E.2d 18, —— (2000); *State v. Golphin*, 352 N.C. 364, 395, 533 S.E.2d 168, 193 (2000); *Braxton*, 352 N.C. at 175, 531 S.E.2d at 438; is sufficient to indict on any theory of murder, *Braxton*, 352 N.C. at 174, 531 S.E.2d at 437; does not violate equal protection, *Holman*, 353 N.C. at 180, 540 S.E.2d at ——; and need not allege aggravating circumstances, *Holman*, 353 N.C. at 180, 540 S.E.2d at —— ; *Golphin*, 352 N.C. at 397, 533 S.E.2d at 193-94; *Braxton*, 352 N.C. at 175, 531 S.E.2d at 438. Defendant has neither advanced new arguments nor cited any new authority to persuade us to depart from these holdings. Therefore, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises one additional issue that he acknowledges has previously been decided contrary to his position by this Court, namely, whether the State's use of peremptory challenges to exclude jurors hesitant to impose the death penalty is unconstitutional.

Defendant raises this issue for purposes of urging this Court to reexamine its prior holdings and also for the purpose of preserving the issue for any possible further judicial review. We have considered defendant's arguments on this issue and find no compelling reason to depart from our prior holdings. This assignment of error is overruled.

PROPORTIONALITY

[12] 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 sentences were entered under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1999). Having thoroughly reviewed the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury in each of the three murder convictions. Further, we find no suggestion that the sentences of death were 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 three counts of first-degree murder on the basis of premeditation and deliberation and under the

felony murder rule. At defendant's capital sentencing proceeding, the jury found the three aggravating circumstances submitted for the murders of Watkins and Armstrong: that defendant was previously convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); that the murder was committed to avoid or prevent lawful arrest, N.C.G.S. § 15A-2000(e)(4); and that the murder was part of a course of conduct, including defendant's commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). The jury found the two aggravating circumstances submitted for the murder of Rogers: that defendant was previously convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that the murder was part of a course of conduct, including defendant's commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11).

One statutory mitigating circumstance was submitted and found as to each murder: defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6). As to each of the three murders, three statutory mitigating circumstances were submitted but not found: defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and the catchall, N.C.G.S. § 15A-2000(f)(9). An additional statutory mitigating circumstance as to the murder of Dameon Armstrong was submitted to but not found by the jury: defendant was an accomplice in the capital felony committed by another person, and his participation was relatively minor, N.C.G.S. § 15A-2000(f)(4). Finally, as to all three murders, the jury found both nonstatutory mitigating circumstances submitted and that they 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 three counts of first-degree murder under the felony murder rule and on the basis of premeditation and deliberation. 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). 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*, 528 U.S. 1164, 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). Finally, defendant was convicted of three counts of first-degree murder. This Court has never found the death penalty disproportionate in a multiple-murder case. *See State v. Heatwole*, 344 N.C. 1, 30, 473 S.E.2d 310, 325 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997).

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). In this case one victim, Rogers, was in his home at night, a time and place this Court has taken into consideration in determining the appropriateness of the death penalty. Further, a second victim, Armstrong, was only fourteen-years-old and was shot five times while lying in a prone position after he had heard the shots which killed the other two victims. Given the astonishingly callous disregard for human life evidenced by defendant's actions resulting in these multiple murders, 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 sentences were not excessive or disproportionate. We hold that defendant received a

fair trial and capital sentencing proceeding, free from prejudicial error. Accordingly, the judgments of death are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. RODNEY DALE BUCHANAN

No. 190A00

(Filed 6 April 2001)

Confessions and Incriminating Statements— Miranda warnings—test for custody

A ruling by the trial court suppressing a first-degree murder defendant's statement was remanded where the trial court mistakenly applied the "free to leave" test in determining whether defendant was in custody for purposes of Miranda. The appropriate inquiry is whether, based on the totality of the circumstances, there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The broader "free to leave" test and "restraint on freedom of movement of the degree associated with formal arrest" are not synonymous; circumstances supporting an objective showing that one is "in custody" might include a police officer standing guard at the door, locked doors, or handcuffs. Moreover, the subjective unspoken intent of a law enforcement officer, provided it is not communicated or manifested to the defendant in any way, and the subjective interpretation of a defendant are not relevant to the objective determination of whether the totality of the circumstances support the conclusion that defendant was in custody.

Appeal pursuant to N.C.G.S. § 15A-979(c) from an order allowing suppression of defendant's statement entered in a first-degree murder case by Beal, J., on 14 February 2000, *nunc pro tunc* 7 February 2000, in Superior Court, Gaston County. Heard in the Supreme Court 17 October 2000.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State-appellant.

Richard B. Schultz and Edgar F. Bogle for defendant-appellee.

LAKE, Chief Justice.

Defendant was arrested on 2 July 1997 by Gaston County police for the 24 June 1997 murders of Ronald Hoyle and Maria Pressley and was subsequently indicted on 4 August 1997 for two counts of first-degree murder. On 31 January 2000, defendant filed a motion to suppress his pretrial statements to detectives based on the assertions that defendant was "in custody" at the time the statements were given, defendant was not advised of his constitutional rights until after he had made incriminating statements, and defendant's mental and physical faculties were impaired at the time the statements were given. The motion to suppress was heard by Judge Beverly T. Beal on 7 February 2000, and following an evidentiary hearing, the trial court made extensive findings of fact and reached conclusions of law in open court and granted defendant's motion to suppress. On 14 February 2000, *nunc pro tunc* 7 February 2000, the trial court entered a written order to that effect. The State filed written notice of appeal on 14 February 2000.

Evidence presented at the suppression hearing showed that on 2 July 1997, at approximately 1:30 p.m., Sergeant Dean Henderson of the Gaston County Police Department was dispatched to the construction site of a church where defendant was working on the roof. When informed that Sergeant Henderson was there to see him, defendant climbed down a ladder to speak to the sergeant. The two had spoken a few days earlier about the homicides of Maria Pressley and Ronald Hoyle, and on 2 July, the sergeant informed defendant that new information had been received and that officers needed to speak with defendant at the police station. Apparently, police had found some inconsistencies in statements regarding defendant's whereabouts on the night of the murders.

Sergeant Henderson was in plain clothes and was driving an unmarked car. He asked defendant if he would come to the police station to answer some questions, and defendant agreed. Sergeant Henderson gave defendant the option of taking defendant's own vehicle to the station or riding with him, and defendant chose to ride with Sergeant Henderson. The sergeant told defendant that he was not under arrest and that he was free to leave at any time. Defendant was not handcuffed or searched and rode in the front passenger seat of the vehicle.

At the police station, Sergeant Henderson parked in back of the building in a lot where officers park, and he and defendant entered a

back door of the building and went through the break room and up one flight of stairs to the second floor. Defendant asked to use the rest room, and after receiving directions from Sergeant Henderson, defendant went to the rest room and to get a drink of water by himself. The two then went to Captain Farley's office, which was approximately twelve feet by twelve feet and had a desk, some computer equipment, a telephone, some chairs and one window. Sergeant Henderson left defendant alone in the office and went to get Sergeants Osborne and Myers, who came into the office a few minutes later. Both sergeants were dressed in shirt and tie; Sergeant Osborne was wearing a firearm, and Sergeant Myers was unarmed. Sergeant Osborne sat at the desk to take notes, defendant sat in a chair in front of the desk, and Sergeant Myers sat in another chair next to defendant. Sergeant Myers conducted the interview, which started at approximately 2:00 p.m., half an hour after defendant was picked up at his work site.

At the beginning of the interview, Sergeant Myers told defendant that he was not under arrest and that he was free to leave at any time. He also asked defendant if he wanted anything to eat or drink and engaged in conversation to establish rapport. The sergeant eventually told defendant that they had spoken to Vaughn Trammel, who lived near the clubhouse where the victims had been killed; that they had talked about defendant's whereabouts at the time of the homicides; and that Trammel had said that defendant told him not to tell the police that defendant was at Trammel's house the night of the murders. In response to the sergeant's request for an explanation, defendant admitted to being at the clubhouse the night of the murders.

After further questioning, defendant gave an oral statement, between 2:00 p.m. and 3:23 p.m., stating that he went to the clubhouse that night, that Hoyle was upset with him because defendant was drunk and that a confrontation ensued between defendant and Hoyle in the living room. Defendant stated that he "just went berserk," that he went behind the bar where the shotgun rack was and that he took a gun off the wall and started shooting at Hoyle and Pressley.

Sergeant Myers estimated that defendant gave the verbal statement about forty-five minutes into the interview and that Sergeant Osborne started writing the statement at 3:23 p.m. Shortly thereafter, defendant asked to use the rest room, and defendant and both officers went to the rest room, with Sergeant Osborne entering first, defendant following, and Sergeant Myers entering last. Sergeant

Osborne was the first one out of the rest room, and he and defendant were standing in the hallway when Sergeant Myers came out. Upon returning to the office, defendant was again told he was not under arrest and was free to leave.

After the written statement was prepared, the officers gave it to defendant for him to read and sign. Defendant signed the statement at 4:36 p.m. After defendant signed the statement, the officers asked him for further clarification based on the fact that the victims had been shot in their bedroom at the clubhouse, and this was inconsistent with defendant's statement that the shooting had occurred in the living room. Defendant then admitted that after the fight was over, Hoyle and Pressley went downstairs to the bedroom, and because defendant felt that Hoyle was going to get his shotgun, defendant went to the bedroom and shot them. Defendant's change to his statement was reduced to writing and signed by defendant at 5:46 p.m. Defendant had not yet been advised of his *Miranda* rights.

After defendant's second statement was signed, he was arrested and charged, he was given *Miranda* warnings, the officers filled in the *Miranda* form, and defendant signed the form waiving his constitutional rights at 5:57 p.m. The next day, at 11:00 a.m., while in custody, the officers again advised defendant of his *Miranda* rights, and those rights were invoked.

During the evidentiary hearing on the motion to suppress, Sergeant Osborne stated that about halfway through the interview the secretary's phone rang, and because the secretary was talking on the phone, the sergeant closed the office door where the interview was being conducted. The door remained closed, but unlocked, for the rest of the interview.

Both sergeants also stated that, other than one request for a bathroom break, defendant never asked for anything to eat or drink, to make a telephone call, to take a break or to leave. Defendant was never patted down or handcuffed, and the seating arrangement of the three did not change. The sergeants stated that they did not notice any odor of alcohol; impairment in defendant's speech; bloodshot, glassy, or watery eyes; or any signs that defendant was under the influence of any impairing substance.

On appeal, the State contends the trial court applied an incomplete test in determining whether defendant was "in custody" for the purposes of *Miranda* and, therefore, erred in granting defendant's

motion to suppress. Specifically, the State contends that in reaching its decision to suppress defendant's statement, the trial court's inquiry was based on the incorrect standard of whether a reasonable person in defendant's position, under the totality of the circumstances, would have felt "free to leave," rather than whether a reasonable person would have perceived that there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." We agree that the trial court applied the incorrect test in determining whether defendant was "in custody" for the purposes of *Miranda*, and we remand to the trial court for reconsideration and application of the appropriate test.

It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact " 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (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)), *cert. denied*, — U.S. —, 148 L. Ed. 2d 992 (2001). Additionally, the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). " '[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, — U.S. —, 149 L. Ed. 2d 305 (2001). In the instant case, the trial court's conclusions of law reflect an incorrect application of legal principles to the facts found.

In considering the appropriate test for determining whether a defendant is "in custody" for purposes of *Miranda*, it is instructive to briefly review the history of *Miranda*. The warning was conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogations by police officers. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Although the United States Supreme Court has acknowledged that the Fifth Amendment prohibits the use only of "compelled" testimony, it has interpreted the *Miranda* decision as holding that failure to administer *Miranda* warnings in "custodial situations" creates a presumption of compulsion which would exclude statements of a

defendant. *Oregon v. Elstad*, 470 U.S. 298, 306-07, 84 L. Ed. 2d 222, 230-31 (1985). Therefore, the initial inquiry in determining whether *Miranda* warnings were required is whether an individual was "in custody."

In *Miranda*, the Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any *significant* way." *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706 (emphasis added). In subsequent years, the Court has explained and refined what it meant by that language. In *Oregon v. Mathiason*, the Supreme Court reviewed the Oregon Supreme Court's conclusion that, although the defendant went to the police station voluntarily and was told he was not under arrest, the defendant was in custody because the parties were at the police station and were alone behind closed doors, the officer had informed the defendant that he was a suspect, the defendant was falsely told that the officers had evidence incriminating him in the crime, and the questioning took place in a "coercive environment." *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714 (1977). The Supreme Court reversed the Oregon court, stating:

> [A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

Id. at 495, 50 L. Ed. 2d at 719.

Six years later, in *California v. Beheler*, the United States Supreme Court reviewed a California Court of Appeals' decision in

which that court found "custody" where the interview took place in the station house, the police had already identified Beheler as a suspect and the design of the interview was to produce incriminating responses. In reversing the California court, the Supreme Court concluded that the court improperly focused on the fact that Beheler was a suspect and was questioned at the station house and held that, "[a]though the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 1279 (1983) (quoting *Mathiason*, 429 U.S. at 495, 50 L. Ed. 2d at 719).

Since *Beheler*, the Supreme Court has consistently held that the "ultimate inquiry," based on the totality of circumstances, in determining whether an individual is "in custody" is whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *See Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995) (stating that the court must apply an objective test to resolve the "ultimate inquiry"); *Stansbury v. California*, 511 U.S. 318, 322, 128 L. Ed. 2d 293, 298 (1994) (stating the "ultimate inquiry" is whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest"); *Berkemer v. McCarty*, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 335 (1984) (stating that it is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's "freedom of action is curtailed to a degree associated with formal arrest").

The Supreme Court of North Carolina summarized the law regarding the application of *Miranda* in custodial interrogations in *State v. Gaines* and recognized that "in determining whether a suspect [is] 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." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *see also Brewington*, 352 N.C. at 499, 532 S.E.2d at 502 (definitive inquiry is whether there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest"); *State v. McNeill*, 349 N.C. 634, 644, 509 S.E.2d 415, 421 (1998) (definitive inquiry is whether there was a "formal arrest or

a restraint on freedom of movement of the degree associated with a formal arrest"), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Gregory*, 348 N.C. 203, 207-08, 499 S.E.2d 753, 757 (definitive inquiry is whether there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest"), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998); *State v. Daughtry*, 340 N.C. 488, 506-07, 459 S.E.2d 747, 755 (1995) ("ultimate inquiry" is whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest"), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). Therefore, based on United States Supreme Court precedent and the precedent of this Court, the appropriate inquiry in determining whether a defendant is "in custody" for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."

Defendant contends that the concept of "restraint on freedom of movement of the degree associated with a formal arrest" merely clarifies what is meant by a determination of whether a suspect was "free to leave." The two standards are not synonymous, however, as is evidenced by the fact that the "free to leave" test has long been used for determining, under the Fourth Amendment, whether a person has been seized. *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). Conversely, the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly "in custody." *See Gaines*, 345 N.C. at 662-63, 483 S.E.2d at 405-06 (applying the "free to leave" test in Fourth Amendment analysis and the "restraint on freedom of movement to the degree of a formal arrest" test to Fifth Amendment analysis); *see also United States v. Sullivan*, 138 F.3d 126, 130 (4th Cir. 1998) (differentiating between being "free to leave" and having "freedom of action curtailed to a degree associated with arrest"). Circumstances supporting an objective showing that one is "in custody" might include a police officer standing guard at the door, locked doors or application of handcuffs.

The trial court in the instant case mistakenly applied the broader "free to leave" test in determining whether defendant was "in custody" for the purposes of *Miranda*. We therefore remand the case to the trial court for a redetermination of whether a reasonable person in defendant's position, under the totality of the circumstances,

would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest.

The State contends this Court has been inconsistent in its application of the "ultimate inquiry" test versus the "free to leave" test. *See State v. Jackson*, 348 N.C. 52, 55, 497 S.E.2d 409, 411 (applying the "free to leave" test to determine custody), *cert. denied*, 525 U.S. 943, 142 L. Ed. 2d 301 (1998); *State v. Rose*, 335 N.C. 301, 334, 439 S.E.2d 518, 536 (applying the "free to leave" test to determine custody), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994); *State v. Hicks*, 333 N.C. 467, 478, 428 S.E.2d 167, 173 (1993) (applying the "free to leave" test to determine custody); *State v. Smith*, 317 N.C. 100, 104, 343 S.E.2d 518, 520 (1986) (holding that the operative question was whether a reasonable person would believe he was "free to leave"). To the extent that these or other opinions of this Court or the Court of Appeals have stated or implied that the determination of whether a defendant is "in custody" for *Miranda* purposes is based on a standard other than the "ultimate inquiry" of whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," that language is disavowed. *See McNeill*, 349 N.C. at 644, 509 S.E.2d at 421 (definitive inquiry is whether there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest"); *Gregory*, 348 N.C. at 207-08, 499 S.E.2d at 757 (definitive inquiry is whether there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest"); *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405 (definitive inquiry is whether there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest"); *Daughtry*, 340 N.C. at 506-07, 459 S.E.2d at 755 (ultimate inquiry is whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest").

In reviewing the trial court's findings of fact in the instant case, we note several findings which reference the fact that although Sergeant Myers told defendant he was not under arrest and was free to leave, the sergeant subjectively did not intend to let defendant leave the station after defendant verbally confessed to shooting the victims. The trial court's findings also indicate that the reason the officers did not read defendant his *Miranda* warnings was because they did not want defendant to invoke his rights and because the interrogation by the officers was intended to elicit an incriminating response from defendant. Specifically, the trial court found:

10. The Defendant and both officers went to the restroom and upon returning, the Defendant was told again that he was not under arrest and was free to leave. This was not true. The Defendant was not free to leave. The officers would not have allowed him to leave at that time.

. . . .

15. The Defendant was not free to leave the Gaston County Police Department after his arrival there. He was deceived in regard to his ability to freely leave.

16. The Defendant has an eight [sic] grade education. The interrogation by the officers was intended to, and was reasonably likely to, elicit an incriminating response from the Defendant.

17. It was the officer's testimony that the reason why he did not read the Defendant his Miranda warnings was because he did not want the Defendant to invoke his rights.

Based on the aforementioned and other findings of fact, the trial court concluded as a matter of law "that a reasonable person would, considering the totality of the circumstances, not have felt free to leave" and that "[t]he statements obtained from the Defendant were the result of custodial interrogation." Although it is not clear to what extent the trial court, in reaching its conclusions of law, considered as significant the officer's unspoken intention not to let defendant leave the station after his verbal confession and the officer's intention to elicit incriminating responses from defendant, we determine that the law should be clarified in this regard.

Throughout the years, the United States Supreme Court has stressed that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323, 128 L. Ed. 2d at 298. Unless "they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the *Miranda* custody inquiry." *Id.* at 324, 128 L. Ed. 2d at 300. Nor can an officer's knowledge or beliefs bear upon the custody issue unless they are conveyed, by word or deed, to the individual being questioned. *Id.* at 325, 128 L. Ed. 2d at 300. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only rele-

vant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442, 82 L. Ed. 2d at 336.

In the instant case, the fact that Sergeant Myers had decided at some point during the interview that he was not going to allow defendant to leave and was going to arrest defendant at the end of the interview is irrelevant to the custody inquiry, unless those intentions were somehow manifested to defendant. The subjective unspoken intent of a law enforcement officer, provided it is not communicated or manifested to the defendant in any way, and subjective interpretation of a defendant are not relevant to the objective determination of whether the totality of the circumstances support the conclusion that defendant was "in custody."

As to the officer's intent to elicit incriminating responses from defendant, the objective of *Miranda* is to protect against coerced confessions, not to suppress voluntary confessions, which "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426, 89 L. Ed. 2d 410, 424 (1986). "Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' " *Colorado v. Connelly*, 479 U.S. 157, 170, 93 L. Ed. 2d 473, 486 (1986) (quoting *Elstad*, 470 U.S. at 305, 84 L. Ed. 2d at 229). Therefore, in the instant case, the fact that Sergeant Myers intended to elicit incriminating responses from defendant through means other than coercion is irrelevant to the determination of whether defendant was "in custody."

On remand, the trial court should consider Sergeant Myers' intention not to allow defendant to leave the station and his attempts to elicit incriminating responses as relevant only to the extent that those intentions were manifested to defendant in some way that would contribute to an objective determination that defendant's freedom of movement was restrained to the degree associated with a formal arrest. In reaching its determination, the trial court may, but is not required to, take additional evidence. We express no view on the ultimate disposition of defendant's motion to suppress because this necessarily involves fact-specific assessments and inquiries which the trial court is in the best position to make.

REMANDED.

Justices EDMUNDS and BUTTERFIELD did not participate in the consideration or decision of this case.

PIEDMONT TRIAD REGIONAL WATER AUTHORITY v. SUMNER HILLS INCORPORATED, AND DENMARK GOLF SERVICES, INC.

No. 86PA00

(Filed 6 April 2001)

Eminent Domain— size of taking—de novo review—condemnor shows property "of little value"—condemning authority shows proposed condemnation authorized

The Court of Appeals erred by concluding that plaintiff may condemn defendants' entire tract of property including the 97 unneeded acres because a de novo review applies to cases brought under N.C.G.S. § 40A-7 for: (1) the threshold inquiry under N.C.G.S. § 40A-7(a) that the comdemnor has the burden to show the unneeded remainder of property is "of little value;" and (2) thereafter the condemning authority must affirmatively demonstrate the proposed condemnation is authorized by N.C.G.S. § 40A-7(a)(1), (2), or (3).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 136 N.C. App. 425, 524 S.E.2d 375 (2000), reversing and remanding an order entered by Cornelius, J., on 26 October 1998 in Superior Court, Guilford County. On 15 June 2000 the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 16 October 2000.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by M. Jay DeVaney and Erin L. Roberts, for plaintiff-appellee.

Hill, Evans, Duncan, Jordan & Davis, P.L.L.C., by R. Thompson Wright, for defendant-appellant Sumner Hills Incorporated.

MARTIN, Justice.

Piedmont Triad Regional Water Authority (the Water Authority) is a public authority organized pursuant to Article 1 of Chapter 162A

of the General Statutes. *See* N.C.G.S. §§ 162A-1 to -19 (1999). The Water Authority is vested with the power of eminent domain under N.C.G.S. § 162A-6.

On 24 February 1998 the Water Authority filed a complaint, declaration of taking and notice of deposit (the complaint) to condemn property for the Randleman Dam and Lake water supply project (the Project) in Guilford and Randolph Counties. The property at issue, an approximately 145-acre tract owned by Sumner Hills Incorporated (Sumner Hills), is located in Sumner Township, Guilford County, North Carolina. A substantial portion of the Property is bounded by Reddick Creek. Sumner Hills and its lessees have used the property as an eighteen hole golf course for over twenty years. The Project requires approximately 48 acres along Reddick Creek, leaving a remainder of approximately 97 acres not necessary for the public purpose specified in the complaint.

The question raised by the instant appeal is whether the Water Authority may condemn the entire tract of property, including the 97 unneeded acres, under North Carolina law.

Section 40A-7(a) of our General Statutes provides:

> (a) *When the proposed project requires condemnation of only a portion of a parcel of land leaving a remainder of such shape, size or condition that it is of little value*, a condemnor may acquire the entire parcel by purchase or condemnation. If the remainder is to be condemned the petition filed under the provisions of G.S. 40A-20 or the complaint filed under the provisions of G.S. 40A-41 shall include:
>
> (1) A determination by the condemnor that a partial taking of the land would substantially destroy the economic value or utility of the remainder; or
>
> (2) A determination by the condemnor that an economy in the expenditure of public funds will be promoted by taking the entire parcel; or
>
> (3) A determination by the condemnor that the interest of the public will be best served by acquiring the entire parcel.

N.C.G.S. § 40A-7(a) (1999) (emphasis added).

The Water Authority alleged and declared in the complaint that Sumner Hills' entire tract should be condemned because the requirements of subsection 40A-7(a)(1), (2), or (3) had been met. In its answer, Sumner Hills asserted that the Water Authority had "improperly determined that the entire tract should be condemned, rather than the portion thereof actually required for the public purpose."

After a hearing, the trial court determined "[t]he Project require[d] the taking of approximately 48 acres along Reddick Creek, leaving approximately 97 acres of the original Property." Moreover, it found the 97-acre portion will "retain substantial value" and "will not be in a shape, size and condition so as to have little value, even though the value of this remaining parcel will be adversely affected by the taking." Based on its findings of fact, the trial court concluded the Water Authority was not authorized under N.C.G.S. § 40A-7 to condemn the entire 145-acre tract and that the condemnor may take only that portion of the property necessary for the Project. Accordingly, the trial court ordered plaintiff to file an amended map showing the portion of the property actually required for the Project.

The Court of Appeals reversed the trial court. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 136 N.C. App. 425, 430, 524 S.E.2d 375, 378 (2000). According to the Court of Appeals, because "the purpose of section 40A-7 [was] to set forth the allegations necessary for the [Water] Authority's complaint, it would be illogical to require a threshold determination that the remainder [was] 'of little value' in order to condemn the property." *Id.* at 429, 524 S.E.2d at 377. The Court of Appeals felt "that the phrase 'of little value' [was] so subjective that our legislature could not have possibly intended it to be a threshold determination." *Id.* The Court of Appeals therefore concluded that the "of little value" provision in the statute served only as "a mere introduction to the more specific determinations in subsections (1), (2) and (3)." *Id.* We disagree.

We have not previously addressed whether a condemnor may take property in excess of that required for an otherwise valid public purpose as envisioned under section 40A-7. Because the legislature stated no specific intent in enacting section 40A-7(a), "this Court must determine the intent of that body." *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 133 N.C. App. 587, 591, 515 S.E.2d 743, 746, *disc. rev. denied and cert. denied*, 351 N.C. 102, 540 S.E.2d 358 (1999); *see also State v. Bell*, 184 N.C. 701, 705, 115 S.E. 190, 192 (1922).

At the outset we note that eminent domain is permissible in North Carolina, as in other American jurisdictions, only for a valid public purpose. *See, e.g., City of Charlotte v. Heath*, 226 N.C. 750, 754, 40 S.E.2d 600, 603-04 (1946); *City of Monroe v. W.F. Harris Dev., L.L.C.*, 131 N.C. App. 22, 26, 505 S.E.2d 160, 163, *disc. rev. denied*, 349 N.C. 528, 526 S.E.2d 173 (1998); 1 Julius L. Sackman, *Nichols on Eminent Domain* § 1.11 (rev. 3d ed. 2000); 2 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 19-1(a), at 918 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed. 1999) [hereinafter *Webster's*]. When a proposed project requires only part of a parcel of land, section 40A-7(a) permits condemnation of the entire tract if the unnecessary remainder of land is "of such shape, size or condition that it is of little value." At a minimum, however, the condemnor must identify the land it is condemning for the proposed project and the land it is condemning in excess of the public purpose. The statute thus prevents the condemnor from taking the entire tract of land by simply alleging or declaring that the property is needed for a public purpose *without* defining that segment of the land actually necessary for the proposed project.

By giving effect to the "of little value" provision, we effectuate the legislative intent to prohibit the condemnation of land in excess of an otherwise valid public purpose absent a showing by the condemnor that the remainder is "of little value" to the landowner. Section 40A-7(a), as applied in this fashion, is consistent with the constitutional limitations on eminent domain. *See State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998) ("Where one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question.").

If the threshold inquiry were read as mere introductory language, the condemnor could take any remainder it desired by simply showing the excess condemnation would promote an "economy in the expenditure of public funds." N.C.G.S. § 40A-7(a)(2). For example, in the present case, the Water Authority could simply sell the remaining 97 acres for a profit after it completed the Project and thus recover some of its costs. This method of condemning and reselling land, known as "recoupment," is generally disfavored in American courts because it denies due process to landowners. *See, e.g., City of Cincinnati v. Vester*, 33 F.2d 242, 244-45 (1929), *aff'd*, 281 U.S. 439, 74 L. Ed. 950 (1930); *State ex rel. State Highway Dep't v. 9.88 Acres of Land*, 253 A.2d 509, 510-11 (Del. 1969). Similarly, this Court has dis-

approved of excess condemnations for the purpose of general financial gain. *See, e.g., N.C. State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 473, 189 S.E.2d 272, 280 (1972).

Accordingly, we hold, as a threshold inquiry under section 40A-7(a), that the condemnor has the burden to show the unneeded remainder of property is "of little value." In making the determination of the value of any such remainder, the trial court should consider its highest and best use. As stated by an eminent treatise on North Carolina property law:

> [The condemnee] is entitled to have considered all the capabilities of the property and all the uses to which it *may* be applied, or for which it is adapted, which affects its value in the market. He is not limited merely to compensation for the value of his property in its present application. . . . The owner is entitled to compensation for the highest and most profitable use for which the property is adaptable in the reasonably near future . . . .

See Webster's § 19-9, at 945-946 (emphasis in original). Once the trial court conducts this threshold inquiry and determines the condemnor has carried its burden of proof, the condemning authority must then affirmatively demonstrate the proposed condemnation is authorized by subsection 40A-7(a)(1), (2), or (3).

We now consider the appropriate standard of review applicable to actions arising under section 40A-7. The Water Authority argues that the manner and extent of its condemnation may not be disturbed by a court of law absent proof its action is arbitrary, capricious, or an abuse of discretion. Indeed, we have held, as a general proposition applicable to eminent domain cases, that "[t]he Legislative Branch decides the political question of the extent of the taking, and the courts cannot disturb such a decision unless the condemnee proves the action is arbitrary, capricious, or an abuse of discretion." *City of Charlotte v. Cook*, 348 N.C. 222, 225, 498 S.E.2d 605, 608 (1998).

City of Charlotte v. Cook did not deal with the question we now confront under section 40A-7(a). In *City of Charlotte v. Cook* two tracts of land were condemned for a water pipeline. *Id.* at 223, 498 S.E.2d at 606. The city sought a fee simple interest in the two tracts while the landowner argued only an easement was necessary to fulfill the public purpose. *Id.* at 225-26, 498 S.E.2d at 608. In holding the city could condemn a fee simple interest, we stated it was our duty to decide "whether a taking is for a public purpose," whereas the legis-

lature decides "the extent of the taking." *Id.* at 225, 498 S.E.2d at 607-08. As a result, the legislative decision on the extent of the taking in that case could be overturned only upon a showing the decision was "arbitrary, capricious, or an abuse of discretion." *Id.* at 225, 498 S.E.2d at 608.

In *City of Charlotte v. Cook* it was undisputed the entire parcel of land was needed for a public purpose. The sole issue was what interest, fee simple or easement, the condemnor could take in the property. In contrast, in the present case, only a portion of the tract at issue is necessary for the Project. Therefore, *City of Charlotte v. Cook* and similar cases do not govern actions arising under section 40A-7.

In determining the appropriate standard of review for condemnation proceedings under section 40A-7(a), we are mindful of our duty to construe the statute, if possible, in a constitutional fashion. *See T.D.R.*, 347 N.C. at 498, 495 S.E.2d at 705. As already stated, when the proposed condemnation seeks to encompass property in excess of an otherwise valid public purpose pursuant to section 40A-7(a), constitutional limitations on the exercise of the power of eminent domain are necessarily implicated.

It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated. *See, e.g., State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000) (whether to grant a motion to continue is in the trial court's discretion; however, when a constitutional question is implicated, de novo review is appropriate); *see also Ornelas v. United States*, 517 U.S. 690, 696-97, 134 L. Ed. 2d 911, 918-19 (1996) (in reviewing constitutional standards that are not "finely-tuned," de novo review is necessary for appellate courts to maintain control of and clarify the legal principles, to "unify precedent," and to provide a defined set of rules).

We observe that decisions arising from other jurisdictions indicate that de novo review is appropriate to protect the due process rights of landowners. *See, e.g., Hensler v. City of Glendale*, 8 Cal.4th 1, 16, 876 P.2d 1043, 1052-53, 32 Cal. Rptr. 244, 253-54 (1994) (application of de novo review was appropriate because prior proceeding was inadequate), *cert. denied*, 513 U.S. 1184, 130 L. Ed. 2d 1129 (1995); *Engelhaupt v. Village of Butte*, 248 Neb. 827, 829, 539 N.W.2d 430, 432 (1995) (application of de novo review by appellate court is proper in condemnation action); *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 711 (R.I. 2000) (application of de novo review was

proper in condemnation case implicating constitutional concerns); *T.E. Wannamaker, Inc. v. City of Orangeburg*, 278 S.C. 637, 639, 300 S.E.2d 729, 730 (1983) (per curiam) (application of de novo review in condemnation cases ensures the landowner's due process rights are protected). De novo review of whether the condemnor has satisfied the "of little value" requirement, as well as the condemnor's burden of proof under subsection 40A-7(a)(1), (2), or (3), best ensures uniform and constitutional application of section 40A-7.[1] Accordingly, we hold that de novo review applies to cases brought under section 40A-7.

During the hearing conducted in this matter, the trial court considered two maps of Sumner Hills' property. This Court amended the record on appeal to include both maps pursuant to N.C. R. App. P. 9(b)(5). The maps reveal that the 97-acre remainder tract appears to be comprised of sufficient space and character for Sumner Hills to make valuable use of the remaining land.

The trial court found the 97-acre remainder "would retain substantial value." No transcript of the hearing conducted in the trial court appears in the record on appeal. Moreover, our review of the record reveals the Water Authority has not otherwise included any evidence contradicting this finding. *See Mooneyham v. Mooneyham*, 249 N.C. 641, 643, 107 S.E.2d 66, 67 (1959) ("The responsibility for sending the necessary parts of the record proper is upon the appellant."); *Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 375, 481 S.E.2d 326, 328 (1997) ("it is the responsibility of each party to ensure the record on appeal clearly sets forth evidence favorable to that party's position"). In the absence of evidence to the contrary, we are unwilling to disturb the trial court's finding. This finding in turn supports the trial court's conclusion of law that the 97-acre remainder is "not of such shape, size or condition as to render it of little value."

Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

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1. We recognize that, absent allegations of bad faith, malice, wantonness, or abuse of discretion on behalf of the condemnor, the propriety of a taking is not generally reviewable. See 2 Webster's § 19-1(a), at 918. Because section 40A-7 necessarily envisions a taking in excess of a public purpose, however, we place the burden upon the condemnor to establish the propriety of the taking under subsection 40A-7(a)(1), (2), or (3) after the condemnor has established the nominal value of the remainder under the "of little value" provision.

BARBARA D. MEADOWS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 516A00

(Filed 6 April 2001)

Workers' Compensation— aggravation of preexisting foot condition—issued shoes—not condition of employment—not occupational disease

The evidence supported findings by the Industrial Commission that, although shoes issued to plaintiff driver's license examiner as part of her uniform aggravated plaintiff's preexisting foot condition, the shoes were not required as a condition of employment because plaintiff could have requested permission to wear other shoes, and the findings supported the Commission's conclusion that the aggravation of plaintiff's preexisting foot condition did not constitute an occupational disease arising out of and in the course of her employment.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 140 N.C. App. 183, 535 S.E.2d 895 (2000), reversing an opinion and award entered 4 March 1999 by the North Carolina Industrial Commission and remanding for further proceedings. Heard in the Supreme Court 15 March 2001.

Kellum Law Firm, by J. Kevin Jones, for plaintiff-appellee.

Roy A. Cooper, Attorney General, by Sharon Patrick-Wilson and William H. Borden, Assistant Attorneys General, for defendant-appellant.

PER CURIAM.

Plaintiff in this action sought workers' compensation benefits claiming multiple foot problems as an occupational disease. A deputy commissioner for the Industrial Commission concluded that plaintiff's disease was nonoccupational and, therefore, denied her workers' compensation claim. On appeal, the full Commission affirmed the opinion and award of the deputy commissioner with minor modifications. The Commission found that the shoes issued as part of plaintiff's uniform aggravated plaintiff's preexisting non-work-related foot condition and that the shoes were not required as a condition of employment, as plaintiff could have requested permission to wear

other shoes. The Commission then concluded that, as the shoes were not a requirement for employment, the aggravation of plaintiff's pre-existing foot condition was not due to causes and conditions that are characteristic of and peculiar to the employment and that plaintiff has therefore not suffered an occupational disease arising out of and in the course of the employment.

Our review of the record discloses competent evidence in the record supporting the Industrial Commission's findings of fact. Those findings of fact, in turn, support the Industrial Commission's conclusions of law. Accordingly, we reverse the opinion of the Court of Appeals. *See Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998).

REVERSED.

DAVID ARROWOOD, PETITIONER v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. 489A00

(Filed 6 April 2001)

Public Assistance— welfare benefits—limitation—APA rule not required

The decision of the Court of Appeals is reversed for the reason stated in the dissenting opinion in the Court of Appeals that the N.C. Department of Health and Human Services properly implemented a twenty-four month limitation of Work First benefits pursuant to a waiver by the U.S. Department of Health and Human Services without the promulgation of a rule under the Administrative Procedure Act.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 140 N.C. App. 31, 535 S.E.2d 585 (2000), reversing an order signed 27 May 1999 by Hyatt, J., in Superior Court, Rutherford County. Heard in the Supreme Court 15 March 2001.

Pisgah Legal Services, by Curtis B. Venable, for petitioner-appellee.

Roy A. Cooper, Attorney General, by Belinda A. Smith, Assistant Attorney General, for respondent-appellant.

North Carolina Justice and Community Development Center, by William D. Rowe; and Hunton & Williams, by Charles D. Case and Julie Beddingfield, on behalf of North Carolina Justice and Community Development Center, North Carolina Chapter of the National Organization for Women, North Carolina Hunger Network, Southerners for Economic Justice, and North Carolina Fair Share, amici curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Walker, we reverse the decision of the Court of Appeals.

REVERSED.

MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA v. GARY EUGENE MAULDIN, M.D., AND SYLVA ANESTHESIOLOGY, P.A.

No. 222PA00

(Filed 6 April 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 137 N.C. App. 690, 529 S.E.2d 697 (2000), reversing an order for summary judgment entered 30 September 1998 by Downs, J., in Superior Court, Macon County, and remanding for further proceedings. Heard in the Supreme Court 12 February 2001.

Roberts & Stevens, P.A., by James W. Williams and Gary T. Bruce, for plaintiff-appellee.

Wade E. Byrd; and Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Steven B. Williamson, for defendant-appellants.

Clifford Britt, of counsel, North Carolina Academy of Trial Lawyers, amicus curiae.

Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney III, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

Justice MARTIN did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

AFFIRMED.

DAVID C. VAN EVERY v. CHERYL R. REID (FORMERLY CHERYL R. VAN EVERY)

No. 224PA00

(Filed 6 April 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished, unanimous decision of the Court of Appeals, 137 N.C. App. 589, 533 S.E.2d 570 (2000), affirming a judgment and order entered 12 October 1998 by Cayer, J., in District Court, Mecklenburg County. Heard in the Supreme Court 15 February 2001.

The Tryon Legal Group, by Jerry Alan Reese, for plaintiff-appellant.

Joseph L. Ledford for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CHRISTENBURY SURGERY CENTER, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, RESPONDENT

No. 305PA00

(Filed 6 April 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 138 N.C. App. 309, 531 S.E.2d 219 (2000), affirming a decision entered by Bullock, J., on 16 April 1999 in Superior Court, Wake County. Heard in the Supreme Court 15 March 2001.

Parker, Poe, Adams & Bernstein, L.L.P., by Renee J. Montgomery and Amy Flanary-Smith, for petitioner-appellee.

Roy A. Cooper, Attorney General, by James A. Wellons, Special Deputy Attorney General, for respondent-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., and Forrest W. Campbell, Jr.; and Maupin, Taylor & Ellis, P.A., by Charles B. Neely, Jr., on behalf of the North Carolina Hospital Association, the North Carolina Association of County Commissioners, and Mission-St. Joseph's Health System, Inc., amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. MELVIN KEITH SMITH

No. 321PA00

(Filed 6 April 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 138 N.C. App. 605, 532 S.E.2d 235 (2000), reversing orders denying defendant's motions for mistrial and subsequent judgment, entered by Guice, J., on 5 December 1997 and 12 February 1998, respectively, in Superior Court, Rutherford County, and remanding for a new trial. Heard in the Supreme Court 12 March 2001.

Roy A. Cooper, Attorney General, by Jane Ammons Gilchrist, Assistant Attorney General, for the State-appellant.

Teddy & Meekins, P.L.L.C., by David R. Teddy, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MILLS v. THOMAS

[353 N.C. 356 (2001)]

JERRY MILLS, JR., AND WIFE, TERRIE SUTHERLAND MILLS v. JOSEPH WAYNE THOMAS AND ANDREA WEST THOMAS

No. 345PA00

(Filed 6 April 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished, unanimous decision of the Court of Appeals, 138 N.C. App. 553, 536 S.E.2d 366 (2000), reversing and remanding an order for summary judgment entered 16 October 1998, *nunc pro tunc* 16 September 1998, by Morgan (Melzer A., Jr.), in Superior Court, Randolph County, and a judgment entered 6 January 1999 by Balog, J., in Superior Court, Randolph County. Heard in the Supreme Court 13 February 2001.

Dees, Giles, Tedder, Tate & Gaylord, L.L.P., by T.M. Gaylord, Jr., and Jeffrey T. Workman, for plaintiff-appellants.

Stephen E. Lawing for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STEG v. STEG

[353 N.C. 357 (2001)]

LYNNE HERBIG STEG v. BRIAN DAVID STEG

No. 354PA00

(Filed 6 April 2001)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of orders entered by the Court of Appeals on 8 August 2000, denying defendant's petition for writ of supersedeas and defendant's petition for writ of certiorari to review an order for contempt entered by Abernethy, J., on 26 July 2000 in District Court, Catawba County. Heard in the Supreme Court 13 March 2001.

Morrow Alexander Tash Kurtz & Porter, by John F. Morrow; and W. Wallace Respess, Jr., for plaintiff-appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

NORMAN J. LEVASSEUR v. BILLY JOE LOWERY

No. 370A00

(Filed 6 April 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 235, 533 S.E.2d 511 (2000), affirming in part and reversing and remanding in part an order entered 15 January 1999 by Caldwell, J., in Superior Court, Gaston County. Heard in the Supreme Court 14 March 2001.

Arthurs & Foltz, by Nancy E. Foltz and Douglas P. Arthurs, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Laura M. Wolfe, for unnamed defendant-appellees Beam Electric Co., Inc., and Key Risk Management Services, Inc.

PER CURIAM.

AFFIRMED.

MICHELLE PARLET ALLSUP v. McVILLE, INC.

No. 371A00

(Filed 6 April 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 415, 533 S.E.2d 823 (2000), affirming a judgment entered 6 May 1999 by Hooks, J., in Superior Court, Chatham County. Heard in the Supreme Court 14 February 2001.

Moody, Williams & Roper, by C. Todd Roper, for plaintiff-appellant.

Tuggle, Duggins & Meschan, P.A., by Leonard A. Colonna, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

PHILLIP WHITMAN AND WIFE, EVA WHITMAN v. WILLIAM "SONNY" KIGER AND WIFE, BEVERLY KIGER

No. 375A00

(Filed 6 April 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 44, 533 S.E.2d 807 (2000), reversing summary judgment for defendants, entered 12 July 1999 by Graham, J., in District Court, Forsyth County, and remanding for further proceedings. Heard in the Supreme Court 13 February 2001.

Larry L. Eubanks for plaintiff-appellees.

Morrow Alexander Tash Kurtz & Porter, by John F. Morrow, for defendant-appellants.

PER CURIAM.

AFFIRMED.

KEITH PAGE v. GRADY BOYLES

No. 419A00

(Filed 6 April 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 809, 535 S.E.2d 561 (2000), reversing an order awarding a new trial, entered 20 January 1999 by Butterfield, J., in Superior Court, Wilson County, and remanding for entry of judgment based on the jury's verdict. Heard in the Supreme Court 15 February 2001.

Anderson Law Firm, by Michael J. Anderson, for plaintiff-appellant.

Baker, Jenkins & Jones, P.A., by Roger A. Askew and Kevin N. Lewis, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

RPR & ASSOCIATES, INC., A SOUTH CAROLINA CORPORATION v. THE STATE OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA-CHAPEL HILL AND THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION

No. 435A00

(Filed 6 April 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 525, 534 S.E.2d 247 (2000), affirming an order entered 16 July 1998 by Barnette, J., in Superior Court, Wake County. Heard in the Supreme Court 15 February 2000.

Wilson & Waller, P.A., by Brian E. Upchurch, for plaintiff-appellee.

Roy A. Cooper, Attorney General, by D. David Steinbock, Assistant Attorney General, for defendant-appellant the North Carolina Department of Administration; and Thomas J. Ziko, Special Deputy Attorney General, and Thomas J. Pitman and Donald R. Esposito, Jr., Assistant Attorneys General, for defendant-appellant the University of North Carolina at Chapel Hill.

PER CURIAM.

AFFIRMED.

WILLIAMSON v. BULLINGTON

[353 N.C. 363 (2001)]

LADANE WILLIAMSON v. LAURA M. BULLINGTON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WILLIAM T. BULLINGTON, JR., DECEASED

No. 432A00

(Filed 6 April 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 571, 534 S.E.2d 254 (2000), vacating summary judgment entered 4 March 1999 by Gore, J., in Superior Court, Brunswick County, and remanding with instructions to the trial court to allow plaintiff the opportunity to amend her pleadings. Heard in the Supreme Court 14 February 2001.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William P.H. Cary and Jessica M. Marlies, for plaintiff-appellant.

Rountree & Seagle, L.L.P., by George Rountree, III, and Charles S. Baldwin, IV; and Frink, Foy & Yount, P.A., by Henry G. Foy, for defendant-appellee.

PER CURIAM.

Justice EDMUNDS did not participate in the consideration or decision of this case. The remaining members of this Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999); *Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

STATE OF NORTH CAROLINA v. KENNETH RAY BLUE

No. 292PA00

(Filed 6 April 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 138 N.C. App. 404, 531 S.E.2d 267 (2000), finding error in the trial and subsequent judgment of second-degree murder entered 16 December 1998 by Johnston, J., in Superior Court, Gaston County, and ordering a new trial. Heard in the Supreme Court 13 February 2001.

Roy A. Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Beth S. Posner and Daniel R. Pollitt, Assistant Appellate Defenders, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is affirmed except that portion awarding a new trial, and the case is remanded to that court for further remand to the Superior Court, Gaston County, for entry of judgment for involuntary manslaughter.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

STATE v. KEEL

[353 N.C. 365 (2001)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JOSEPH TIMOTHY KEEL	)	

No. 134A93-8

(Filed 1 March 2001)

Upon consideration of the state's Motion to Lift Stay of Execution filed in this Court on 12 January 2001, the following order is entered:

It appears to the Court that (i) on 7 April 2000 this Court issued a decision in *State v. Williams*, 351 N.C. 465 (2000), and established the rule of law with respect to waiver of post-conviction discovery rights under G.S. § 15A-1415(f); (ii) on the same day this Court remanded this case "to the Superior Court for reconsideration in light . . . State v. Marvin Earl Williams, Jr. . . .;" (iii) on remand to Edgecombe County Superior Court, the state conceded that defendant would be entitled to post-conviction discovery under the *Williams* decision; and (iv) on 5 January 2001 the trial court entered an order which denied post-conviction discovery to defendant under G.S. § 15A-1415(f).

Based on the foregoing and applicable law, the Court concludes that defendant is entitled to post-conviction discovery pursuant to G.S. § 15A-1415(f) and, therefore, the trial court's order dated 5 January 2001 denying same must be reversed.

NOW, THEREFORE, IT IS ORDERED that the Motion to Lift Stay of Execution filed by the State of North Carolina on 12 January 2001 is hereby denied.

IT IS FURTHER ORDERED that the trial court's order dated 5 January 2001 is hereby reversed and this matter is remanded *ex mero motu* to Edgecombe County Superior Court for entry of an order granting defendant post-conviction discovery pursuant to G.S. § 15A-1415(f).

By order of this Court in Conference, this the 1st day of March, 2001.

Butterfield, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ERNEST PAUL McCARVER	)	

No. 384A92

(Filed 27 February 2001)

Upon consideration of the Emergency Petition for Writs of Prohibition and Certiorari filed by the State of North Carolina and the Cross-Petition for Writ of Certiorari filed by Petitioner, Ernest Paul McCarver, the following order is entered:

It appears to the Court, based upon the Petitions filed by the State and Petitioner, that the stay of execution entered by the trial court in this matter on 27 February 2001 is inconsistent with North Carolina law.

NOW, THEREFORE, IT IS ORDERED (i) that the Emergency Petition for Writs of Prohibition and Certiorari filed by the State of North Carolina on 27 February 2001 are hereby allowed and the Cross-Petition for Writ of Certiorari filed by Petitioner on 27 February 2001 is hereby denied; and (ii) that the stay of execution entered by the trial court on 27 February 2001 is hereby dissolved.

By order of this Court in Conference, this the 27th day of February, 2001.

Edmunds, J.
For the Court

STATE v. WILSON

[353 N.C. 367 (2001)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHRISTOPHER LAMAR WILSON	)	

No. 106PA98

(Filed 13 March 2001)

Upon consideration of the inordinate delay in perfecting defendant's appeal and the brief and record submitted by R.L. Gilbert, III on behalf of defendant, the Court *ex mero motu* removes Mr. Gilbert as counsel for defendant, and orders that Mr. Gilbert receive no payment for any services provided on behalf of defendant. The Court appoints the Appellate Defender to represent the defendant. The Appellate Defender shall have 60 days to submit a new proposed record, and 60 days thereafter to prepare defendant's brief. The State shall have 60 days from the date the defendant's brief is filed to submit its brief. By order of the Court in Conference, this the 13th day of March, 2001.

Butterfield, J.
For the Court

ADAMS v. TESSENER

No. 3PA01

Case below: 141 N.C. App. 64

Motion by plaintiffs for temporary stay allowed 18 January 2001. Petition by plaintiffs for writ of supersedeas allowed 1 February 2001. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 1 February 2001.

ALVARNAS v. ENTWISTLE

No. 507P00

Case below: 140 N.C. App. 385

Petition by defendants (Cabarrus Memorial Hospital, Cabarrus Memorial Hospital, d/b/a/ Kannapolis Internal Medicine and Kannapolis Internal Medicine) for discretionary review pursuant to G.S. 7A-31 denied 17 January 2001. Motion by defendants (Cabarrus Memorial Hospital, Cabarrus Memorial Hospital d/b/a Kannapolis Internal Medicine and Kannapolis Internal Medicine) to withdraw petition for discretionary review dismissed as moot 29 January 2001.

AUSTIN v. CONTINENTAL GEN. TIRE

No. 73A01

Case below: 141 N.C. App. 397

Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 April 2001.

BEN JOHNSON HOMES, INC. v. BERRYHILL

No. 147P01

Case below: 142 N.C. App. 212

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

BEN JOHNSON HOMES, INC. v. PLAUCHE

No. 149P01

Case below: 142 N.C. App. 212

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001. Justice Martin recused.

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

No. 85P01

Case below: 141 N.C. App. 655

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

BLUE SKY ASSOCS. v. BANK OF ESSEX

No. 20P01

Case below: 140 N.C. App. 787

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

BRATTON v. OLIVER

No. 35P01

Case below: 141 N.C. App. 121

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001. Justice Edmunds recused.

BRIDGES v. BRIDGES

No. 54P01

Case below: 141 N.C. App. 149

Petition by defendant (Bruce Bridges) for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001. Justice Edmunds recused.

BROOKS v. WAL-MART STORES, INC.

No. 473P00

Case below: 139 N.C. App. 637

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 1 February 2001. Justice Edmunds recused.

CABE v. WORLEY

No. 512P00

Case below: 140 N.C. App. 250

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

CITY OF HILLSBOROUGH v. HUGHES

No. 25P01

Case below: 140 N.C. App. 714

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

COCA-COLA BOTTLING CO. CONSOL. v.
DURHAM COCA-COLA BOTTLING CO.

No. 78P01

Case below: 141 N.C. App. 569

Petition by plaintiffs/defendants (Coca-Cola Bottling Co. Consolidated and Reidsville Transaction Corporation, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 2 March 2001.

DANCY v. ABBOTT LABS.

No. 436A00

Case below: 139 N.C. App. 553

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 1 February 2001. Justice Edmunds recused.

DISCIPLINARY HEARING COMM'N OF THE
N.C. STATE BAR v. FRAZIER

No. 72PA01

Case below: 354 N.C. 555
141 N.C. App. 514

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 March 2001. Justice Edmunds recused.

DKH CORP. v. RANKIN-PATTERSON OIL CO.

No. 151P01

Case below: 142 N.C. App. 212

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2001. Justice Edmunds recused.

ERIE INS. EXCH. v. BLEDSOE

No. 88P01

Case below: 141 N.C. App. 331

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 March 2001.

EVANS v. UNITED SERVS. AUTO. ASS'N

No. 157P01

Case below: 142 N.C. App. 18

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 5 April 2001.

GAUNT v. PITTAWAY

No. 472P00-2

Case below: 139 N.C. App. 778

Petition by plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) for writ of certiorari to review the decisions of the North Carolina Court of Appeals denied 5 April 2001. Motion by plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) under Rule 2 denied 5 April 2001.

GLENN-ROBINSON v. ACKER

No. 16P01

Case below: 140 N.C. App. 606

Motion by the plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant (Acker) for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

GOODWIN v. SCHNEIDER NAT'L, INC.

No. 181P99

Case below: 132 N.C. App. 585

Third motion by plaintiffs to reconsider denial of petition for discretionary review dismissed 1 February 2001.

GROVES v. TRAVELERS INS. CO.

No. 468A00

Case below: 139 N.C. App. 795

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 1 February 2001. Motion by defendant to dismiss petition for discretionary review dismissed as moot 1 February 2001. Justice Edmunds recused.

HANSEN v. CRYSTAL FORD-MERCURY, INC.

No. 403P00

Case below: 138 N.C. App. 369

Joint motion by plaintiff and defendants for reconsideration of petition for discretionary review denied 1 February 2001.

HENSLEY v. CALAWAY

No. 565P00

Case below: 130 N.C. App. 449

Petition by plaintiff pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001.

HILL v. HILL

No. 385P00

Case below: 139 N.C. App. 206

Motion by plaintiff pro se for temporary delay denied 3 January 2001. Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 3 January 2001. Petition by plaintiff pro se for writ of certiorari denied 3 January 2001. Justice Martin recused.

HYLTON v. KOONTZ

No. 296P00

Case below: 138 N.C. App. 511

353 N.C. 264

Petition by defendants (Schkolne, M.D. and Piedmont Anesthesia and Pain Consultants) to rehear order denying petition for discretionary review pursuant to Rule 31 dismissed 1 February 2001.

HYLTON v. KOONTZ

No. 296P00-2

Case below: 138 N.C. App. 629

Petition by defendant (Medical Park Hospital, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 2 January 2001.

IN RE APPEAL OF GEN. ELEC. CO.

No. 155P01

Case below: 142 N.C. App. 212

Petition by petitioner (General Electric Company) for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

IN RE BROWN

No. 121P01

Case below: 141 N.C. App. 349

Petition by Guardian Ad Litem for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001.

IN RE GOYENS

No. 26P01

Case below: 140 N.C. App. 787

Petition by respondent pro se for writ of certiorari denied 1 March 2001.

IN RE HUFF

No. 532P00

Case below: 140 N.C. App. 288

Notice of appeal by respondent (James J. Huff) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 1 February 2001. Petition by respondent (James J. Huff) for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Notice of appeal by respondent (Tampatha C. Huff) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 1 February 2001. Petition by respondent (Tampatha C. Huff) for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

IN RE THOMPSON

No. 511P00

Case below: 140 N.C. App. 386

Petition by respondent (Gregory Thompson) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001.

IN RE WILL OF SECHREST

No. 560P00

Case below: 140 N.C. App. 464

Petition by caveators (Thomas D. Wilson, Kristen Wilson Jones, Heather Wilson, Ashely Wilson and Kevin A. Sechrest) for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

INTERIOR DISTRIBS., INC. v. AUTRY

No. 559P00

Case below: 140 N.C. App. 541

Petition by defendants (Sigma Construction Company, Inc., David A. Martin and The American Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

ISASI v. F.D.Y., INC.

No. 55P01

Case below: 141 N.C. App. 149

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001. Justice Edmunds recused.

JACKSON v. MARSHALL

No. 553P00

Case below: 140 N.C. App. 504

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

JAMES v. COMMUNICATION SERVS., INC.

No. 70P01

Case below: 141 N.C. App. 349

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

JAMES v. WAL-MART STORES, INC.

No. 112A01

Case below: 142 N.C. App. 721

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 April 2001. Justice Edmunds recused.

JORDAN v. N.C. DEP'T OF TRANSP.

No. 18P01

Case below: 140 N.C. App. 771

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001. Justice Edmunds recused.

KEECH v. HENDRICKS

No. 82P01

Case below: 141 N.C. App. 649

Joint motion by defendant and plaintiff to withdraw petitions for discretionary review allowed 21 March 2001.

KELLEY v. CITY OF DURHAM

No. 89P01

Case below: 141 N.C. App. 350

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

KEMP v. KEMP

No. 262P00

Case below: 138 N.C. App. 167

352 N.C. 674

Petition by plaintiff to rehear pursuant to Rule 31 denied 1 February 2001. The Court ex mero motu vacates its order entered 5 October 2000 denying plaintiff's peitition for writ of certiorari

and allows plaintiff's petition for writ of certiorari for the purpose of reversing the order entered 16 May 2000 by the N.C. Court of Appeals denying plaintiff's petition for writ of certiorari and remanding the case to the Court of Appeals for determination on the merits.

LEXINGTON INS. CO. v. JOHN DOE 1

No. 66P01

Case below: 141 N.C. App. 350

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

LITTLE v. STOGNER

No. 571P00

Case below: 140 N.C. App. 380

Petition by defendant (Jack Douglas Stogner individually, and Jack Douglas Stogner, as Administrator of the Estate of Peggy W. Stogner) for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

MEDLIN v. FYCO, INC.

No. 443P00

Case below: 139 N.C. App. 534

Petition by defendant (Fyco, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

MELTON v. STAMM

No. 297P00

Case below: 138 N.C. App. 314

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

MURPHY v. COASTAL PHYSICIAN GRP., INC.

No. 410A00

Case below: 139 N.C. App. 290

Joint motion by defendant and plaintiff to withdraw appeal allowed 5 April 2001.

NORMAN v. NASH JOHNSON & SONS' FARMS, INC.

No. 555A00

Case below: 140 N.C. App. 390

Petition by defendant (Johnson Investment Partnership) 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 1 February 2001. Petition by defendants (Nash Johnson & Sons' Farms, Inc., House of Raeford Farms, Inc., House of Raeford Farms of Michigan, Inc., E. Marvin Johnson, Robert Cowan Johnson, Mary Anna Johnson Carr Peak, Dennis N. Beasley and Diane Carol Johnson) 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 1 February 2001.

NORRIS v. DREXEL HERITAGE FURNISHINGS, INC.

No. 484P00

Case below: 139 N.C. App. 620

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001.

PARRISH v. HAYWORTH

No. 355P00

Case below: 138 N.C. App. 637

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

PEACOCK v. SHINN

No. 442P00

Case below: 139 N.C. App. 487

353 N.C. 267

Motion by plaintiff pro se for reconsideration of order allowing motion to dismiss appeal and denying petition for discretionary review dismissed 1 February 2001.

PEARSON v. C.P. BUCKNER STEEL ERECTION

No. 452P97-2

Case below: 139 N.C. App. 394

Petition by intervenor (Cary Health Care Center, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 2 March 2001.

PETTY v. OWEN

No. 557P00

Case below: 140 N.C. App. 494

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

POTTER v. CITY OF HAMLET

No. 98P01

Case below: 142 N.C. App. 714

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001.

PRICE v. CITY OF WINSTON-SALEM

No. 21A01

Case below: 141 N.C. App. 55

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 Appeal is denied 1 March 2001. Justice Edmunds recused.

RATCHFORD v. C.C. MAGNUM, INC.

No. 51P01

Case below: 141 N.C. App. 150

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

REDDING v. SHELTON'S HARLEY DAVIDSON, INC.

No. 470P00

Case below: 139 N.C. App. 816

Petition by defendants for writ of supersedeas denied and temporary stay dissolved 3 January 2001. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 January 2001.

REECE v. ESTATE OF SWANN

No. 133P01

Case below: 141 N.C. App. 350

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001.

RIPLEY v. DAY

No. 84P01

Case below: 139 N.C. App. 630

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

SHAH v. HOWARD JOHNSON

No. 546P00

Case below: 140 N.C. App. 58

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed as moot 1 February 2001.

SIMMS v. PRUDENTIAL LIFE INS. CO. OF AM.

No. 558P00

Case below: 140 N.C. App. 529

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

SMITH v. BEAUFORT CTY. HOSP. ASS'N, INC.

No. 83A01

Case below: 141 N.C. App. —— (29 December 2000)

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 2 March 2001.

SPEAGLE v. SEITZ

No. 32PA01

Case below: 141 N.C. App. 534

Motion by plaintiffs for temporary stay allowed 18 January 2001. Petition by plaintiffs for writ of supersedeas allowed 1 March 2001. Motion by defendant to dismiss plaintiffs' appeal for lack of substantial constitutional question allowed 1 March 2001. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 1 March 2001. Justice Edmunds recused.

STATE v. ADAMS

No. 30P01

Case below: 141 N.C. App. 150

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. ALLEN

No. 23P01

Case below: 141 N.C. App. 610

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. ATKINS

No. 9A94-3

Case below: Buncombe County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Buncombe County, denied 27 March 2001.

STATE v. AVILA

No. 162P01

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 26 March 2001. Justice Butterfield recused.

STATE v. BATES

No. 569P00

Case below: 140 N.C. App. 743

Motion by the Attorney General for temporary stay allowed 22 December 2000 pending determination of petition for discretionary review. Petition by the Attorney General for writ of supersedeas denied 1 February 2001. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Temporary stay dissolved 1 February 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. BOWENS

No. 519P00

Case below: 140 N.C. App. 217

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001. Justice Edmunds recused.

STATE v. BOYD

No. 34P01

Case below: 141 N.C. App. 350

Motion by the Attorney General for temporary stay allowed 18 January 2001.

STATE v. BROWN

No. 539P00

Case below: 140 N.C. App. 604

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001. Justice Edmunds recused.

STATE v. BROWN

No. 29P01

Case below: 140 N.C. App. 788

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 February 2001. Justice Wainwright recused.

STATE v. BROWN

No. 93P01

Case below: 141 N.C. App. 351

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 1 March 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. BUCHANAN

No. 42P01

Case below: 141 N.C. App. 150

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. CHOPPY

No. 47P01

Case below: 141 N.C. App. 32

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. CLOWERS

No. 533P00

Case below: 140 N.C. App. 386

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. CUNNINGHAM

No. 508P00

Case below: 140 N.C. App. 315

Motion by the Attorney General for temporary stay allowed 10 January 2001 pending determination of motion for discretionary review. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 1 February 2001. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Petition by the Attorney General for writ of supersedeas denied 1 February 2001. Temporary stay dissolved 1 February 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 1 February 2001.

STATE v. DANIELS

No. 506A90-3

Case below: Mecklenburg County Superior Court

Application by defendant for writ of habeas corpus denied 22 February 2001.

STATE v. DAVIS

No. 6P01

Case below: 140 N.C. App. 604

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 1 March 2001.

STATE v. DAVIS

No. 153P01

Case below: 142 N.C. App. 81

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. ETHERIDGE

No. 485P00

Case below: 140 N.C. App. 151

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. FERGUSON

No. 27P01

Case below: 140 N.C. App. 699

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

STATE v. FISHER

No. 62A93-3,-4,-5

Case below: Forsyth County Superior Court

Application by defendant for writ of habeas corpus denied 18 January 2001. Justice Edmunds recused. Motion by defendant for stay of execution denied 19 February 2001. Motion by the State to vacate stay of execution allowed 9 March 2001. Justice Edmunds did not participate in the consideration or decision of this motion. Petition by the State for writ of certiorari to review the order of the Superior Court, Forsyth County, dated 8 March 2001 dismissed as moot 9 March 2001. Justice Edmunds did not participate in the consideration or decision of this petition. Petition by the State for writ of mandamus dismissed as moot 9 March 2001. Justice Edmunds did not participate in the consideration or decision of this petition.

STATE v. FISHER

No. 86P01

Case below: 141 N.C. App. 448

Notice of appeal by the Attorney General pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 1 March 2001. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. FLIPPEN

No. 178A95-3

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County denied 5 April 2001.

STATE v. FLOWE

No. 31P01

Case below: 142 N.C. App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. GALLMAN

No. 40P01

Case below: 135 N.C. App. 790

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 dismissed 1 February 2001.

STATE v. GODLEY

No. 498P00

Case below: 140 N.C. App. 15

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

STATE v. GODWIN

No. 492P00

Case below: 140 N.C. App. 151

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 February 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. GROVER

No. 198A01

Case below: 142 N.C. App. 411

Motion by the Attorney General for temporary stay allowed 5 April 2001.

STATE v. GUICE

No. 33P01

Case below: 141 N.C. App. 177

Motion by the Attorney General for temporary stay allowed 18 January 2001.

STATE v. HARRIS

No. 345A92-3

Case below: Durham and Onslow County Superior Court

Motion by the Attorney General to lift stay of execution denied 18 January 2001. Petition by the Attorney General for writ of prohibition denied 18 January 2001. Petition by the Attorney General for a writ of certiorari to review the order of the Superior Court, Durham County, denied 18 January 2001. Petition by defendant for writ of certiorari to review the order of the Superior Court, Durham County, denied 18 January 2001. Petition by the Attorney General for writ of prohibition denied 19 February 2001. Petition by the Attorney General for writ of certiorari to review the order of the Superior Court, Durham County, denied 19 February 2001.

STATE v. HEADEN

No. 92P00-2

Case below: 130 N.C. App. 613

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001.

STATE v. HOLMAN

No. 200A99

Case below: Wake County Superior Court

Motion by defendant for appropriate relief denied 1 February 2001.

STATE v. HOLSTON

No. 535P00

Case below: 134 N.C. App. 599

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001.

STATE v. HOPKINS

No. 49P01

Case below: 140 N.C. App. 788

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 5 April 2001.

STATE v. HOUGH

No. 24A01

Case below: 141 N.C. App. 351

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 March 2001. Justice Edmunds recused.

STATE v. IVEY

No. 501A98

Case below: Robeson County Superior Court

Motion by defendant to withdraw proposed record on appeal denied 18 January 2001 without prejudice to defendant's right to refile his motion based upon the outcome of defendant's review of the existing proposed record, or to file an amended record or a substituted proposed record. Without objection by the State, defendant is granted an extension of time to and including 15 February 2001 to investigate the circumstances of the preparation of the transcript of the trial and to file any such motion or record. The State shall respond to any such motion or filing by defendant on or before 22 March 2001.

STATE v. JAMES

No. 536P00

Case below: 140 N.C. App. 387

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. JENKINS

No. 81P01

Case below: 141 N.C. App. 351

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. KELLY

No. 529P00

Case below: 140 N.C. App. 387

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 1 February 2001. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. KIMBLE

No. 37P01

Case below: 141 N.C. App. 144

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. KRIDER

No. 279A00

Case below: 138 N.C. App. 37

Upon defendant's notice of appeal from the opinion of the North Carolina Court of Appeals, filed 16 May 2000, and defendant's motion for appropriate relief, the Court ex mero motu remands the case to the Court of Appeals for reconsideration in light of this court's opinion in *State v. Thomas Richard Jones* (No. 347A99, filed 21 December 2000). Motion by the Attorney General to dismiss appeal based upon a constitutional question denied 1 February 2001. Motion by the Attorney General to dismiss motion for appropriate relief denied 1 February 2001.

STATE v. LEE

No. 521P00

Case below: 140 N.C. App. 384

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 February 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. MARTIN

No. 513P00

Case below: 140 N.C. App. 387

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 February 2001.

STATE v. McCORD

No. 568P00

Case below: 140 N.C. App. 634

Motion by the Attorney General for temporary stay allowed 22 December 2000 pending determination of the petition for discretionary review. Petition by the Attorney General for writ of supersedeas denied and temporary stay dissolved 1 February 2001. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

STATE v. McEACHIN

No. 138P01

Case below: 142 N.C. App. 60

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001. Conditional petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 dismissed as moot 5 April 2001.

STATE v. McFADDEN

No. 132P01

Case below: 140 N.C. App. 604

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 5 April 2001. Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001.

STATE v. McKEITHAN

No. 556P00

Case below: 140 N.C. App. 422

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 February 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. McNEAL

No. 77P01

Case below: 141 N.C. App. 351

Motion by State to dismiss the appeal for lack of substantial constitutional question allowed 1 March 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. McQUAIG

No. 120P01

Case below: 142 N.C. App. 214

Motion by the Attorney General for temporary stay allowed 26 February 2001.

STATE v. MEDLEY

No. 46P01

Case below: 141 N.C. App. 150

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001. Justice Edmunds recused.

STATE v. MOODY

No. 64A96-3

Case below: Davidson County Superior Court

Application by defendant for writ of habeas corpus denied 6 March 2001.

STATE v. MOULTRY

No. 141P01

Case below: 142 N.C. App. 214

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. PARKER

No. 518P00

Case below: 140 N.C. App. 169

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 February 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. ROBERTS

No. 200A01

Case below: 142 N.C. App. 424

Motion by the Attorney General for temporary stay allowed 6 April 2001.

STATE v. ROGERS

No. 52P01

Case below: 141 N.C. App. 151

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. SALMON

No. 570P00

Case below: 140 N.C. App. 567

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 March 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. SCURLOCK

No. 166P01

Case below: 142 N.C. App. 214

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001.

STATE v. SHEFFIELD

No. 134P01

Case below: 142 N.C. App. —— (2 February 2001)

Motion by defendant for temporary stay pending consideration of petition for discretionary review and notice of appeal and any subsequent review of Court of Appeals opinion pursuant to N.C. Rule of Appellate Procedure 23(B) denied 9 March 2001. Petition by defendant for writ of supersedeas pending consideration of petition for discretionary review and notice of appeal and any subsequent review of Court of Appeals opinion pursuant to N.C. Rule App. P. 23(B) denied 5 April 2001. Petition by defendant for writ of supersedeas and motion for temporary stay denied 5 April 2001. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 April 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. STOKELEY

No. 36P01

Case below: 141 N.C. App. 352

Motion by the Attorney General to dismiss the appeal for lack of substantial question allowed 1 March 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. TAYLOR

No. 576P00

Case below: 123 N.C. App. 786

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 March 2001.

STATE v. TAYLOR

No. 69P01

Case below: 141 N.C. App. 352

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. THOMAS

No. 577P00

Case below: 140 N.C. App. 790

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 5 April 2001. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. THOMPSON

No. 114P01

Case below: 142 N.C. App. 698

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2001.

STATE v. WALKER

No. 388P99-2

Case below: 134 N.C. App. 500

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 March 2001. Justice Edmunds recused.

STATE v. WASHINGTON

No. 74P01

Case below: 141 N.C. App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001. Justice Edmunds recused.

STATE v. WHITE

No. 38A01

Case below: 141 N.C. App. 352

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 March 2001.

STATE v. WILLIAMS

No. 48P01

Case below: 139 N.C. App. 636

Petition by defendant for writ of certiorari denied 1 March 2001.

STATE v. WOOTEN

No. 8P01

Case below: 140 N.C. App. 791

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001.

STATE v. YOUNG

No. 454PA00

Case below: 140 N.C. App. 1

Notice of appeal by the Attorney General pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 1 March 2001. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 1 March 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

STATE v. YOUNGS

No. 76P01

Case below: 141 N.C. App. 220

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 1 March 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001. Justice Edmunds recused.

STEVENS v. GUZMAN

No. 97PA01

Case below: 140 N.C. App. 780

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 March 2001. Justice Edmunds recused.

WARD v. BEATON

No. 56A01

Case below: 141 N.C. App. 44

Notice of appeal by defendant pursuant to G.S. 7A-30 (dissent) dismissed ex mero motu 1 February 2001. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 1 March 2001.

WATTS v. HEMLOCK HOMES OF THE HIGHLANDS, INC.

No. 57P01

Case below: 142 N.C. App. 725

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001. Justice Edmunds recused.

WEBB v. POWER CIRCUIT, INC.

No. 101P01

Case below: 141 N.C. App. 507

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 April 2001.

WESTMINSTER HOMES, INC. v. TOWN OF CARY ZONING BD. OF ADJUST.

No. 499PA00

Case below: 140 N.C. App. 99

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 allowed 1 February 2001.

WOOLARD v. WEYERHAEUSER CO.

No. 509P00

Case below: 140 N.C. App. 385

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 February 2001. Justice Edmunds recused.

YADKIN VALLEY LAND CO., L.L.C. v. BAKER

No. 71P01

Case below: 141 N.C. App. 636

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 March 2001.

PETITION TO REHEAR

BROWN v. BROWN

No. 77A00

Case below: 353 N.C. 220

Petition by plaintiff to rehear pursuant to Rule 31 denied 1 February 2001.

STATE OF NORTH CAROLINA v. ERIC LAWRENCE CALL

No. 341A96-2

(Filed 4 May 2001)

1. Jury— selection—capital sentencing—stake-out question

The trial court did not err during jury selection in a capital sentencing proceeding by sustaining the prosecutor's objection to defendant's question about whether a juror could maintain the courage of her convictions if she did not think that the State had proved its case and the other eleven jurors felt that it had. Counsel may not pose hypothetical questions designed to elicit in advance what a juror's decision will be under a given state of facts; moreover, the question also appeared to be an incorrect statement of the law in that jurors have a duty to deliberate with the other jurors with a view to reaching an agreement.

2. Sentencing— capital—mitigating circumstance—peremptory instruction—jury instructed in accord with request

There was no error in a capital sentencing proceeding where defendant contended that the court failed to peremptorily instruct the jury on a mitigating circumstance, but the court instructed the jury in accordance with defendant's request.

3. Sentencing— capital—mitigating circumstances—peremptory instructions

The trial court did not err in a capital sentencing proceeding by failing to peremptorily instruct the jury on the mitigating circumstances of impaired capacity to appreciate the criminality of the offense and the age of the defendant where defendant's evidence supporting these two circumstances was controverted.

4. Indigent Defendants— capital sentencing—right to two attorneys—only one permitted to object

The trial court did not err during a capital sentencing proceeding by permitting only one of defendant's attorneys to object during the prosecutor's direct examination of a witness. Defendant had two court-appointed attorneys as required by N.C.G.S. § 7A-450(b1) and the court's ruling did not prevent them from communicating, prompting, or consulting one another or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys meaningless.

5. Constitutional Law— capital sentencing—right to two attorneys—no constitutional requirement

There was no constitutional error in a capital sentencing proceeding where the trial court permitted only one defense attorney to object during the prosecutor's direct examination of a witness. Defendant did not raise the issue at trial and so did not preserve it for review; even if he had, the right to the appointment of additional attorneys in a capital trial is statutory rather than constitutional.

6. Sentencing— capital—continuance—not requested

The trial court did not fail to exercise its discretion in declining to continue a capital sentencing proceeding where defendant challenged the admissibility of prior recorded testimony of a witness then in Mexico and there was a discussion by the prosecutor of recessing the hearing until the witness could return, but defendant never made a motion for a continuance or objected to the trial court's negative response to the prosecutor's suggestion.

7. Criminal Law— prosecutor's argument—decision without prejudice or sympathy

The trial court did not err by not intervening ex mero motu in the prosecutor's argument in a capital sentencing proceeding where defendant contended on appeal that the prosecutor falsely represented to the jurors that they had promised to decide defendant's case without sympathy, but the court had told the jurors that they must be as free from bias, prejudice, or sympathy as humanly possible and the prosecutor properly argued that the jury should follow the law and render a verdict without prejudice or sympathy for either side.

8. Criminal Law— prosecutor's argument—jurors answering to higher power

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where the prosecutor argued that the jurors would have to answer to someone higher than the court if they failed to follow the law and decided the case without sympathy or prejudice. The prosecutor did not contend that the State's law enforcement powers were ordained by God.

9. Sentencing— capital—prosecutor's argument—aggravating circumstances—course of conduct

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where defendant contended on appeal that the prosecutor improperly argued that defendant had been convicted of assaulting the victim's nephew and that the jury may have accepted without question the State's evidence regarding the assault when it found the course of conduct aggravating circumstance, but, in context, the prosecutor informed the jury only that defendant had been convicted of first-degree murder, first-degree kidnapping, and armed robbery, and did not inform the jury that defendant had been convicted of assaulting the nephew.

10. Sentencing— capital—defendant's argument—aggravating circumstance—course of conduct—assault on victim's nephew

There was no prejudice in a capital sentencing proceeding where defendant argued that the court violated his constitutional rights by sustaining the prosecutor's objection to defendant's attempt to inform the jury that defendant's related conviction for assaulting the victim's nephew had been vacated, but defendant did not object at trial, and, assuming that the court abused its discretion by improperly limiting the scope of defendant's argument, there was no prejudice because the court specifically instructed the jurors that they could find the course of conduct aggravating circumstance only if defendant engaged in conduct which involved another crime of violence, and the court permitted defense counsel to inform the jury that defendant had never been convicted of an assault on the nephew.

11. Sentencing— capital—prosecutor's argument—number of aggravating circumstances

The trial court did not err by failing to intervene ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor improperly argued that the jury should sentence defendant to death based solely upon the number of aggravating circumstances, but, in context, the prosecutor properly argued that the four aggravating circumstances outweighed (rather than outnumbered) the mitigating circumstances.

12. Sentencing— capital—prosecutor's argument—existence of aggravating circumstances

The trial court did not err by failing to intervene ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor argued that the aggravating circumstances had already been determined to exist, but, in context, the argument informed the jurors that they would have to determine beyond a reasonable doubt whether any of the aggravating circumstances existed.

13. Sentencing— capital—aggravating circumstance—especially heinous, atrocious, or cruel murder—not overbroad

The aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), is not unconstitutionally vague and overbroad.

14. Sentencing— capital—aggravating circumstance—especially heinous, atrocious or cruel murder—evidence sufficient

The evidence in a capital sentencing proceeding was sufficient to support submission of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where defendant lured the victim to a rural location where he knew they would be alone, he beat the victim to death with a shovel and tire iron without provocation, inflicting several blunt-force injuries to the victim's head, causing the victim's skin to split and leaving jagged fractures underneath the victim's forehead, beneath his left eye, across the bridge of his nose, and above his ear, the force of the blows caused the shovel handle to break in half, the victim's hands were tied behind his back and his right foot was tied up to the shoulder area, and defendant later said that he needed to return to the cornfield to see if the victim was alive, indicating defendant's personal belief that the victim might have lived through the beating.

15. Appeal and Error— preservation of issues—capital resentencing—expert testimony—failure to object

Defendant did not object and did not preserve for review the question of whether the trial court erred in a capital resentencing proceeding by allowing an expert forensic pathologist to give opinion testimony where he described the nature of the victim's injuries even though he had not performed the autopsy.

16. Evidence— capital sentencing—leading questions—no prejudice

There was no error in a capital sentencing proceeding where defendant contended that the court erred by overruling his objection to the prosecutor's improper cross-examination of a pathologist by leading questions, but the precise nature of defendant's first objection is not clear, the prosecutor restated the question and the court sustained defendant's second objection, defendant waived his right to raise the objection on appeal by asking a similar question, and there was no prejudice because the challenged examination occurred outside the presence of the jury and defendant did not object to the pathologist's testimony before the jury.

17. Indictment and Information— facially invalid indictment—challenged at any time

While as a general rule a defendant waives an attack on an indictment when the indictment is not challenged at trial, an indictment alleged to be facially invalid may be challenged at any time notwithstanding failure to contest its validity at trial because it would deprive the trial court of jurisdiction.

18. Homicide— short-form murder indictment—constitutional

A short-form indictment for first-degree murder was valid under *Jones v. United States*, 526 U.S. 227.

19. Sentencing— capital—death sentence proportionate

A death sentence was proportionate where the record supported the aggravating circumstances found by the jury; there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and the case was more similar to cases in which the death sentence was found proportionate than to those in which it was found disproportionate. Defendant was convicted based in part on premeditation and deliberation, the jury found four aggravating circumstances which have not been found in any of the cases held disproportionate, and three of the aggravating circumstances found here are among those which have been held sufficient to support a sentence of death standing alone.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a 21 May 1999 judgment imposing a sentence of death entered by Doughton, J., at a resentencing proceeding held in Superior Court,

Wilkes County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 18 October 2000.

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

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

WAINWRIGHT, Justice.

On 9 October 1995, defendant was indicted for the first-degree murder of Macedonio Hernandez Gervacio (the victim). On 18 March 1996, defendant was indicted for robbery with a dangerous weapon, first-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried capitally before a jury at the 15 July 1996 Criminal Session of Superior Court, Ashe County. The jury found defendant guilty of all charges, specifically finding defendant guilty of first-degree murder both on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder, and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to a concurrent sentence of sixty-three to eighty-five months' imprisonment for the kidnapping conviction and to consecutive sentences of fifty-five to seventy-five months' imprisonment for the robbery conviction and twenty-five to thirty-nine months' imprisonment for the assault conviction.

On appeal, this Court found no error in the guilt phase of defendant's trial with regard to his convictions for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon. *State v. Call*, 349 N.C. 382, 508 S.E.2d 496 (1998). However, we arrested judgment as to defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury based on a fatal variance in the indictment. *Id.* at 424, 508 S.E.2d at 522. We also vacated defendant's sentence of death and remanded for resentencing because, during the capital sentencing proceeding, the prosecution was allowed to impeach defendant with evidence of his post-*Miranda* silence. *Id.* at 425-26, 508 S.E.2d at 523.

On 23 April 1999, the trial court entered an order transferring venue from Ashe County, North Carolina, to Wilkes County, North

Carolina. Defendant's new capital sentencing proceeding was held at the 17 May 1999 Special Criminal Session of Superior Court, Wilkes County. On 21 May 1999, the jury once again recommended a sentence of death, and the trial court entered judgment in accordance with that recommendation. Defendant appeals his sentence of death to this Court.

The State's evidence at defendant's capital sentencing proceeding tended to show as follows: At around 9:30 p.m. on 24 August 1995, defendant visited the victim and offered him twenty-five dollars to help him move some things. The victim told his nephew, Gabriel Gonzalez (Gabriel), that he would "be right back," then departed the trailer with defendant.

At approximately 11:00 p.m., Gabriel heard a knock on the door and assumed that the victim had returned. When he opened the door, however, he saw that defendant had returned alone. Defendant offered Gabriel twenty dollars to help him move a refrigerator. Gabriel accepted defendant's offer and departed with defendant in defendant's pickup truck. Defendant took Gabriel to a cornfield several miles away and parked his pickup truck. Thereafter, defendant lured Gabriel outside of the vehicle by telling him the pickup truck was stuck. As Gabriel pushed the bumper of the pickup, defendant picked up an aluminum bat and, after pretending to use the bat to lift the tire, struck Gabriel on the head. Gabriel recovered, stood up, and ran to the edge of a nearby river. Defendant ran after him briefly, then returned to the pickup truck and departed the area. Gabriel then ran into the cornfield and lay on the ground all night.

The next morning, Gabriel swam across the river and sought assistance at area homes. Eventually, Gabriel received a ride home. At approximately 7:00 p.m. on 25 August 1995, Gabriel, through an interpreter, told the trailer park owner, David Shatley, what had happened the previous night. Thereafter, law enforcement officers were contacted, and Gabriel led a search team back to the cornfield to search for the victim. When the search party arrived at the cornfield, Gabriel excitedly told the same interpreter that defendant had brought him to that location and assaulted him. After walking six to eight rows into the cornfield, law enforcement officers found a baseball cap on the ground and noticed several broken corn stalks. As they continued their search, the officers noticed a plaid shirt near the edge of the cornfield. After walking toward the shirt, the officers discovered that the shirt was on the victim's body. The victim's body was partially covered by corn stalks. The officers noted that the victim

had suffered severe head injuries. The victim's right foot was tied up to his shoulder area with a yellow rope, and the victim's hands were tied behind his back with a white rope. Shatley identified the victim's body, and Gabriel identified the baseball cap as the one the victim was wearing when he left the trailer with defendant. The officers also discovered a broken stick, similar to a shovel handle, at the scene.

After the victim's body was found, the authorities immediately began to search for defendant. Defendant was not found at his residence. However, based on information obtained at defendant's residence, a warrant was issued for his arrest. Defendant was arrested on 27 August 1995 in a motel room in Monroe, North Carolina. Defendant and his pickup truck were brought back to Ashe County, where officers inventoried the contents of defendant's pickup truck. Among items inventoried, officers found a bag of clothes and a steel rod that appeared to have blood and hair embedded in it. In addition, officers recovered a motel registration form in the name of "Rick N. Finley." A handwriting expert later determined that the registration form was written by defendant.

On 28 August 1995, Alan Varden, defendant's friend and associate, gave a statement to Steve Cabe, a special agent with the North Carolina State Bureau of Investigation. According to Varden, defendant repeatedly suggested robbing the victim in the weeks leading up to the murder and tried to obtain Varden's assistance. Defendant told Varden that the victim carried a large amount of cash that he was saving to purchase an automobile. On one occasion, defendant showed Varden a shovel handle that was in defendant's pickup truck and stated that he would like to use it to "whack" the victim in the head. On another occasion, defendant took Varden out to the cornfield where the victim's body was later found and told Varden that the cornfield, because it was desolate, would be a good place to rob the victim and dispose of the body. Defendant also offered to share the victim's money with Varden if he would help defendant take care of Gabriel because Gabriel was much bigger than defendant. Varden refused to help defendant.

At approximately 8:00 p.m. on the day of the murder, defendant told Varden he was going to help Shatley move some furniture out of a trailer and asked Varden to help. Varden refused to go but did give defendant a piece of yellow plastic rope to help tie the furniture down. At approximately 10:30 p.m., defendant returned home, where Varden and defendant's wife, Virginia Call (Jennie), were playing

Nintendo. Defendant asked Varden to help him move a dresser, and Varden and defendant departed, each in his own pickup truck. On the way to Varden's trailer, defendant and Varden stopped at a church and used the rest room. While at the church, defendant handed Varden a one hundred dollar bill, stating that it was for the camper shell he had obtained from Varden. After leaving the church, defendant and Varden stopped at a service station, and defendant gave Varden a ten dollar bill and another one hundred dollar bill.

Upon arriving at Varden's trailer, defendant told Varden that he had hit the victim over the head, had broken a shovel handle, and had hit the victim with a tire iron. Defendant also described how he had tied the victim's right leg and hands behind the victim's back. Defendant told Varden he needed to go back and check the victim's pulse and that he also needed to get Gabriel. Once again, defendant sought Varden's assistance, stating that Varden's pickup truck had a quieter muffler. After Varden declined to help defendant, defendant put Varden's baseball bat in his pickup truck and departed in the direction of the victim's trailer. Varden returned to defendant's trailer.

Approximately thirty minutes later, defendant sped down his driveway and ran into his trailer, repeatedly telling Varden and Jennie that he had "f---ed up." Defendant told Varden that he had hit Gabriel with the bat but that Gabriel had gotten away. Defendant then gathered some clothes and said he was "leaving the country." Defendant, Varden, and Jennie went to Varden's trailer, where defendant showered and shaved off his mustache. Defendant also returned Varden's baseball bat to him. Varden went to defendant's trailer to get defendant's wallet and pants, as well as shoes for Jennie. When Varden returned to his trailer, defendant told him he had written a note and left it on Varden's coffee table. The note, which was recovered during the investigation, read as follows: "I Eric Call hereby declare that my wife Virginia Cox Call had absolutely no knowledge of what might have taken place. Signed Eric L. Call."

Sometime after midnight, defendant departed in his pickup truck, and Jennie and Varden followed defendant in Varden's pickup truck. After traveling some distance, defendant stopped and said goodbye to Jennie, then departed the area. Varden and Jennie returned home.

Prior to testifying at defendant's capital sentencing proceeding, forensic pathologist Dr. Thomas A. Sporn reviewed the autopsy

report prepared by Dr. Robert Thompson, as well as the autopsy photographs and a transcript of Dr. Thompson's prior testimony. Dr. Sporn testified that the victim's body showed a pattern of blunt-force injuries to the head and facial area that could have been caused by a baseball bat, a shovel handle, or a tire iron. Dr. Sporn noted the splitting of the victim's skin and fracturing of the victim's skull at the forehead and beneath the left eye, as well as splitting and tearing of the skin and fracturing of the skull above the victim's ear. Dr. Sporn also opined that the victim's injuries were caused by "clearly several, more than two," blows. Dr. Sporn's opinion with regard to the number of blows the victim received was based, in part, on Dr. Thompson's assessment that the victim had suffered at least eleven blows to the head.

[1] In his first assignment of error, defendant contends the trial court erred by sustaining the prosecutor's objection to a question posed by defendant during jury selection. We disagree.

"The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992), *quoted in State v. Larry*, 345 N.C. 497, 509, 481 S.E.2d 907, 914, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997). " 'Regulation of the manner and the extent of inquiries on *voir dire* rests largely in the trial court's discretion.' " *State v. Elliott*, 344 N.C. 242, 261, 475 S.E.2d 202, 209 (1996) (quoting *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). "In order for the defendant to show reversible error, he must show that the trial court abused its discretion and that he was prejudiced thereby." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995).

In the present case, the trial court sustained the prosecutor's objection to the form of the following question posed by defense counsel:

> Ms. Mathis, I'm just going to pick on you for one second. If, if you personally do not think the State has proved something beyond a reasonable doubt and the other eleven have [sic], could you maintain the courage of your convictions and say "They've not proved that"?

This Court has held that " '[c]ounsel 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.' " *Elliott*, 344 N.C. at 262, 475 S.E.2d at 209 (quoting *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)). " '[S]uch questions tend to "stake out" the juror and cause him to pledge himself to a future course of action.' " *State v. Richmond*, 347 N.C. 412, 425, 495 S.E.2d 677, 683 (quoting *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68), *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). Moreover, we have held that "[a] question which is designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to an impermissible 'stake out.' " *Elliott*, 344 N.C. at 262, 475 S.E.2d at 209; *accord State v. Bracey*, 303 N.C. 112, 118-19, 277 S.E.2d 390, 395 (1981).

As in *Elliott*, the question excluded by the trial court in the present case was improper as it "seems to be designed to determine how well prospective jurors would stand up to other jurors in the event of a split decision." 344 N.C. at 262, 475 S.E.2d at 209. The challenged question also appears to be an " 'incorrect or inadequate statement[] of the law.' " *Id.* (quoting *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68). Although jurors are required to make individual decisions about a case, "each juror also has a duty to deliberate with other jurors with a view to reaching an agreement." *Id.*; *see also* N.C.G.S. § 15A-1235(b) (1999). Here, the question excluded by the trial court "may have had the tendency to suggest that jurors should make decisions without considering the opinions of other jurors." *Elliott*, 344 N.C. at 262-63, 475 S.E.2d at 209. For these reasons, the trial court did not abuse its discretion by sustaining the prosecutor's objection to the form of defendant's question. Moreover, assuming error *arguendo*, defendant has failed to demonstrate that he was prejudiced by the trial court's ruling. *See Jones*, 339 N.C. at 134, 451 S.E.2d at 835. This assignment of error is overruled.

By assignment of error, defendant contends the trial court erred in refusing to peremptorily instruct the jury on the following three statutory mitigating circumstances: (1) the murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1999); (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); and (3) the age of the defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7). None of the jurors found any of these requested statutory mitigating circumstances to exist.

"A defendant is entitled, upon request, to a peremptory instruction on a statutory mitigating circumstance when the evidence supporting the circumstance is uncontroverted." *State v. Roseboro*, 351 N.C. 536, 547, 528 S.E.2d 1, 8, *cert. denied*, — U.S. —, 148 L. Ed. 2d 498 (2000); *accord State v. White*, 349 N.C. 535, 568, 508 S.E.2d 253, 274 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). However, " '[i]f the evidence supporting the circumstance is controverted or is not manifestly credible, the trial court should not give the peremptory instruction.' " *State v. Hedgepeth*, 350 N.C. 776, 787, 517 S.E.2d 605, 612 (1999) (quoting *State v. Bishop*, 343 N.C. 518, 557, 472 S.E.2d 842, 863 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997)), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000).

[2] At the outset, we note defendant's assertion that the trial court failed to peremptorily instruct the jury on the (f)(2) mitigating circumstance is not supported by the record. To the contrary, the record reveals the trial court informed the prosecution and defense counsel that it would instruct the jury peremptorily on the (f)(2) mitigating circumstance. During its charge to the jury, the trial court did in fact instruct the jury in accordance with defendant's request. Therefore, defendant's argument regarding the (f)(2) mitigating circumstance is rejected.

[3] With regard to the trial court's refusal to peremptorily instruct the jury on the (f)(6) and (f)(7) mitigating circumstances, the record reveals defendant's evidence supporting these circumstances was in fact controverted. Dr. Ron Hood, a psychologist, evaluated defendant one month before the sentencing proceeding. During the sentencing proceeding, Dr. Hood testified that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired on the date of the murder due to personality and substance-abuse disorders. Dr. Hood also testified that defendant's IQ was "within a normal range." On cross-examination, Dr. Hood testified there was no evidence that defendant suffered from organic brain damage or mental retardation. Regarding defendant's substance-abuse impairment, Dr. Hood testified that he relied solely on defendant's statements to him about marijuana usage and that he had no independent medical evidence. In addition, Dr. Hood stated that he did not question defendant about his drug usage on the day of the murder.

The State's evidence tended to show that defendant carefully planned to kidnap, rob, and murder the victim, and that defendant

carried out his plan in a calm and calculated manner. Defendant discussed his plan on several occasions with his friend, Varden, and repeatedly tried to obtain Varden's assistance. On one occasion, defendant showed Varden a shovel handle and stated that he would like to use it to "whack" the victim in the head. On another occasion, defendant took Varden to the cornfield where the victim's body was ultimately found and told Varden that the cornfield would be a good place to rob the victim and dispose of the body. On the night of the murder, defendant left the victim's body in the cornfield, then returned home and described to Varden how he had beaten and tied up the victim. He then explained to Varden that he needed to get Gabriel because defendant knew that Gabriel would be a witness to the fact that the victim had left home with defendant earlier that night.

The record therefore reveals conflicting evidence regarding whether defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. " '[A] peremptory instruction is inappropriate when the evidence surrounding that issue is conflicting.' " *Roseboro*, 351 N.C. at 548, 528 S.E.2d at 9 (quoting *State v. Noland*, 312 N.C. 1, 20, 320 S.E.2d 642, 654 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)) (alteration in original). Thus, the trial court did not err by denying defendant's motion for a peremptory instruction on the (f)(6) mitigating circumstance.

We likewise reject defendant's argument that the trial court erred by refusing to peremptorily instruct the jury on the statutory mitigating circumstance of the age of defendant at the time of the crime. N.C.G.S. § 15A-2000(f)(7). This Court has characterized "age" as a "flexible and relative concept." *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986); *accord State v. Spruill*, 338 N.C. 612, 660, 452 S.E.2d 279, 305 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). We have also held that chronological age is not the determinative factor with regard to submission of the (f)(7) mitigating circumstance. *State v. Peterson*, 350 N.C. 518, 528, 516 S.E.2d 131, 138 (1999), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000). Rather, the trial court must consider other varying conditions and circumstances. *Id.*

In the present case, defendant was twenty-six when he murdered the victim. During his capital sentencing proceeding, however, Dr. Hood testified that, based on his psychological evaluation, defendant's emotional age "could have been around the eighteen to

nineteen year old range" at the time of the murder. Although evidence demonstrating emotional immaturity is relevant, such evidence "is not viewed in isolation, particularly where other evidence shows 'more mature qualities and characteristics.' " *Spruill*, 338 N.C. at 660, 452 S.E.2d at 305 (quoting *Johnson*, 317 N.C. at 393, 346 S.E.2d at 624).

The evidence presented in this case showed that defendant's IQ is within the normal range, that he had significant work experience, that defendant was a good employee and a good mechanic, that defendant completed his GED, and that defendant had attended Anson Tech to become a mechanic and had received good grades. The foregoing evidence controverted Dr. Hood's testimony regarding defendant's emotional age or immaturity. Therefore, the trial court did not err by denying defendant's request for a peremptory instruction on the (f)(7) mitigating circumstance. This assignment of error is overruled.

[4] By assignment of error, defendant contends the trial court erred by permitting only one of his attorneys to object during the prosecutor's direct examination of a witness. As the prosecutor questioned Shatley, both defense attorneys objected at different times. After the second attorney objected to a question directed to the same witness, the trial court overruled the objection, then stated, "whoever is going to do each witness, one at a time. You understand?" Shortly thereafter, the jury was released for lunch break, and the following exchange occurred out of the presence of the jury:

> THE COURT: I only ask whoever is going to do the examination of each witness that one of you do it at a time.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: It's hard for me to keep up with everything.

Defendant argues that the trial court's ruling in this regard impermissibly infringed on his statutory right to the assistance of two attorneys in a capital trial and his constitutional right to the assistance of counsel. We disagree.

The governing statute provides in pertinent part:

> An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner. If the indigent person is represented by the public defender's office, the requirement of an

assistant counsel may be satisfied by the assignment to the case of an additional attorney from the public defender's staff.

N.C.G.S. § 7A-450(b1) (1999).

In *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996), this Court held that the trial court did not violate the defendant's statutory right to two attorneys by not allowing both attorneys to object during *voir dire*. We reasoned that because the trial court "did not deny defendant the assistance of a second attorney or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys meaningless," section 7A-450(b1) was not violated. *Id.* at 493, 461 S.E.2d at 675.

In the present case, as in *Frye*, we conclude the trial court's ruling did not violate defendant's statutory entitlement to two attorneys. Here, defendant had two court-appointed attorneys as required by section 7A-450(b1). The trial court ruled merely that only one of defendant's attorneys could make objections during the testimony of each witness. The trial court's ruling did not "prohibit[] or prevent[] defendant's attorneys from communicating, prompting, or consulting one another." *State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 887 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997); *see also Frye*, 341 N.C. at 493, 461 S.E.2d at 675. In short, the trial court "did not deny defendant the assistance of a second attorney or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys meaningless." *Frye*, 341 N.C. at 493, 461 S.E.2d at 675. Therefore, defendant's argument is without merit.

[5] Defendant also contends the trial court's ruling in this regard violated his right to the assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. Because defendant did not raise this constitutional issue at trial, he has failed to preserve it for our review. *State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 344 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Even if defendant had properly preserved this constitutional issue for appeal, his argument would fail because " '[a]n indigent defendant's right to the appointment of *additional* counsel in capital cases is statutory, not constitutional.' " *Frye*, 341 N.C. at 493, 461 S.E.2d at 675 (quoting *State v. Locklear*, 322 N.C. 349, 357, 368 S.E.2d 377,

382 (1988)) (alteration in original). Accordingly, this assignment of error is overruled.

[6] By assignment of error, defendant contends the trial court committed reversible error by failing to exercise its discretion when it declined to continue defendant's capital sentencing proceeding. We disagree.

This Court has held that "[w]hen 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 (1997). 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. *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 constitutional 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. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982); *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's] case was prejudiced as a result of the error." *Branch*, 306 N.C. at 104, 291 S.E.2d at 656.

In the present case, we need not address whether the trial court failed to exercise its discretion because the record reveals that defendant never made a motion for a continuance. Prior to the prosecution's presentation of evidence at trial, defendant made a motion for recordation of any testimony given in a foreign language. In response, the prosecutor informed the trial court that there would be no Spanish-speaking witnesses. The prosecutor explained that Gabriel had failed to obtain his temporary visa and board the airplane out of Mexico. The prosecutor also told the trial court that he intended to read Gabriel's prior recorded testimony into the record and provided the trial court with a copy of the transcript. Defendant did not make a motion for a continuance at that time. After the prosecutor presented the testimony of two witnesses, he announced his intention to read Gabriel's prior recorded testimony into evidence. Although defense counsel challenged the admissibility of the prior recorded testimony, the record reveals that defense counsel did not

seek a continuance. After defense counsel concluded their argument against the admission of the prior recorded testimony, the trial court asked the prosecutor if he wanted to respond. The prosecutor responded as follows:

> [PROSECUTOR]: Well, Yes, Your Honor. I mean, it sounds like Mr. Wiley really wants the, Mr. Hernandez (sic) . . . Gonzalez here, and the State's done everything we could to get him here. We'd like to have the victim's father here to tell the jury about his loss, so maybe a proper, a proper solution would be to recess this hearing until June 1st criminal term of court and that [sic] we can have everybody here and let the jury hear all about the actual events. But, we've made a very good faith attempt to get them here. But, if you feel like it's prejudicing their client in some way, we'd be happy to recess this matter, if the Court pleases, until June 1st criminal session of court and pick it back up then where we can have them here.

Defendant did not request a continuance at that time. Thereafter, the following exchange occurred:

> THE COURT: We have a jury sitting in that jury room right back there. It's not going to [be] possible to recess this case until June 1st.
>
> [PROSECUTOR]: All right.
>
> [DEFENSE COUNSEL]: *Nothing further.*

(Emphasis added.)

The record therefore demonstrates that defendant neither requested a continuance nor objected to the trial court's response to the prosecutor's suggested course of action. Thus, the trial court was never called upon by defendant to exercise its discretion, and defendant has failed to preserve this issue for appellate review. *See* N.C. R. App. P. 10(b)(1); *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 69 U.S.L.W. 3629 (2001). Accordingly, this assignment of error is rejected.

By assignments of error, defendant contends the trial court erred by failing to intervene *ex mero motu* to prevent improper argument by the prosecutor during closing arguments. We disagree.

When, as here, a 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*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999); *State v. Sexton*, 336 N.C. 321, 348-49, 444 S.E.2d 879, 895, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). " '[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. Davis*, 353 N.C. 1, 31, 539 S.E.2d 243, 263 (2000) (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)).

We have recognized that " '[t]rial 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. Hyde*, 352 N.C. 37, 56, 530 S.E.2d 281, 294 (2000) (quoting *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)), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 775 (2001). Moreover, "the prosecutor in a capital case has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *Green*, 336 N.C. at 188, 443 S.E.2d at 41. 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. *State v. McNeil*, 350 N.C. 657, 685, 518 S.E.2d 486, 503 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). We also emphasize that " 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " *Guevara*, 349 N.C. at 257, 506 S.E.2d at 721 (quoting *Green*, 336 N.C. at 188, 443 S.E.2d at 41).

[7] Defendant first argues the prosecutor falsely represented to the jurors that they had promised him they would decide defendant's case without sympathy. The prosecutor argued, in context, as follows:

> One more thing I want to point out. Don't forget your duty as a juror in this case. Your duty is, ladies and gentlemen of the jury, to set a punishment. We're here to punish [defendant] for the

crimes he's committed. We're not here to reward anybody. We're not here to avenge anybody's debt. We're here to select a proper punishment, and there's only two options, and you all know that.

But, don't forget, ladies and gentlemen, because there's a lot of emotion came up in this trial. There was a lot of emotion. And, you could let that emotion override your duty as a juror, because your duty is to apply the facts that you heard in this case to the law that the Judge is going to give you. And, if the facts fit the law and show that you ought to recommend the death penalty, you cannot let your emotions override your duty.

Yes, it's hard. There's nothing easy about this case for anybody involved. There's nothing easy in anybody's case when it comes down to saying whether a man ought to live or die. Nobody said it was easy. *But, you have to go by the law. Not only that, you gave your oath to this Court that you would hear this case fairly, impartially, you would follow the law even if you disregarded it, and you would decide this case, this verdict without sympathy and without prejudice for anyone.*

And, if you didn't do that, and if you don't do that, there's nothing we can do about it. But, one day you'll have to answer to somebody higher than this court.

(Emphasis added.)

Contrary to defendant's contention, the above-emphasized argument reveals that the prosecutor did not claim that the jurors had promised him they would decide defendant's case without sympathy. Rather, the prosecutor stated that the jurors had promised to decide the case without sympathy in their oath to the trial court. The record reveals that the trial court required the jurors to give an oath to decide the case based on the evidence presented, and without prejudice or partiality. In addition, the trial court told the jurors that they "must be as free as humanly possible from bias, prejudice, or sympathy, and must not be influenced by preconceived ideas either as to the facts or as to the law."

Viewed in context, the prosecutor properly argued to the jurors that they should follow the law and render a verdict without prejudice or sympathy for either side. The prosecutor did not, as defendant suggests, argue that the jurors should reject all mitigating circumstances. Moreover, the trial court properly instructed the jury how mitigating circumstances should be considered. The trial court

also instructed the jury on the catchall mitigating circumstance, which permits jurors to consider anything in mitigation. *See State v. Conner*, 345 N.C. 319, 332-33, 480 S.E.2d 626, 632, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). Finally, we have held that prosecutors "may properly argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill the defendant, but on the law." *Frye*, 341 N.C. at 506, 461 S.E.2d at 683; *accord State v. Rouse*, 339 N.C. 59, 93, 451 S.E.2d 543, 561-62 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). Accordingly, the trial court did not err in failing to intervene *ex mero motu*.

[8] Defendant next argues the trial court should have intervened *ex mero motu* when, as noted above, the prosecutor argued that the jurors "would have to answer to somebody higher than this court" if they failed to follow the law and decide this case "without sympathy and without prejudice for anyone."

This Court has disapproved " '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.' " *State v. Cummings*, 352 N.C. 600, 628, 536 S.E.2d 36, 56 (2000) (quoting *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)). We have also repeatedly cautioned counsel " 'that they should base their jury arguments solely upon the secular law and the facts.' " *Davis*, 353 N.C. at 28, 539 S.E.2d at 262 (quoting *State v. Williams*, 350 N.C. 1, 27, 510 S.E.2d 626, 643, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999)). As we have previously recognized, "[j]ury 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." *Williams*, 350 N.C. at 27, 510 S.E.2d at 643.

In the instant case, the prosecutor did not contend that the State's law enforcement powers were ordained by God. *See Geddie*, 345 N.C. at 100, 478 S.E.2d at 160. We also note that, as in *Williams*, the prosecutor in the present case told the jury that it should make its sentencing decision based on the law and the evidence presented in this case. *Williams*, 350 N.C. at 26-27, 510 S.E.2d at 643; *accord Davis*, 353 N.C. at 29, 539 S.E.2d at 262. Accordingly, the prosecutor's argument was not so grossly improper as to warrant *ex mero motu* intervention.

[9] Defendant next argues the prosecutor improperly argued that the jurors should accept without question that defendant assaulted Gabriel because defendant had been previously convicted of that offense. Defendant contends that, based on this improper argument, the jury may have accepted without question the State's evidence regarding defendant's assault of Gabriel when it found the (e)(11) aggravating circumstance, that "the murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). The prosecutor argued in context as follows:

> [T]his man who had no previous criminal history, this man who had a character of peacefulness and respect towards others, this man who had been a kind and considerate person[] to individuals with disabilities, beat the brains out of an innocent victim, and was convicted, ladies and gentlemen, of first degree murder, both on the basis of the felony murder rule and premeditation and deliberation.
>
> This man . . . who was a courteous, respectful and obedient student, this man who carried his cousin on his back for a mile and a half to get him help, was convicted, ladies and gentlemen of the jury, of tricking an innocent victim into a desolate area so that he could rob and kill him. He was convicted of first degree kidnapping.
>
> This[] man, ladies and gentlemen of the jury, who shows mechanical aptitude and work skills and a willingness to use these skills to benefit others, this man, who had a reputation for being industrious, hardworking, patient among his co-workers, this man who showed initiative by getting his GED and attending community college, instead of using those skills, took a man out to a desolate area where he could rob him. He took a man out there and then took money from either a dead person or a person that was dying, and he was convicted of armed robbery.
>
> Ladies and gentlemen of the jury, when you go back to your deliberations, you consider him to be guilty of these charges. You consider that he did everything that the State's evidence shows in the hearing in this case. And, don't forge[t] that if you don't remember anything else.

> Now, that matter has been decided for you. And, it really doesn't matter what you think about the facts. It doesn't matter what Mr. and Mrs. Call think. It doesn't matter what [defense counsel] and myself think about the facts. Those facts have been decided. It's not for you to determine facts about August the 24th, of 1995.
>
> . . . .
>
> . . . Your duty is, ladies and gentlemen of the jury, to set a punishment.

After reviewing the challenged argument in context, we conclude the prosecutor's argument was not improper. Contrary to defendant's argument, the prosecutor never informed the jury that defendant had previously been convicted of assaulting Gabriel. Rather, the prosecutor informed the jury only that defendant had been previously convicted of first-degree murder, first-degree kidnapping, and armed robbery. Therefore, the trial court did not err by failing to intervene *ex mero motu*.

[10] We likewise reject defendant's related argument that the trial court violated his constitutional rights by sustaining the prosecutor's objection to defendant's attempt to inform the jury that defendant's conviction for assaulting Gabriel had been vacated by this Court. During defendant's closing argument, the following exchange occurred:

> [DEFENSE COUNSEL]: . . . One other thing as to this last aggravating circumstance, that the State did not tell you is that, that charge, that the charge of conviction for assault against this individual. We never saw Gabriel Gonzalez. It was in fact vacated by . . . .
>
> [PROSECUTOR LYLE]: . . . OBJECTION.
>
> [PROSECUTOR GREEN]: . . . OBJECTION. I'd like to be heard.

At the outset, we note defendant made no constitutional argument at trial in this regard. Constitutional questions not raised and passed upon at trial will not be considered on appeal. *Gibbs*, 335 N.C. at 42, 436 S.E.2d at 344. Assuming, without deciding, that the trial court abused its discretion by improperly limiting the scope of defendant's argument, we nonetheless conclude that defendant suffered no prejudice. The trial court specifically instructed the jurors

that they could find the existence of the (e)(11) aggravating circumstance only if they found

> *from the evidence beyond a reasonable doubt* that in addition to killing the victim, Defendant . . . engaged [in] *conduct* which involved the commission of another crime of violence against another person . . . .

(Emphasis added).

Moreover, the record reveals that after sustaining the prosecutor's objection to defendant's proposed argument, the trial court permitted defense counsel to inform the jury that "[defendant] has never been convicted of an assault on Gabriel Gonzales." Accordingly, this argument is rejected.

[11] Defendant next contends the prosecutor improperly argued that the jury should sentence defendant to death based solely upon the number of aggravating circumstances submitted to it. Defendant contends the prosecutor's argument negated the need for the jury to weigh the aggravating circumstances against the mitigating circumstances. The record reveals that after arguing the evidence supporting aggravating circumstances, the prosecutor argued as follows:

> Are all four of these, when you only need one to call for the death penalty, are four of them enough? Sure. Absolutely.
>
> Is it true what we heard about the Defendant's past? See, because that's what they call mitigating circumstances. That's what the lawyers are going to want you to consider as mitigating the crime down so as not to recommend the death penalty.
>
> Are they true, what we heard about his past? Sure. We don't contest anything about how he grew up and what the family said. That's all true.
>
> But, did that outweigh what he did on August the 24th of 1995? Do those mitigating circumstances about his life, which I told you that I was talking about here at first [sic]. Those are all mitigating factors. I read them right off the sheet you'll get. Do those outweigh these four? No.
>
> And, if they don't outweigh these four, you can't recommend life.

Read in context, the prosecutor did not suggest to the jury that it should make its sentencing decision "by means of mathematical cal-

culations." Rather, the prosecutor properly argued to the jury that the four aggravating circumstances outweighed, rather than outnumbered, the mitigating circumstances. Moreover, the record reveals that the trial court instructed the jurors as follows:

> In so doing, you're the sole judges of the weight to be given to any individual circumstance which you find[,] whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.

The trial court's instruction properly explained to the jury the manner in which it should consider the aggravating and mitigating circumstances. Accordingly, the trial court did not err in failing to intervene *ex mero motu*.

[12] Finally, defendant contends the prosecutor improperly argued that four of the five aggravating circumstances submitted to the jury had already been determined to exist. The prosecutor argued as follows:

> The law says, in North Carolina, that you have to do certain specific things in the course of a murder before you can even be subjected to the death penalty. And, there's only eleven of them.
>
> They're set out in the law books as to what you can do. If you didn't do any of those things in a murder case, then you can't get the death penalty.
>
> In this case, ladies and gentlemen of the jury, out of those eleven, the Judge is going to submit four to you. They're going to be on the first page of the sheet that you get that's called Issue I. What it says is: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? That's what they're called.

At the outset, we note that, contrary to defendant's argument, only four aggravating circumstances were submitted to the jury. Moreover, we fail to see how the challenged argument could have left

jurors with the impression that the four submitted aggravating circumstances had already been determined to exist. When read in context, the prosecutor's argument informed the jurors that they would have to determine beyond a reasonable doubt whether any of the submitted aggravating circumstances existed. This argument is without merit.

These assignments of error are overruled.

[13] By assignments of error, defendant contends the trial court erred by submitting to the jury the aggravating circumstance that the victim's murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). Defendant argues that the (e)(9) aggravating circumstance is unconstitutionally vague and overbroad and that, based on the evidence presented during the sentencing proceeding, its submission was error. We disagree.

With regard to defendant's first contention, we have repeatedly rejected the argument that the (e)(9) aggravating circumstance is unconstitutionally vague and overbroad, *State v. Fleming*, 350 N.C. 109, 119, 512 S.E.2d 720, 728, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999); *State v. Lee*, 335 N.C. 244, 285, 439 S.E.2d 547, 568-69, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), and we decline defendant's invitation to reconsider our prior holdings.

[14] Further, "[i]n 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.' " *McNeil*, 350 N.C. at 693, 518 S.E.2d at 508 (quoting *State v. Robinson*, 342 N.C. 74, 86, 463 S.E.2d 218, 225 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996)) (alteration in original). Finally, determination of whether submission of the (e)(9) aggravating circumstance is warranted depends on the particular facts of each case. *State v. Brewington*, 352 N.C. 489, 525, 532 S.E.2d 496, 517 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 992 (2001); *McNeil*, 350 N.C. at 693-94, 518 S.E.2d at 508.

We have 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 the present case, the State's evidence tended to show that defendant lured the victim to a rural location where he knew they would be alone. *See Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328 (defendant killed victim at a time he knew victim would be alone). Without provocation, defendant then beat the victim to death with a shovel handle and a tire iron, supporting an inference that the murder was conscienceless and pitiless. *See State v. Ingle*, 336 N.C. 617, 641-42, 445 S.E.2d 880, 893 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). Defendant inflicted several blunt-force injuries to the victim's head, causing the victim's skin to split and leaving jagged fractures of bone underneath the victim's forehead, beneath his left eye, and across the bridge of his nose. Defendant also caused the skin to split and the bone to fracture above the victim's ear. The force of the blows inflicted upon the victim by the defendant caused the shovel handle to break in half. The record also reveals that defendant tied the victim's hands behind his back and tied his right foot up to his shoulder area. This evidence supports an inference that the victim was left in his " 'last moments aware of but helpless to prevent impending death.' " *Gibbs*, 335 N.C. at 61-62, 436 S.E.2d at 356 (quoting *Hamlet*, 312 N.C. at 175, 321 S.E.2d at 846). This inference is buttressed by evidence that, upon returning to his residence, defendant told Varden he needed to return to the cornfield to see if the victim was alive because he had not checked his pulse. Defendant's statement to Varden indicates defendant's personal belief that the

victim might have lived through the severe beating as he lay tied up on the ground. Viewed in the light most favorable to the State, the evidence in this case supports the trial court's submission of the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. This assignment of error is overruled.

[15] By assignment of error, defendant contends the trial court erred when it allowed the State's expert witness to give inherently unreliable opinion testimony. At the sentencing proceeding, Dr. Sporn was qualified as an expert in forensic pathology. During direct examination, Dr. Sporn explained that he did not perform the autopsy on the victim's body but that he did review Dr. Thompson's autopsy report, a transcript of Dr. Thompson's prior testimony, and the autopsy photographs. As Dr. Sporn testified concerning his observations of the autopsy photographs, defense counsel requested an opportunity to question Dr. Sporn outside the presence of the jury. After extensive questioning by both the prosecution and defense counsel outside the presence of the jury, the trial court allowed Dr. Sporn to describe to the jury the nature of the victim's injuries. Dr. Sporn testified, among other things, that the victim received "clearly several, more than two," blunt-force injuries and that the injuries could have been caused by a baseball bat, a shovel handle, or a tire iron.

Defendant contends that Dr. Sporn's testimony was inherently unreliable and that its admission violated his constitutional rights. 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). During defense counsel's *voir dire* of Dr. Sporn, the trial court specifically asked defense counsel whether they had any objections to the proposed testimony of Dr. Sporn. One of defendant's attorneys responded, "It's not that I don't have any objections, I mean, if I could think of a legal basis for it, I'd be making it." Thereafter, when Dr. Sporn testified before the jury, defense counsel failed to object. Accordingly, defendant has failed to preserve this assignment of error for appellate review. In addition, this Court will not review defendant's constitutional argument because the issue was not " '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)). Finally, defendant has failed to assert plain

error on appeal. *See* N.C. R. App. P. 10(c)(4). Therefore, this assignment of error is overruled.

[16] In a related assignment of error, defendant contends the trial court erred when it overruled defendant's objections to the prosecutor's improper cross-examination of Dr. Sporn outside the presence of the jury. Specifically, defendant argues the prosecutor improperly led Dr. Sporn during cross-examination in such a manner that the prosecutor testified for the witness. Defendant contends the challenged cross-examination violated his due process rights.

The record reveals that defendant objected twice during the prosecutor's cross-examination of Dr. Sporn, as follows:

> [PROSECUTOR]: All right. Now, did you, now this examination that you did, based on the evidence . . . now, Mr. Lynch asked you some questions and you gave some answers. Certainly your opinion might be . . . .
>
> [DEFENSE COUNSEL]: . . . OBJECTION to his testifying, now, this is voir dire. That's when he's (Unintelligible) testify (sic).
>
> THE COURT: OVERRULED.
>
> [PROSECUTOR]: Certainly your opinion would be, in other words, it would be better if you had actually examined the body, is that correct?
>
> [DR. SPORN]: Well, for, for giving an opinion as to the precise number of blows, yes.
>
> [PROSECUTOR]: Yes. But, the fact that you did not actually examine the body does not prevent you from forming an opinion to a reasonable degree or medical certainty as to the questions I asked you about the nature of the wounds, the number of wounds, and whether these objects which have been previously introduced could have caused those wounds, is that correct?
>
> [DEFENSE COUNSEL]: OBJECTION. May I be heard on the objection?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: Here's my objection. We have a, a, an expert who has said himself that his opinion could be inherently unreliable. We have a lawyer[] who is not a doctor or a patholo-

gist making such leading questions that he is suggesting to him how to get to where he couldn't get to on his own knowledge, and I OBJECT to that.

THE COURT: Well, I SUSTAIN the question.

[DEFENSE COUNSEL]: You sustained the question?

THE COURT: I'm going to SUSTAIN the . . . .

[DEFENSE COUNSEL]: . . . yes, sir . . . .

THE COURT: . . . the question that you just asked.

Based on this record, the precise nature of defendant's first objection is unclear. In any event, the prosecutor restated the same question and the trial court ultimately sustained defendant's second objection to the manner in which the prosecutor was leading Dr. Sporn. "Where the trial court sustains a defendant's objection, he has no grounds to except." *State v. Woods*, 345 N.C. 294, 311-12, 480 S.E.2d 647, 655, *cert. denied*, 522 U.S. 875, 139 L. Ed. 2d 132 (1997); *accord State v. Quick*, 329 N.C. 1, 29, 405 S.E.2d 179, 196 (1991). In addition, we note that, both during *voir dire* and before the jury, defendant similarly asked Dr. Sporn whether his opinions would have been better formed if he had personally examined the victim's body. " 'Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.' " *Trull*, 349 N.C. at 446, 509 S.E.2d at 191 (quoting *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995)). Therefore, defendant has waived his right to raise this objection on appeal. Even assuming *arguendo* that this issue was properly preserved and that the trial court committed error, we nonetheless conclude that the challenged cross-examination did not prejudice defendant, as it occurred outside the presence of the jury. Moreover, defendant did not object to Dr. Sporn's testimony before the jury. This assignment of error is overruled.

[17] By assignment of error, defendant contends the short-form murder indictment violated his federal constitutional rights as it failed to allege all the elements of first-degree murder. At the outset, we note defendant did not challenge the murder indictment in the trial court. 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). As a general rule, a defendant waives an attack on the indictment when the indictment is

not challenged at trial. *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990). However, when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 797 (2001). Thus, this issue is properly before this Court.

[18] In support of his challenge to the validity of the murder indictment, defendant cites the United State Supreme Court's decision in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999). We have repeatedly addressed and rejected defendant's argument. *See, e.g.*, *Braxton*, 352 N.C. 158, 531 S.E.2d 428. In *Braxton*, this Court examined the validity of short-form indictments in light of the United States Supreme Court's decisions in *Jones*, 526 U.S. 227, 143 L. Ed. 2d 311, and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and concluded that nothing in either case altered prior case law on these matters. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 437-38. Defendant has presented no compelling basis for this Court to revisit the issue in the present case. Accordingly, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises four additional issues that he concedes this Court has previously decided contrary to his position: (1) the trial court committed prejudicial error when it failed to direct jurors to consider and give appropriate effect to mitigating evidence; (2) the trial court's instruction to the jury that defendant's evidence of mitigating circumstances simply had to "satisfy" the jury was so inherently ambiguous and vague that it violated defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (3) the North Carolina death penalty statute is unconstitutional; and (4) the trial court committed reversible error when it instructed the jury to decide whether nonstatutory mitigating circumstances have mitigating value. Defendant makes these arguments in order to allow this Court to reexamine its prior holdings and to preserve these issues for any possible further judicial review. We have thoroughly considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, these assignments of error are overruled.

PROPORTIONALITY REVIEW

[19] Having concluded that defendant's capital sentencing proceeding was free from 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 sentence of death was based; (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. Following a capital sentencing proceeding, the jury found four aggravating circumstances: (1) the murder was committed while defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

Five statutory mitigating circumstances were submitted for the jury's consideration: (1) the defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); (4) the age of the defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (5) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of these statutory mitigating circumstances, the jury found only (f)(1) and (f)(9) to exist. Of the eighteen nonstatutory mitigating circumstances submitted by the trial court, one or more jurors found the following: (1) defendant has shown a character of peacefulness and respect toward others throughout his life prior to the date of the murder, (2) defendant has shown his ability to adjust to prison life throughout his period of incarceration, (3) defendant is ideally suited by temperament to a highly structured environment,

and (4) defendant has difficulties in maintaining close interpersonal relationships.

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 sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn now to our final statutory duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting our 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).

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

We conclude this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. We have recognized 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 *Lee*, 335 N.C. at 297, 439 S.E.2d at 575), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995). Moreover, in none of the cases held disproportionate by this Court did the jury find the existence of four aggra-

vating circumstances. In the present case, however, the jury found that the (e)(5), (e)(6), (e)(9), and (e)(11) aggravating circumstances existed.

We also compare the present case with cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of 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 support a sentence of death. *See State v. Warren*, 347 N.C. 309, 328, 492 S.E.2d 609, 619 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). The (e)(5), (e)(9), and (e)(11) statutory aggravating circumstances, which the jury found here, are among those four. *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). Therefore, we conclude that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

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 crimes 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.

Accordingly, we conclude defendant received a fair capital sentencing proceeding, free from prejudicial error. The sentence of death recommended by the jury and entered by the trial court must therefore be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. DAVID CHARLES DIEHL

No. 195A00

(Filed 4 May 2001)

1. Criminal Law— prosecutor's argument—references to race—mistrial

The Court of Appeals erred in a first-degree murder case by concluding that the trial court abused its discretion when it denied defendant's motion for a mistrial under N.C.G.S. § 15A-1061 based on the prosecutor's alleged inappropriate reference to the race of the jurors, because (1) although it is improper to interject race into a jury argument where race is otherwise irrelevant, the prosecutor was properly pursuing a legitimate prosecutorial theory that race was a motive or factor in the crime; (2) defendant's original objection was immediately made and properly sustained, meaning defendant and the trial court could only speculate whether the prosecutor was undertaking an improper appeal to the racial prejudices of the jury; and (3) instruction by the trial court calling attention to the prosecutor's unfinished sentence may have done more harm than good.

2. Appeal and Error— preservation of issues—assignment of error does not encompass additional issues

Although defendant and amicus contend in a first-degree murder case that a prosecutor's additional remarks during closing argument were improper, these issues were not properly preserved because: (1) the scope of appellate review is limited to those issues raised in an assignment of error set out in the record on appeal; and (2) defendant's single assignment of error pertaining to closing argument does not direct the attention of the appellate court to the particular error about which the question is made nor does it refer to the transcript pages where any questionable comments may be found as required by N.C. R. App. P. 10(c)(1).

Justice MARTIN dissenting.

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. 541, 528 S.E.2d 613 (2000), vacating a judgment entered 10 March 1998 by Albright, J., in Superior Court, Randolph County, and remanding for a new

trial. On 5 October 2000, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 14 February 2001.

Roy A. Cooper, Attorney General, by Buren R. Shields, III, Assistant Attorney General, for the State-appellant.

Mary March Exum for defendant-appellee.

Seth H. Jaffe, Counsel, American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

EDMUNDS, Justice.

On 16 January 1996, defendant David Charles Diehl was indicted for first-degree murder. The case was tried capitally. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation. After a capital sentencing proceeding, the jury recommended life imprisonment without parole, and on 10 March 1998, the court imposed sentence accordingly. In a split decision, the Court of Appeals vacated defendant's conviction and judgment and remanded for a new trial, holding that the trial court erred in denying defendant's motion for mistrial. Judge Walker dissented, contending that any error in defendant's trial was not prejudicial, and the State appealed pursuant to N.C.G.S. § 7A-30(2). This Court also allowed the State's petition for discretionary review as to the related issue whether an incomplete comment made by the prosecutor in closing argument constituted an appeal to the jury for a "race-based decision." We reverse the holding of the Court of Appeals.

At trial, the State presented evidence that the victim, Jake Spinks, was found dead at his Asheboro, North Carolina, home in the early morning hours of 23 December 1995. Spinks, a dealer in crack cocaine, had been stabbed sixty-four times. Anise Raynor testified that approximately two weeks before the murder, he and defendant went to Spinks' home to purchase crack cocaine. When defendant expressed dissatisfaction with the quantity Spinks was willing to sell for fifty dollars, Spinks pointed a revolver at defendant and ordered him to leave. After defendant complied, he told Raynor that he would "get" Spinks.

On 22 December 1995, defendant and Raynor spent a large part of the day and evening smoking crack cocaine. Raynor testified that defendant told him that he (defendant) and Spinks "had worked something out" and that Spinks was going to give defendant money or

drugs because of a previous deal during which Spinks supposedly had taken defendant's money without providing any crack cocaine in return. Raynor dropped defendant off at a pay telephone approximately one block from Spinks' home, then left to buy crack cocaine for himself elsewhere. Later that night, Raynor searched for defendant and found him walking along a road near Spinks' house, wearing bloody clothes and carrying a butcher knife in the waist of his trousers. When Raynor asked what happened, defendant responded, "I had to do him, I had to do him." DNA testing confirmed that blood found in Spinks' kitchen was from defendant.

Defendant took the stand in his defense. He admitted being present at the killing, but claimed that Raynor had stabbed Spinks. Defendant testified that his blood was found at the crime scene only because his hand had been slashed when he attempted to calm Raynor. Although the evidence was undisputed that defendant's hand had been cut the evening of the murder and stitched by an emergency room doctor, defendant previously had provided conflicting accounts to explain his injury.

During closing argument in the guilt-innocence phase of the trial, the prosecutor referred to the race of the jurors. Defendant is white, as were all the jurors, while the victim was African-American. The prosecutor argued, "Well if [defendant's] story is sufficient to confuse you or to whatever, or if it's just another reason. If, and I hope that is the answer, if twelve people good and true, twelve [w]hite jurors in Randolph County, just doesn't think—." Defendant immediately objected, stating, "Your Honor, please, I object to the racism." The trial court sustained the objection by saying, "Well, let's just—We're not going to have that thing going on." Defendant did not ask for a curative instruction. The prosecutor completed his closing argument, and court adjourned for the day.

The following morning, defense counsel asked the court to revisit the issue: "Judge, during the course of [the prosecutor's] argument yesterday he made some statements that we objected to, and I believe the Court sustained. I was hoping you could amplify just a little bit our objections to what we considered to be inappropriate and racist arguments." The trial court declined to take further action, explaining,

> [the court] sustained the objection to any line of argument that attempted to inject racial division in the argument, and [the court] sustained the objection to [any] type of argument that the

> [prosecutor] was about to make which would have constituted a feel for a race-based decision, and I don't know—I ruled for you.

Defendant then moved for a mistrial. The court denied the motion, and the trial proceeded to conclusion.

[1] Defendant contends that the trial court erred when it denied his motion for mistrial. A trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1999). The decision to grant or deny such a motion will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *State v. McGuire*, 297 N.C. 69, 75, 254 S.E.2d 165, 169-70, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979). Although the challenged portion of the prosecutor's closing argument is unsettling when read *in vacuo*, an examination of the context in which the comment was made reveals that the district attorney was pursuing a legitimate prosecutorial theory.

Closing argument may properly be based upon the evidence and the inferences drawn from that evidence. *State v. Oliver*, 309 N.C. 326, 357, 307 S.E.2d 304, 324 (1983). Here, the prosecutor argued that defendant's primary motive for killing Spinks was robbery of cash and crack cocaine. However, the prosecutor also contended that defendant had a secondary motivation for the killing: Defendant held in contempt the victim and others with whom he dealt drugs, and their race was a component of that contempt. Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate. *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984) (holding that white defendant's reference to African-American victim as a "damn nigger," along with evidence that victim was seen driving through a white community, sufficient to support jury argument that murder was, in part, racially motivated). Here, the record reveals that when the prosecutor argued to the jury about defendant's secondary motivation, defendant did not object to remarks citing his dismissive perceptions of minorities with whom he dealt. However, when the prosecutor appeared to incorporate the jurors in this argument ("If, and I hope that is the answer, if twelve people good and true, twelve

[w]hite jurors in Randolph County, just doesn't think—"), defendant objected, and the court sustained the objection. The court's denial of defendant's request the next day that the court "amplify" his objection led to the motion for mistrial now before us.

Having reviewed the context in which the prosecutor made the challenged comment, we now consider whether the court abused its discretion in denying defendant's mistrial motion. Abuse of discretion occurs when the trial court's decision is " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 46, 530 S.E.2d 281, 288 (2000) (quoting *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986)), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 775 (2001). The experienced trial judge was presented with a perplexing situation. Because defendant's original objection was immediately made and promptly sustained, the prosecutor never completed his thought. Accordingly, defendant and the court could only speculate whether the prosecutor was undertaking an improper appeal to the racial prejudices of the jury, whether the prosecutor had experienced a slip of the tongue, or whether some other explanation applied. Further instruction by the court calling attention to the prosecutor's unfinished sentence may have done more harm than good. Because the court's decision not to address the issue anew was reasonable, we are unable to conclude that the denial of defendant's subsequent motion for mistrial constituted a manifest abuse of discretion.

[2] Defendant and *amicus* also seek to argue that various other comments in the prosecutor's closing argument violated defendant's due process rights, as guaranteed under the Fourteenth Amendment to the United States Constitution. However, defendant made a contemporaneous objection only to the prosecutor's comment about "twelve [w]hite jurors," and his request the next day for amplification referred only to "inappropriate and racist arguments." When the trial court responded to the request by discussing the remark quoted above, defendant did not direct the court's attention to any other statement made by the prosecutor during his closing argument.

In the absence of an objection to other comments, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *State v. Golphin*, 352 N.C. 364, 452, 533 S.E.2d 168, 226 (2000), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 305 (2001). 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 (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)), *cert. denied*, — U.S. —, 148 L. Ed. 2d 100 (2000). However, we need not decide whether the trial court erred in failing to intervene because defendant's sole assignment of error pertaining to closing argument was limited to "[w]hether the trial court erred in denying defendant's motion for mistrial after the State's closing argument." The scope of appellate review is limited to those issues raised in an assignment of error set out in the record on appeal, N.C. R. App. P. 10(a), and where "no assignment of error can fairly be considered to encompass" additional issues that a party seeks to raise at the appellate level, those issues are not properly before the reviewing court, *State v. Burton*, 114 N.C. App. 610, 615, 442 S.E.2d 384, 387 (1994). Defendant's single assignment of error pertaining to closing argument does not "direct[] the attention of the appellate court to the particular error about which the question is made," nor does it refer to transcript pages where any questionable comments may be found. N.C. R. App. P. 10(c)(1). "This Court has noted that when the appellant's brief does not comply with the rules by properly setting forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, it is difficult if not impossible to properly determine the appeal." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999). Accordingly, we will not address issues relating to additional remarks made by the prosecutor during his closing argument.

The result in the Court of Appeals did not require it to reach other issues properly preserved by defendant and raised on appeal. Because we now reverse the Court of Appeals' decision as to the only issue it addressed, on remand, that court should also consider defendant's remaining issues.

REVERSED.

Justice MARTIN dissenting.

In a criminal proceeding the "prosecutor may argue the evidence and any inferences to be drawn therefrom." *State v. Oliver*, 309 N.C. 326, 357, 307 S.E.2d 304, 324 (1983). It is well settled, however, that "[t]he Constitution prohibits racially biased prosecutorial argu-

ments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 95 L. Ed. 2d 262, 289 n.30 (1987). "Nonderogatory references to race are permissible . . . if material to issues in the trial and sufficiently justified to warrant 'the risks inevitably taken when racial matters are injected into any important decision-making.' " *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 245, 259 (1994) (quoting *McFarland v. Smith*, 611 F.2d 414, 419 (2d Cir. 1979)), *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995), *overruled on other grounds by State v. Warren*, 347 N.C. 309, 320, 492 S.E.2d 609, 615 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998).

During closing argument the state argued to the jury: "If, and I hope that is the answer, if twelve people good and true, twelve [w]hite jurors . . . ." It is an unremarkable proposition that the state's reference to "twelve *[w]hite jurors*" was not relevant to any issue presented by the evidence or any reasonable inference arising therefrom. Indeed, it is difficult to envision a criminal trial in which the *jurors'* race would constitute a proper matter for argument. Notably, the state acknowledges in brief that "the reference to race might have turned out to be unnecessary."

The majority concludes the state's reference to the *jurors'* race does not constitute reversible error yet concedes the racially based line of argument may have been improper. In any event, the majority does not dispute that the trial judge properly sustained defendant's objection to the state's racial argument. Further, the majority notes that a curative instruction may have done more harm than good. In such circumstances, this Court cannot reasonably ascertain the extent to which the improper argument inflamed the jury with irrelevant racial considerations. Accordingly, in the absence of evidence to the contrary, we should presume the state's reference to the *jurors'* race "so infected the trial with unfairness that it rendered the conviction fundamentally unfair." *State v. Robinson*, 346 N.C. 586, 607, 488 S.E.2d 174, 187 (1997).

I recognize that plain error analysis does not govern our review of jury arguments. *See State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998) (plain error review generally limited to jury instructions and evidentiary rulings), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Nonetheless, the rationale underlying the doctrine in criminal cases generally, correcting errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson*, 297 U.S. 157, 160, 80 L. Ed. 555, 557 (1936), applies with great force here. Public confidence in the administration of justice is

seriously eroded when, as here, irrelevant information about the *jurors'* race is introduced during the state's closing argument.

The *jurors'* race was wholly irrelevant to the jury's consideration of the evidence in reaching a verdict at defendant's trial. I would affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. RONALD LEE POINDEXTER A/K/A RONALD PUGH

No. 563A99

(Filed 4 May 2001)

Jury— capital sentencing—alternate juror—substituted during deliberations—error

The trial court erred in a capital first-degree murder prosecution by denying defendant's motion for a mistrial under N.C.G.S. § 15A-1061 based on the post-verdict removal of a juror for juror misconduct committed during the guilt-innocence phase of deliberations and the substitution of an alternate juror for the sentencing proceeding, because: (1) defendant has a right under the North Carolina Constitution to trial by a jury composed of twelve qualified jurors; and (2) the dismissed juror's misconduct during jury deliberations resulted in a guilty verdict by a jury composed of less than twelve qualified jurors. N.C. Const. art. I, § 24.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., on 30 November 1999 in Superior Court, Randolph County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 March 2001.

Roy A. Cooper, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

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

PARKER, Justice.

Defendant was indicted on 23 February 1998 for the first-degree murder of Wanda Luther Coltrane. Defendant was tried capitally and

found guilty of first-degree murder on the basis of premeditation and deliberation and under the felony-murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder; and the trial court entered judgment accordingly. For the reasons discussed herein, we conclude that defendant is entitled to a new trial.

This case appears to present a factual situation of first impression. In the afternoon of 18 November 1999, the jury completed its deliberations and returned a verdict of guilty. After receiving the verdict the trial court instructed the jury to return on Monday, 29 November 1999, and recessed the trial until that date. Within minutes after the jurors were dismissed, juror two, who was the foreperson, approached the courtroom clerk and said he needed to speak with someone about a rumor that "defendant's family was going to get whoever they had to get." The clerk informed the trial court about her conversation with the foreperson; and the trial court detained the foreperson and jurors one and six, who were also still at the courthouse. The trial court then questioned these three jurors on the record in the presence of the court reporter, the clerk, the prosecutors, and defense counsel. The foreperson stated the following:

> We were in the jury room, and one of the jurors spoke up and said that he lives in the approximate area as the family and that the word in the street in that—I guess what he said was the jurors would be dealt with or got or taken care of, and there was some concerns.

The foreperson indicated that this comment was made during deliberations and that juror eleven was the person who made the statement. The foreperson then expressed his concern that if he did not report the information and something happened to another member of the jury, he would have it on his conscience the rest of his life.

Upon questioning, jurors six and one testified to the effect that juror eleven had said during deliberations that the word "in the area" was for jurors or witnesses to be forewarned of possible harm from defendant's family if defendant was found guilty.

After questioning these three jurors, the trial court sent them home with instructions to return the next morning. The trial court also directed the clerk to contact the remaining jurors and instruct

them to return the next morning. The trial court then expressed to the prosecutors and defense counsel its intention to remove juror eleven, stating:

> I think the best thing for [juror eleven], I've got to excuse him. I don't have any problem with that. I don't have a choice with him. We've got to excuse him. But what he did, you know, was—whoo—

The next morning, before the trial court began questioning any jurors, defense counsel requested that the trial court refrain from asking the jurors about the effect, if any, of juror eleven's misconduct on their verdict. The trial court denied defense counsel's request. When questioned, each juror acknowledged that a statement had been made which in some manner touched on their safety and well-being. Nine of the jurors specifically corroborated the foreperson's statement that juror eleven had conveyed to the jurors a suggestion that they be aware or careful on account of defendant's family.

Juror eleven told the court that he received a telephone call from a friend who wanted him to "be aware of these—of how this was down there, not only the family but the whole people in general." Juror eleven stated that he told the jurors "that I had heard to be aware that—keep your eyes open, that—Well, it was just to make me aware that there could be. You know, there was no threats, no nothing of any kind." Juror eleven acknowledged that the purpose of the call had been to warn him. Juror eleven and juror six also informed the trial court that the jurors briefly discussed whether to tell the trial court about the telephone call that juror eleven had received.

The trial court subsequently removed juror eleven for his misconduct, explaining:

> It was highly improper for you not to report [the telephone call] to me. It was highly improper for you to bring [the telephone call] to the other jurors. Since you obviously—I mean I'm not going to punish you for doing your civic duty and being on the jury. But what you did was improper. I don't feel like that I can let you continue on with this case, so I'm going to dismiss you from the case with my thanks for your service up to this point. And I'm going to release you at this time.

Defendant then filed a motion for mistrial pursuant to N.C.G.S. § 15A-1061 on the basis that the jury had heard extraneous informa-

tion in violation of defendant's constitutional right to confront the witnesses against him. After the trial court denied defendant's motion for mistrial, it inquired of the prosecutors and defense counsel as to their wishes regarding the jury in the capital sentencing proceeding. The prosecutor expressed a willingness to replace juror eleven with an alternate juror for the capital sentencing proceeding. However, defense counsel argued that the trial court had erroneously denied defendant's motion for mistrial and the trial court, therefore, would err by continuing to the sentencing proceeding with either an alternate juror or with a newly empaneled sentencing jury. The trial court ultimately seated an alternate juror for the capital sentencing proceeding.

Defendant contends that the post-verdict removal of juror eleven for juror misconduct committed during the guilt-innocence phase deliberations violated his right under the North Carolina Constitution to trial by a jury composed of twelve qualified jurors. We agree.

Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or no less than a jury of twelve persons. *See State v. Bindyke*, 288 N.C. 608, 623, 220 S.E.2d 521, 531 (1975) (holding that an alternate's presence in the jury room for a brief period at the beginning of jury deliberations was a violation of this constitutional right); *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (holding that notwithstanding defendant's consent, the verdict was a nullity where the trial court proceeded to verdict with a jury of eleven). In *State v. Bunning*, 346 N.C. 253, 256, 485 S.E.2d 290, 292 (1997), this Court held that the constitutional requirement of trial by a jury of twelve was violated by substitution of an alternate juror for an incapacitated juror after jury deliberations had started, resulting in a verdict rendered by eleven jurors plus two jurors who each participated partially. Similarly, we hold that the requirement of trial by a jury of twelve is violated where, as here, a juror becomes disqualified during deliberations as a result of juror misconduct.

The State argues that no evidence supports that juror eleven was disqualified during the guilt-innocence phase and that juror eleven was properly removed only for the sentencing proceeding. This position is untenable. First, we note that cases cited by the State are distinguishable. In *State v. Allen*, 323 N.C. 208, 223, 372 S.E.2d 855, 864 (1988), *sentence vacated on other grounds*, 494 U.S. 1021,

108 L. Ed. 2d 601 (1990), the juror who overheard co-workers talking about the case was removed and replaced with an alternate before deliberations began as permitted by N.C.G.S. § 15A-1215. The other cases, *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), and *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), did not involve juror misconduct or anything occurring during deliberations.

In the present case, within an hour after the jury returned its guilty verdict, the trial court determined that it must remove juror eleven; and the basis was clearly juror misconduct during deliberations. Under these facts, if this juror was not qualified to continue serving during the sentencing proceeding, then he became disqualified during the guilt-innocence deliberations. The recordation of the verdict and dismissal of the jury for the recess until the capital sentencing proceeding did not absolve the misfeasant juror's misconduct and render him qualified for purposes of the guilt-innocence phase deliberations. Moreover, the gravity of this juror misconduct was compounded by some of the jurors collectively deciding, in direct contravention of the trial court's instructions, not to tell the trial court about this report of alleged potential harm. Thus, juror eleven's misconduct during jury deliberations resulted in a guilty verdict by a jury composed of less than twelve qualified jurors.

A trial by a jury that is improperly constituted is so fundamentally flawed that the verdict cannot stand. *Bunning*, 346 N.C. at 257, 485 S.E.2d at 292. In *Bindyke*, 288 N.C. at 627, 220 S.E.2d at 533, this Court held that a violation of a defendant's constitutional right to have the verdict determined by twelve jurors constituted error *per se*. *See also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Accordingly, this case is not subject to harmless error analysis; and defendant is entitled to a new trial.

NEW TRIAL.

MARIKA VON VICZAY v. SELINE THOMS

No. 572A00

(Filed 4 May 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 140 N.C. App. ——, 538 S.E.2d 629 (2000), affirming an order for summary judgment entered orally in open court on 12 July 1999 and entered in writing in an undated order signed by Noble, J., in Superior Court, Buncombe County. Heard in the Supreme Court 18 April 2001.

John E. Tate, Jr., for plaintiff-appellant.

Frank J. Contrivo and Rick S. Queen for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

EVANGELINE SCOTT DANCY, EMPLOYEE v. ABBOTT LABORATORIES, EMPLOYER, SELF/FIREMAN'S FUND INSURANCE COMPANY

No. 436A00

(Filed 4 May 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 553, 534 S.E.2d 601 (2000), reversing an opinion and award entered by the North Carolina Industrial Commission on 26 February 1999 and remanding the case for further proceedings. Heard in the Supreme Court 17 April 2001.

Ralph G. Willey, P.A., by Ralph G. Willey, III, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendant-appellants.

PER CURIAM.

AFFIRMED.

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

IN RE MERRITT

[353 N.C. 447 (2001)]

IN THE MATTER OF TONY MERRITT

No. 493PA00

(Filed 4 May 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished, per curiam decision of the Court of Appeals, 140 N.C. App. 151, 539 S.E.2d 58 (2000), dismissing Durham County's appeal from an order entered by O'Neal, J., on 25 June 1999 in District Court, Durham County. Heard in the Supreme Court 17 April 2001.

Roy A. Cooper, Attorney General, by Brent D. Kiziah, Assistant Attorney General, for petitioner-appellee State.

S.C. Kitchen, County Attorney, and Curtis O. Massey II, Assistant County Attorney, for respondent-appellant Durham County.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by Darin P. Meece, for respondent-appellee Tony Merritt, Sr.

North Carolina Association of County Commissioners, by James B. Blackburn, III, General Counsel; and Jonathan V. Maxwell, Guilford County Attorney, and Mercedes O. Chut, Assistant Guilford County Attorney, on behalf of North Carolina Association of County Commissioners, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

THE NORTH CAROLINA STATE BAR v. DOUGLAS S. HARRIS, ATTORNEY

No. 464PA00

(Filed 4 May 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 139 N.C. App. 822, 535 S.E.2d 74 (2000), reversing an order of disbarment entered by the Disciplinary Hearing Commission of the North Carolina State Bar on 3 December 1998 and remanding the matter for a new hearing. Heard in the Supreme Court 17 April 2001.

Fern Gunn Simeon for plaintiff-appellant.

Douglas S. Harris, defendant-appellee, pro se.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. RUSSELL EDWARD MANNING

No. 439A00

(Filed 4 May 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 454, 534 S.E.2d 219 (2000), finding no error in judgments entered 21 October 1998 by Everett, J., in Superior Court, Pitt County. Heard in the Supreme Court 17 April 2001.

Roy A. Cooper, Attorney General, by David N. Kirkman, Assistant Attorney General, for the State.

W. Gregory Duke for defendant-appellant.

PER CURIAM.

AFFIRMED.

BRITT v. HAYES

No. 115PA01

Case below: 140 N.C. App. 262

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 May 2001. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 May 2001.

CLARK v. SANGER CLINIC, P.A.

No. 205P01

Case below: 142 N.C. App. 350

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 May 2001.

DAWKINS v. SALE

No. 145P01

Case below: 142 N.C. App. 212

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001.

FINNEY v. STUDEVENT

No. 53P01

Case below: 141 N.C. App. 149

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 23 April 2001.

FURR v. K-MART CORP.

No. 173P01

Case below: 142 N.C. App. 325

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001.

GOOD NEIGHBORS OF S. DAVIDSON v. TOWN OF DENTON

No. 170PA01

Case below: 142 N.C. App. 391

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 3 May 2001.

IN RE BRIM

No. 143P01

Case below: 142 N.C. App. 212

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 19 April 2001.

IN RE FORECLOSURE OF HOOPER

No. 111P01

Case below: 141 N.C. App. 149

Petition by defendant (Eugene Hooper) for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001. Justice Martin recused.

LIBERTY MUT. INS. CO. v. PENNINGTON

No. 185PA01

Case below: 141 N.C. App. 495

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 3 May 2001.

LYNN v. BURNETTE

No. 418PA99-2

Case below: 353 N.C. 266
134 N.C. App. 731

Joint motion to withdraw case allowed 18 April 2001.

McCALLUM v. N.C. COOP. EXT. SERV.

No. 146P01

Case below: 142 N.C. App. 48

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 3 May 2001. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001.

ROBINSON v. BETHUNE

No. 94P01

Case below: 141 N.C. App. 350

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 May 2001.

SIMMONS v. LANDFALL ASSOCS.

No. 323PA00

Case below: 138 N.C. App. 554

Motion by plaintiff and defendants to withdraw petition for discretionary review allowed 19 April 2001.

SMITH v. WINN-DIXIE CHARLOTTE, INC.

No. 177P01

Case below: 142 N.C. App. 255

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001.

STANLEY v. BRUNSWICK ELEC. MEMBERSHIP CORP.

No. 154P01

Case below: 142 N.C. App. 213

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 April 2001.

STATE v. AIKEN

No. 283P98-2

Case below: 143 N.C. App. 185

Motion by Attorney General for temporary stay denied 3 May 2001.

STATE v. ANTHONY

No. 257A82-3

Case below: Cabarrus County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cabarrus County, allowed 1 February 2001 for the limited purpose of remanding for a hearing by the trial court, including taking evidence and making findings, on issue of witness recantation. Motion by the Attorney General to reconsider this Court's order remanding case to Superior Court, Cabarrus County, dismissed 3 May 2001.

STATE v. CLEGG

No. 128P01

Case below: 142 N.C. App. 35

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 May 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001. Justice Edmunds recused.

STATE v. DAWSON

No. 109P01

Case below: 138 N.C. App. 327

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 May 2001. Justice Edmunds recused.

STATE v. GROVER

No. 198A01

Case below: 142 N.C. App. 411

Petition by the Attorney General for writ of supersedeas allowed 18 April 2001.

STATE v. JOHNSON

No. 233P01

Case below: 143 N.C. App. 186

Motion by the Attorney General for temporary stay allowed 3 May 2001.

STATE v. McKENZIE

No. 209P01

Case below: 142 N.C. App. 392

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 May 2001.

STATE v. MEDLIN

No. 92P01

Case below: 141 N.C. App. 352

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 May 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001.

STATE v. MUNOZ

No. 183P01

Case below: 141 N.C. App. 675

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 May 2001. Justice Edmunds recused.

STATE v. REED

No. 232PA01

Case below: 143 N.C. App. 155

Motion by the Attorney General for temporary stay allowed 3 May 2001.

STATE v. REESE

No. 202P01

Case below: 140 N.C. App. 790

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 May 2001.

STATE v. SCANLON

No. 480A99-2

Case below: Durham County Superior Court

Motion by defendant for temporary stay allowed 4 May 2001.

STATE v. TUCKER

No. 118P01-2

Case below: 140 N.C. App. 790

Petition by defendant pro se for writ of mandamus denied 3 May 2001.

WALL v. APPLING-BOREN CO.

No. 150P01

Case below: 142 N.C. App. 215

Petition by plaintiffs (Sherrie W. Robbins, Scott Wall and Rhonda Allman) for discretionary review pursuant to G.S. 7A-31 denied 12 April 2001.

WILLIAMSON v. LIPTZIN

No. 50P01

Case below: 141 N.C. App. 1

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 May 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 May 2001.

PETITION TO REHEAR

MEDICAL MUT. INS. CO. OF N.C. v. MAULDIN

No. 222PA00

Case below: 353 N.C. 352

Petition by defendant to rehear pursuant to Rule 31 denied 3 May 2001. Justice Martin recused.

STATE OF NORTH CAROLINA v. JAMES DONALD KING

No. 204A99

(Filed 8 June 2001)

1. Criminal Law— competency to stand trial—failure to conduct competency hearing

The trial court did not err in a capital first-degree murder prosecution by failing to conduct a competency hearing prior to defendant's trial, because: (1) neither defendant nor defense counsel questioned defendant's capacity to proceed at any time during the trial or capital sentencing proceeding, N.C.G.S. § 15A-1002(a); (2) prior to trial the trial court directly asked defense counsel whether there had been a competency screening in this case, and defense counsel stated there was never a determination that defendant was incompetent to stand trial nor did counsel thereafter request a competency hearing or make a motion; (3) defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002(b) by failing to assert that right; and (4) evidence of past treatment standing alone does not constitute substantial evidence before the trial court indicating that defendant lacked capacity to understand the nature and object of the proceedings against him.

2. Homicide— first-degree murder—short-form indictment—constitutional

The short-form indictment used to charge defendant with first-degree murder was constitutional even though it failed to allege all the elements of first-degree murder.

3. Jury— peremptory challenges—African-American prospective jurors—race-neutral explanations

The trial court did not err in a capital first-degree murder prosecution by overruling defendant's objection to the State's use of peremptory challenges to strike African-American prospective jurors, because: (1) the prosecutor presented an adequate race-neutral explanation for the removal of a prospective juror based on the juror's response that she had nothing in her background that would cause her to distrust the police when her father was allegedly fired from the police department over a drug matter; and (2) the prosecutor also presented an adequate race-neutral explanation for the removal of a prospective juror based on one

of several factors including her reaction when speaking about her uncle's murder.

4. Jury— voir dire—prospective juror—improper stake-out question

The trial court did not abuse its discretion by limiting defendant's questioning during voir dire of a prospective juror during a capital first-degree murder prosecution concerning what sentence the prospective juror would vote for if defendant was convicted of first-degree murder under a theory of premeditation and deliberation without evidence of an affirmative defense, because: (1) defendant was allowed to ask the prospective juror about his consideration of life as a possible sentence and whether the juror would automatically vote for the death penalty if defendant was convicted of first-degree murder; and (2) defendant's question was an improper attempt to stake-out the prospective juror.

5. Evidence— hearsay—handwritten portions of victim's diary—state of mind exception

The trial court did not err in a capital first-degree murder prosecution by allowing the State to introduce handwritten portions of the victim's diary into evidence under the state of mind exception of N.C.G.S. § 8C-1, Rule 803(3), because: (1) the victim's challenged statements about her frustration with defendant and her intent to end their marriage were statements indicating the victim's mental condition at the time the statements were made and were not merely a recitation of facts; (2) the victim's journal entries bear directly on the victim's relationship with defendant at the time the victim was killed; and (3) the challenged evidence relates directly to circumstances giving rise to a potential confrontation with the defendant.

6. Evidence— hearsay—out-of-court statements of witnesses—residual hearsay exception—adequate notice—trustworthy and reliable

The trial court did not err in a capital first-degree murder prosecution by allowing the State to introduce out-of-court statements of several witnesses to police officers under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5), because: (1) all four of the declarants were unavailable at the time of trial since they had all died during the almost nine-year period that defendant remained a fugitive from the law; (2) two of the declarants made their statements on the day of the murder, the third

declarant made his statement the day after the murder, and the fourth declarant made his statement two days after the murder; (3) the prosecutor gave defendant sufficient notice to provide a fair opportunity to meet the evidence; and (4) the trial court addressed each of the challenged statements separately and found them to be trustworthy and reliable.

7. Homicide— first-degree murder—failure to instruct on lesser-included offense of second-degree murder

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request to instruct the jury on the lesser-included offense of second-degree murder, because: (1) the State's uncontradicted evidence tends to show that defendant killed the victim with premeditation and deliberation; and (2) mere speculation by defendant that it was possible that a conflict erupted between defendant and the victim that resulted in her death based on his desire to reconcile with the victim is not sufficient to negate evidence of premeditation and deliberation.

8. Sentencing— capital—mitigating circumstances—no significant history of prior criminal activity

The trial court did not err in a capital first-degree murder prosecution by failing to submit the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance of no significant history of prior criminal activity, because: (1) the State presented evidence that defendant had previously been convicted of the first-degree murder of his former wife and was sentenced to life imprisonment, but he was later paroled; and (2) the (f)(1) mitigating circumstance is not properly submitted in cases that involve a prior criminal history which includes a violent felony involving death.

9. Sentencing— capital—jury question—unanimous recommendation for life sentence

The trial court did not err in a capital first-degree murder prosecution by its response to the jury's question concerning whether a recommendation of a life sentence had to be unanimous, because: (1) the trial court properly informed the jury that its answers to issues one, three, and four must be unanimous; and (2) the trial court's additional instruction that the inability of jurors to reach a unanimous verdict should not be their concern but should simply be reported to the court, given at defendant's request before the jury began its deliberations, constituted invited error.

10. Sentencing— capital—aggravating circumstances—violent felony—testimony and photographs from prior murder conviction

The trial court did not abuse its discretion in a capital first-degree murder prosecution by allowing the State to introduce testimony and photographs dealing with defendant's prior murder conviction to support the N.C.G.S. § 15A-2000(e)(3) violent felony aggravating circumstance, because: (1) the Rules of Evidence do not apply to a capital sentencing proceeding, and thus the trial court has great discretion to admit any evidence relevant to sentencing; (2) the trial court reviewed the probative value of the evidence against unfair prejudice and denied admission of photographs that showed blood and brain matter throughout the murder scene and limited the testimony of the investigating officer; and (3) photographs of the murder weapon used by defendant, the condition of that victim's body, and the location of the body and the wound were relevant to establish the existence of a prior violent felony.

11. Sentencing— capital—mitigating and aggravating circumstances—weight given to each

Although defendant contends the trial court committed plain error in a capital first-degree murder prosecution by instructing the jury in a manner that allegedly allowed the jury to impose a death sentence by finding mitigating circumstances and aggravating circumstances of equal value, this argument has been repeatedly rejected and defendant has presented no compelling basis to revisit this issue.

12. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing a sentence of death for a first-degree murder case, because: (1) defendant was convicted of first-degree murder on the basis of premeditation and deliberation; and (2) the jury found the N.C.G.S. § 15A-2000(e)(3) violent felony aggravating circumstance based on defendant's prior murder conviction for shooting and killing his first wife.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Morgan (Melzer A., Jr.), J., on 23 November 1998 in Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 18 April 2001.

Roy A. Cooper, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

WAINWRIGHT, Justice.

On 4 August 1997, defendant was indicted for first-degree murder. Defendant was tried capitally before a jury at the 26 October 1998 Criminal Session of Superior Court, Guilford County. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation. After a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder, and the trial court entered judgment in accordance with that recommendation. Defendant appeals his first-degree murder conviction and sentence of death to this Court.

The State's evidence at trial tended to show as follows: In the early morning hours of 11 September 1988, defendant shot and killed his wife, Gloria Underwood King (the victim), while she was walking home from playing bingo with friends. The victim received seven gunshot wounds, four of which were inflicted to her head. Several area residents heard the gunshots and saw the victim's body lying on a sidewalk in front of Jones Elementary School in Greensboro, North Carolina. However, no one was able to identify the gunman at the time of the shooting.

Greensboro police arrived at the scene at approximately 1:30 a.m. on 11 September 1988. The victim showed no signs of life. Officers observed a bingo marker on the ground near the victim's body.

An autopsy performed on the victim's body revealed that the victim received seven gunshot wounds. One bullet entered the right side of the victim's head, fracturing the skull and causing a subdural hematoma. A small-caliber bullet was removed from the skull in the area of this gunshot wound. A second bullet struck the victim in the same area, causing a small fracture to the skull. This bullet was also removed from the victim's skull. A third bullet, which was fired at close range, struck the victim near the right eyebrow and passed into the scalp. Bullet fragments were removed from the victim's scalp in the area of this injury. A fourth bullet struck the victim just below her right eye. A fifth bullet struck the victim on the back of her neck. Bullet fragments were removed from this wound. The amount of soot or stippling surrounding this wound indicated that the wound was

inflicted at very close range. Gunshot wound number six was located on the victim's right hand near the base of her second finger. The wound was surrounded by a small amount of powder, indicating a close-range gunshot. Finally, gunshot wound number seven was located at the base of the victim's right thumb and was described as a defensive wound. The bullet was recovered from the soft tissue of the victim's right hand. The testifying pathologist opined that the cause of death was a gunshot wound to the head.

On 15 September 1988, the police located defendant's vehicle in downtown Greensboro. The police later searched the vehicle and found, among other things, two .22-caliber bullets, an automobile insurance policy belonging to defendant, and a bottle of Thunderbird wine.

At trial, the victim's daughter, Erika Underwood, testified that defendant and the victim were married on 9 June 1986 and separated near the end of 1987. After the separation, defendant visited the victim approximately once a week. Underwood testified that, as a result of suffering a stroke, defendant walked with a very noticeable limp at the time the victim was killed. Sometime during the separation, the victim learned that defendant was seeing another woman, Betty James (Betty), and the victim visited Betty's apartment to confront her. During her testimony, Underwood read journal entries made by the victim during the days before she was killed. In her journal, the victim described the deterioration of the relationship between defendant and the victim, including the victim's knowledge of defendant's girlfriend, Betty. The victim described defendant as selfish, uncaring, untruthful, and stingy. She also wrote that she had no desire to reconcile with defendant.

Katie Chavis, a friend of the victim's, testified at trial that, in September 1988, defendant and the victim visited her, and defendant sat outside in his automobile. The victim wanted to borrow money from Chavis to go play bingo. During that visit, the victim told Chavis that she knew defendant "had a lady pregnant." The victim also stated that defendant told her if she left him, he was going to kill her, and that she was tired of living in fear. In a previous conversation, the victim told Chavis that defendant had beat her and forced her to have sex and that she was afraid. Chavis encouraged the victim to keep a diary that would serve as a "paper trail" regarding defendant's abusive conduct.

While investigating the victim's murder, the police learned that, on 6 September 1988, defendant visited his cousin, Herbert "Billy" Alston. Defendant told Alston that he wanted to get the victim to come back to him. Alston and defendant visited the victim's apartment, but she was not at home. Defendant and Alston then visited a woman, whose first name was also "Gloria," and asked her to go and talk to the victim about reconciling with defendant.

On 8 September 1988, defendant and Alston visited Gloria once again, and defendant asked her to take his car and go talk to the victim on his behalf about reconciling. At one point, defendant directed Alston to obtain the registration card from defendant's vehicle. When Alston looked over the sun visor for defendant's registration, he observed a .22-caliber revolver with no handle grips.

Alston also spent time with defendant on 10 September 1988, the day before the victim was killed. Defendant and Alston went to see defendant's girlfriend, Betty, and defendant asked her if she knew anyone from whom he could borrow a vehicle. Betty told defendant that she did not know of anyone who had a vehicle, and defendant and Alston returned to Alston's residence. Defendant stayed at Alston's house until approximately 11:30 p.m. on 10 September 1988, the night before the murder.

The police also spoke with Betty during the investigation. Betty dated defendant before his marriage to the victim and resumed her relationship with defendant after his separation from the victim in 1988. According to Betty, she learned that she was pregnant with defendant's child in August of 1988.

On 7 September 1988, defendant came to Betty's residence at approximately 6:00 p.m., carrying a handgun and ammunition. Betty described the gun as having no handle grips. Defendant told Betty he wanted to kill the victim with the gun. Defendant stated that he had to do it because the victim had hurt him too many times and would not talk to him. Defendant left later that evening to find out why the gun was not "shooting right." Defendant told Betty he had fired the weapon out in the country, and it did not work properly. Defendant returned at approximately 10:30 p.m., placed the gun in the nightstand drawer, and spent the night with Betty.

The next morning, on 8 September 1988, defendant once again told Betty that he was going to kill the victim. Betty convinced defendant not to go through with his plan. The next day, defendant

yet again spoke of killing the victim, and once again, Betty talked him out of it. Defendant did not stay with Betty that night. However, on 10 September 1988, defendant visited Betty and told her that she had kept him from killing the victim for two days but that she would not stop him anymore.

When the police visited Betty during the investigation, she gave them a trash bag that contained an unfired .22-caliber bullet and several envelopes addressed to defendant. Betty explained that defendant had left the bullet in her nightstand.

Shortly before the murder, defendant spoke with Mac Durham, an individual who previously served time in prison with defendant. During that conversation, defendant asked Durham, "[I]f you put a .22 against somebody's head, will you kill them?" Durham told defendant that it would kill the person because a .22-caliber gun is a deadly weapon.

During the investigation, the police located three women who played bingo with the victim shortly before she was murdered on 11 September 1988. Two of the women, Minnie Hayes and Verna Pennix, departed the bingo parlor with the victim at approximately 12:30 a.m. At that time, they observed defendant waiting outside for the victim. Defendant approached the victim, led her near the building by her arm, and began talking with her. According to Pennix, the victim acted fearful when she saw defendant. When Hayes and Pennix asked the victim whether she was leaving with them, she did not respond. However, defendant informed the women that he would take the victim home. The third woman, Loretha Foushee, exited the bingo parlor approximately ten minutes after the victim left the building. Foushee observed defendant talking with the victim up against the side of the bingo parlor and noted that defendant had his arms on either side of the victim, "boxing her in."

At trial, Special Agent Gerald F. Wilkes of the Federal Bureau of Investigation (FBI) testified as an expert in the field of firearms and ammunition examination. Agent Wilkes performed an examination of the bullets and bullet fragments that were recovered by the Greensboro Police Department during the investigation. Agent Wilkes determined that a spent round submitted to him, as well as the live rounds recovered during the investigation, were .22-caliber long-rifle bullets. According to Agent Wilkes, the live rounds he examined were similar in physical characteristics to the lead bullet projectile removed from the victim's wrist.

Kathleen M. Lundy, an examiner with the FBI Laboratory in Washington, D.C., also testified at trial. Lundy was tendered and accepted as an expert in the field of comparative bullet lead analysis. Lundy examined three live rounds and six bullet projectile fragments recovered by the Greensboro Police Department. In her expert opinion, the bullets and bullet fragments she examined, including a bullet from one of the live rounds she studied, were similar in composition such that they were manufactured from the same melting pot of lead. Ms. Lundy opined that, based on her lead analysis, the bullets she examined either came from the same box of cartridges or came from different boxes of the same caliber, manufactured at the same time.

On 13 June 1997, almost nine years after the victim was murdered, defendant was arrested in Dayton, Ohio. When law enforcement authorities first located defendant, he identified himself as Robert Robinson and possessed a photo identification card, a social security card, and a birth certificate under that name. Defendant also had a welfare identification card in the name of Peter Emerey.

PRETRIAL ISSUES

[1] By assignment of error, defendant contends the trial court erred by failing to conduct a competency hearing prior to defendant's trial. We disagree.

N.C.G.S. § 15A-1002 governs the determination of a defendant's incapacity to proceed and provides in pertinent part:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.
>
> (b) When the capacity of the defendant to proceed is questioned, the court:
>
> . . . .
>
> (3) Must hold a hearing to determine the defendant's capacity to proceed. . . .

N.C.G.S. § 15A-1002(a), (b)(3) (1988) (amended 1989). Further, N.C.G.S. § 15A-1001 provides that a defendant suffers from an incapacity to proceed if "he is unable to understand the nature and object

of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C.G.S. § 15A-1001(a) (1999).

Pursuant to the plain language of section 15A-1002(b)(3), the trial court "[m]ust hold a hearing to determine the defendant's capacity to proceed" *if* the question is raised. However, this Court has recognized that " 'a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.' " *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977) (quoting *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970)). Moreover, we have said that

> "in order for an appellant to assert a constitutional or statutory right in the appellate courts, the right must have been asserted and the issue raised before the trial court. Further, it must affirmatively appear on the record that the issue was passed upon by the trial court."

Id., (quoting *State v. Parks*, 290 N.C. 748, 752, 228 S.E.2d 248, 250 (1976)).

In the present case, neither defendant nor defense counsel questioned defendant's capacity to proceed. The record reveals that, prior to trial, the trial court directly asked defense counsel whether there had been a competency screening in this case. The trial court informed defense counsel that "if there's some question about [defendant's] competency, then I want to hear whatever evidence is to be presented and make that determination before we go forward so that it's in the record."

In response, defense counsel informed the trial court that defendant had received treatment for depression in connection with a suicide attempt and that "there was never a determination that [defendant] was incompetent to stand trial." Defense counsel did not thereafter request a competency hearing or make a motion "detail[ing] the specific conduct that leads the moving party to question the defendant's capacity to proceed." N.C.G.S. § 15A-1002(a). Accordingly, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002(b) by his failure to assert that right. *Young*, 291 N.C. at 567, 231 S.E.2d at 580.

We likewise reject defendant's argument that the trial court's failure to conduct a competency hearing violated his constitutional

rights. It is beyond question that a conviction cannot stand where the defendant lacks capacity to defend himself. *Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103 (1975); *State v. Heptinstall*, 309 N.C. 231, 236, 306 S.E.2d 109, 112 (1983); *Young*, 291 N.C. at 568, 231 S.E.2d at 581. Indeed, this Court has recognized that " '[a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' " *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (quoting *Crenshaw v. Wolff*, 504 F.2d 377, 378 (8th Cir. 1974), *cert. denied*, 420 U.S. 966, 43 L. Ed. 2d 445 (1975)) (alteration in original).

In the present case, there is some evidence in the record indicating that defendant had received precautionary treatment for depression and suicidal tendencies several months before trial. However, this evidence of past treatment, standing alone, does not constitute "substantial evidence" before the trial court, *id.*, indicating that defendant "lack[ed] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense" at the time his trial commenced, *Drope*, 420 U.S. at 171, 43 L. Ed. 2d at 113. Moreover, the record does not indicate that either defendant or defense counsel raised any questions about defendant's capacity to proceed at any time during defendant's trial and capital sentencing proceeding. Accordingly, the trial court did not err by failing to institute, on its own motion, a hearing to determine defendant's capacity to proceed. This assignment of error is overruled.

[2] By assignment of error, defendant contends the short-form murder indictment violated his federal constitutional rights, as it failed to allege all the elements of first-degree murder. At the outset, we note that defendant did not challenge the murder indictment in the trial court. Constitutional questions "not raised and passed upon in the trial will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Moreover, a defendant waives an attack on the indictment when the indictment is not challenged at trial. *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990). However, when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, the indictment may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court. *Braxton*, 352 N.C. at 173, 531 S.E.2d at 437. Thus, this issue is properly before this Court.

In support of his challenge to the validity of the murder indictment, defendant cites, among other things, the United State Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). This Court has repeatedly addressed and rejected defendant's argument. *See, e.g.*, *Braxton*, 352 N.C. 158, 531 S.E.2d 428. In *Braxton*, this Court examined the validity of short-form indictments in light of the Supreme Court's decisions in *Jones* and *Apprendi*, and concluded that nothing in either case altered prior case law on these matters. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 437-38. Defendant presents no compelling basis for this Court to revisit the issue in the present case. This assignment of error is overruled.

JURY SELECTION

[3] By assignment of error, defendant contends the trial court erred by overruling defendant's objection to the State's alleged impermissible use of peremptory challenges to strike from the jury six African-American prospective jurors solely on account of their race. 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 racially discriminatory purposes. *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986); *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), —— U.S. ——, 148 L. Ed. 2d 684 (2001); *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). In *Batson*, the United States Supreme Court set forth a three-pronged test to determine whether a prosecutor has engaged in impermissible racial discrimination in the selection of jurors. *Batson*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-89; *accord Hernandez v. New York*, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991); *State v. Braxton*, 352 N.C. 158, 179, 531 S.E.2d 428, 440 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 797 (2001).

First, the defendant must establish a *prima facie* case that the State has exercised a peremptory challenge on the basis of race. *Hernandez*, 500 U.S. at 358, 114 L. Ed. 2d at 405. All the 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 discrimi-

nation, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors." *State v. White*, 349 N.C. 535, 548, 508 S.E.2d 253, 262 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999); *accord State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995).

Second, if the defendant makes the required showing, the burden shifts to the State to offer a race-neutral explanation for striking the particular juror. *Hernandez*, 500 U.S. at 358-59, 114 L. Ed. 2d at 405; *State v. Hardy*, 353 N.C. 122, 128, 540 S.E.2d 334, 340 (2000). The prosecutor's 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." *Hardy*, 353 N.C. at 128, 540 S.E.2d at 340; *accord Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680. Moreover, " '[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 574-75 (1998) (quoting *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). The second prong also provides the defendant an opportunity for surrebuttal to show that the State's explanations for the challenge are merely pretextual. *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).

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 in error. *Fletcher*, 348 N.C. at 320, 500 S.E.2d at 684. However, when the trial court does not explicitly rule on whether the defendant made a *prima facie* case and where the State is directed to proceed 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. *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).

Pursuant to the third prong under *Batson*, "the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination." *Braxton*, 352 N.C. at 180, 531 S.E.2d at 441 (citing *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405); *accord Bonnett*, 348 N.C. at 433, 502 S.E.2d at 575. A trial court's rulings regarding race-neutrality and purposeful

discrimination are largely based on evaluations of credibility and should be given great deference. *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. This Court will uphold the trial court's determination unless convinced it is clearly erroneous. *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)).

In the present case, defendant argues that the State exercised peremptory challenges to excuse five African-American prospective jurors. At the outset, we note our independent review of the record reveals that the State in fact exercised peremptory challenges to excuse six African-American prospective jurors. The State exercised four of these peremptory challenges during the selection of the jury and the balance during the selection of the two alternate jurors. In any event, in his brief, defendant specifically challenges only the prosecutor's exercise of a peremptory challenge against prospective juror Stephanie Bruce.

With regard to prospective juror Bruce, the record reveals that defendant made a *Batson* objection after the prosecutor indicated his desire to exercise a peremptory challenge to remove Bruce from the panel. Without ruling on the objection, the trial court directed the prosecutor to assert his reasons for peremptorily challenging Bruce. The prosecutor offered the following explanation:

> [PROSECUTOR]: . . . I am aware from another source of information, Your Honor, that her father, who she indicated on her questionnaire, was a police officer and a detective. That he in fact was—it's my understanding was charged and was ultimately fired or forced to resign, you know, some situation of that type, from the police department over some kind of a drug matter. And he was—my understanding at the time was a narcotics officer. I have attempted to run a criminal record. I do not find that—if there was a formal charge lodged that it ever made it to the computer or to that stage. But apparently, from my information, that a search warrant was executed and whatever information was involved resulted in that situation. That I asked several questions, and one in particular, of the juror, regarding any kind of an unpleasant experience with the police department, something of

that matter, that should have caused, based on my information, an affirmative response from Ms. Bruce. She did not give me an affirmative response and that caused me concern about her truthfulness, obviously.

In addition, she indicated that an uncle was murdered, and it was just my reaction and that of my family member who is present that Ms. Bruce had some kind of reaction to that situation that might affect her decision in this kind of a case.

The trial court then gave defense counsel an opportunity to respond. Defense counsel argued to the court that the prosecutor's information with regard to Bruce's father was outside the record of this case and that there was no showing that Bruce's father was in fact the same individual who had a charge placed against him. Defense counsel also noted that Bruce previously indicated that she had nothing in her background to cause her any concern about being a fair and impartial juror and that there was no unpleasant experience in her background that would cause her to distrust the police. The trial court ruled that the prosecutor had presented an "adequate and a neutral explanation" for exercising a peremptory challenge to remove Bruce.

Defendant contends that the prosecutor's proffered explanation regarding Bruce's father was insufficient. Specifically, defendant argues there is no evidence in the record to support the prosecutor's belief that the police detective who was forced to resign is Bruce's father. We note, however, that the issue for the trial court is the "facial validity" of the prosecutor's stated reason, and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406; *see also Hardy*, 353 N.C. at 129, 540 S.E.2d at 341 ("[T]he prosecution is not required to show that [the prospective juror] could not understand the evidence, so long as the trial court believes that the race-neutral explanation is the prosecution's true motivation in exercising the challenge.").

Finally, with regard to Bruce's murdered uncle, defendant notes that the prosecutor accepted a white prospective juror whose wife had previously been raped, resulting in disparate treatment of similarly situated white jurors. Defendant argues that this disparate treatment demonstrates that the prosecutor's reasons for excusing Bruce were pretextual. It is true that "[t]he 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." *Lawrence*, 352 N.C. at 15, 530 S.E.2d at 816; *see also Fletcher*, 348 N.C. at 317, 500 S.E.2d at 683. However, defendant's approach in this case " 'involves finding a single factor among several articulated by the prosecutor . . . and matching it to a passed juror who exhibited that same factor.' 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.' " *State v. Robinson*, 330 N.C. 1, 19, 409 S.E.2d 288, 298 (1991) (quoting *Porter*, 326 N.C. at 501, 391 S.E.2d at 152-53)(alteration in original).

We have exhaustively reviewed the transcript and conclude that the explanations offered by the State do not appear to have been motivated by purposeful discrimination but are both race-neutral and otherwise appropriate reasons for exercising a peremptory challenge. *See, e.g., State v. Smith*, 352 N.C. 531, 541, 532 S.E.2d 773, 780 (2000) (holding that peremptory challenge based on prosecution's concern about prospective juror's veracity was race-neutral), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 360 (2001). We reiterate that a prosecutor's explanations for a peremptory strike " '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).

In short, the trial court's determination that there was no purposeful discrimination in the challenge of prospective juror Bruce is not 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. This assignment of error is overruled.

[4] By assignment of error, defendant contends that the trial court improperly limited defendant's questioning during *voir dire* of prospective juror Clarence Newnam. We disagree.

In the present case, defense counsel thoroughly questioned prospective juror Newnam during *voir dire*. During questioning, defense counsel made the following two inquiries:

> [DEFENSE COUNSEL]: Now, do you feel like if there happened to be a conviction of first-degree murder that you would automatically vote for the death penalty?
>
> [PROSPECTIVE JUROR NEWNAM]: If the circumstances were such that the law required that. Yes.

> [DEFENSE COUNSEL]: Okay. Now, if we got to [the capital sentencing proceeding], again, it would be a situation where somebody—we're not talking about, you know, self-defense or anything like that. We're talking about if there had been a finding of premeditated killing, somebody wanted to do it, thought about it, and then did it, that would be first-degree murder. So that's the circumstances we'd be at when you got to the second stage. Do you feel like in that situation you would—you would pretty much automatically vote for life—or the death penalty?

The prosecutor objected to the second inquiry, characterizing it as a "stake-out" question, and the trial court sustained the objection. Defendant argues that his question of prospective juror Newnam should have been allowed, based on the United States Supreme Court's decision in *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992).

In *Morgan*, the United States Supreme Court held that a defendant must be allowed "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would *always* impose death following conviction." *Id.* at 733, 119 L. Ed. 2d at 506. This Court has recognized that:

> "*Morgan* stands for the principle that a defendant in a capital trial must be allowed to make inquiry as to whether a particular juror would automatically vote for the death penalty. 'Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion.' *State v. Yelverton*, 334 N.C. 532, 541, 434 S.E.2d 183, 188 (1993)."

State v. Richardson, 346 N.C. 520, 532, 488 S.E.2d 148, 155 (1997) (quoting *State v. Robinson*, 336 N.C. 78, 102-03, 443 S.E.2d 306, 317 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995)), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998).

We have also stated that "[t]he trial court may refuse to allow counsel to ask questions that use hypothetical evidence or scenarios to attempt to 'stake-out' prospective jurors and cause them to pledge themselves to a particular position in advance of the actual presentation of the evidence." *Fletcher*, 348 N.C. at 308, 500 S.E.2d at 677. "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), *quoted in State v. Elliott*, 344 N.C. 242, 265, 475 S.E.2d 202, 211 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997).

In this case, we conclude that the trial court did not abuse its discretion by disallowing defendant's question of prospective juror Newnam. The trial court did not violate *Morgan* because defendant was allowed to explore the juror's consideration of life as a possible sentence. Immediately prior to the challenged inquiry, defense counsel was permitted to ask prospective juror Newnam, in accordance with *Morgan*, whether he would "automatically vote for the death penalty" if defendant was convicted of first-degree murder. As noted above, Newnam responded, "If the circumstances were such that the law required that. Yes."

We perceive that this inquiry by defense counsel, along with other questions asked of Newnam, was sufficient to satisfy the requirements of *Morgan*. Further, we note that prospective juror Newnam appropriately indicated that he would vote for the death penalty only if the law required that punishment under the facts of this case. We further note that the challenged inquiry was not merely an appropriate question designed to determine whether Newnam would "automatically" or "always" vote for the death penalty without regard to the law. *See State v. Conner*, 335 N.C. 618, 643-45, 440 S.E.2d 826, 840-41 (1994). Rather, defendant's question was an improper attempt to "stake-out" prospective juror Newnam and determine what sentence he would vote for if defendant was convicted of first-degree murder under a theory of premeditation and deliberation without evidence of an affirmative defense. Therefore, the trial court did not abuse its discretion when it determined that the challenged question was improper. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[5] By assignments of error, defendant contends that the trial court erred by allowing the State to introduce handwritten portions of the victim's diary into evidence. Specifically, defendant argues the challenged evidence constitutes inadmissible hearsay. We disagree.

Underwood, the victim's daughter, identified the four pages at issue as being in her mother's handwriting. The pages appear to be portions of a journal and state as follows:

> Today is Tuesday, September 6, 1988. James came by this morning about 8:30 a.m. Woke me up wanting sex. Said he was going

to his room and get some rest. He worked—he worked the 11:00 p.m. to 7 a.m. shift last night. About 12:45, I rode by James' rooming house taking Janice to work. James' car was not there. The first thought that went through my mind was he was over Betty's house. So after I left Janice, I rode over on 9-B Lakespring Court and there was the car sitting in front of her house. I got out of the car and knocked on the door. Betty's answered—Betty answered the door. I asked her was James there. She didn't answer my question. She asked me who I was. I said his wife. She closed the door in my face. I got back in the car and drove home. I went up Minnie's house and told her what happened. Before I could finish, James came through the back door. I asked him why did he come, and he could go right back and stay. Then I left and got back in the car. He came out to the car. I locked all the doors and windows. I took Minnie to Bingo Busters and came back to my mother's. James gave Betty my mother's telephone number and she called here. I hung up on her. Later James showed up over here again. I got my cousin to take me to bingo, so I would not run into him. He had his cousin come over my mother's house. I wasn't there.

Today is Thursday, September [8th]. James has not been by again or called.

Today is Friday, September 9. James came by at 9 p.m. today. I still love him, but I'm tired of being a fool. From the first year of our meeting until Tuesday, off and on, you have been here—been a heavy burden to bear. I've tried to let you know that I love you and wanted to care for you. We have not been a married couple. Only on paper. I tried really hard when you had your stroke to show you I cared. Since the time I had cramps in my stomach and leg in Liberty, [North Carolina,] I realized that you did not want to have to take care of me. When my chest was cramping and all you was worried about was when you could [f--k] again. Even at Po Folks, when I got sick on the stomach, you were more worried about getting out of the place without paying the bill that you walked off and you left me behind. I have not gotten the respect from you that I deserve for a long time. I fought myself also, because I went along instead of demanding my rights as a woman. You used me for a long time. Took advantage whenever you could. You talked so much about what you have done for me and my children. We had to put up with with [sic] you, your attitudes and wrath. We are a couple of grown kids playing man and

wife. I put up with you lasciviousness and disrespect to my children. I put up with your sleeping with Betty before we got married. I listened to how lonely you felt and how no one cared about you. I put up with you penny pinching and stinginess. You acted like the food you eat, the place you slept in, not having to pay rent meant nothing. When I—when I meet you, you work making at less than $7 an hour. You cannot keep a home for yourself, feed yourself, nor clean up after yourself. You will never grow up in that respect. I watched enough of my life—I wasted enough of my life living with your lying A-S-S. Yes, I feel used, but no one—but not one other day, hour, minute or second will I spend with you. Since I moved here, you've been able to come eat, sleep, rest. No more. Yes, I feel you owe me. I should have left you long after what happened when I was pregnant. You will never find happiness until you find the Lord. Stay away from me and we will live happily. No more lies. You spit in the face of my love for you. Your ex-wife.

The car belongs to the both of us and I want to be able to use it. You should be giving me money when you get paid. Yes, I want what you owe me. This is all you can ever do for me again. Send the money in the mail. 1730 Dunbar Street. This is a safe address.

Defendant contends that the handwritten entries are a factual recitation and therefore are not statements of the declarant's then-existing mental, emotional, or physical condition. *See* N.C.G.S. § 8C-1, Rule 803(3) (1999).

The trial court found that these statements were admissible under Rule 803(3) of the North Carolina Rules of Evidence, which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed

> unless it relates to the execution, revocation, identification, or terms of declarant's will.

Id.

This Court has previously applied the Rule 803(3) exception to both oral and written statements. *See, e.g., State v. McElrath*, 322 N.C. 1, 17, 366 S.E.2d 442, 451 (1988) (telephone message written by neighbor from victim to his roommate that victim was traveling to North Carolina with the defendant was hearsay but was admissible under exception as evidence of then-existing mental, emotional, or physical condition). We have stated that "[e]vidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991), *quoted in State v. Brown*, 350 N.C. 193, 201, 513 S.E.2d 57, 62 (1999), *and quoted in State v. Westbrooks*, 345 N.C. 43, 59, 478 S.E.2d 483, 493 (1996). "The victim's state of mind is relevant if it bears directly on the victim's relationship with the defendant at the time the victim was killed." *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997); *accord Westbrooks*, 345 N.C. at 59, 478 S.E.2d at 493. Moreover, we have also stated that "a victim's state of mind is relevant if it relates directly to circumstances giving rise to a potential confrontation with the defendant." *State v. McLemore*, 343 N.C. 240, 246, 470 S.E.2d 2, 5 (1996); *see also State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between the victim and the defendant prior to the murder), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 224, 393 S.E.2d 811, 819 (1990) (the defendant's threats to the victim shortly before the murder admissible to show the victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (the victim's statements regarding the defendant's threats relevant to the issue of her relationship with the defendant).

In the present case, the victim's challenged statements about her frustration with defendant and her intent to end their marriage were statements indicating the victim's " 'mental condition at the time [the statements] were made and were not merely a recitation of facts.' " *Brown*, 350 N.C. at 201, 513 S.E.2d at 62 (quoting *Westbrooks*, 345 N.C. at 59, 478 S.E.2d at 492). The victim's journal entries "bear[] directly on the victim's relationship with the defendant at the time the victim was killed." *Bishop*, 346 N.C. at 379, 488 S.E.2d at 776. Moreover, the challenged evidence " 'relates directly to circumstances giving rise to a potential confrontation with the defendant,' "

id., (quoting *McLemore*, 343 N.C. at 246, 470 S.E.2d at 5), in that the victim apparently intended to reject defendant's attempts at reconciliation. Thus, these statements were relevant and admissible as statements of the declarant's then-existing state of mind. For the above reasons, these assignments of error are overruled.

[6] By assignments of error, defendant contends the trial court erred in admitting out-of-court statements of several witnesses under the residual hearsay exception because the declarations lacked adequate guarantees of trustworthiness and reliability. Defendant further argues that the State did not provide him adequate notice of its intention to offer the challenged hearsay statements into evidence. We disagree.

N.C.G.S. § 8C-1, Rule 804(b)(5) provides:

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rule 804(b)(5) (1999). The admissibility of statements under 804(b)(5) is dependent first on whether the declarant is unavailable. A declarant is "unavailable," for purposes of the residual exception to hearsay rule, when he or she is deceased at the time of trial. N.C.G.S. § 8C-1, Rule 804(a)(4).

This Court has articulated the guidelines for admission of hearsay testimony under Rule 804(b)(5). After the trial court has resolved that the declarant is unavailable, it must then conduct a six-part inquiry to determine if the hearsay statements may be admitted into evidence. The trial court must determine:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (quoting N.C.G.S. § 8C-1, Rule 804(b)(5)); *see State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986). Under the third step of this analysis—determining whether the hearsay statement sought to be admitted is trustworthy—this Court has directed trial courts to consider the following:

> (1) whether the declarant had personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination.

State v. Tyler, 346 N.C. 187, 195, 485 S.E.2d 599, 603 (citing *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997). This Court has also determined that the nature and character of the statement and the relationship of the parties are pertinent in determining the trustworthiness of the statement. *State v. Brown*, 339 N.C. 426, 437, 451 S.E.2d 181, 188 (1994) (citing

Triplett, 316 N.C. at 11, 340 S.E.2d at 742), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995).

In the present case, the trial court made extensive findings of fact in the record concerning the admissibility of each of the challenged hearsay statements, which have aided this Court in its analysis. The statements in question were made by Pennix, Hayes, Alston, and Durham to Greensboro police officers between 11 and 13 September 1988. All four of the declarants were unavailable at the time of trial because they had all died during the almost nine-year period that defendant remained a fugitive from the law. Both Pennix and Hayes made their statements on 11 September 1988, the day of the murder; Durham made his statement on 12 September 1988; and Alston made his statement on 13 September 1988. Pennix died on 17 December 1992, Hayes died on 14 April 1995, Alston died on 30 July 1997, and Durham died on 8 September 1994.

Defendant contends that the State did not give sufficient notice of its intention to introduce these statements, and therefore, the statements should not have been allowed into evidence. Defendant received written notice on 14 October 1998 of the prosecution's intent to introduce the statements and actual copies of the handwritten statements on 19 October 1998. The State filed written notice of the intention to offer the four statements on 15 October 1998. This Court has stated that "the notice requirement should be construed 'somewhat flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence.' The central inquiry is whether the notice gives the opposing party a fair opportunity to meet the evidence." *Ali*, 329 N.C. at 410, 407 S.E.2d at 193 (quoting *Triplett*, 316 N.C. at 13-14, 340 S.E.2d at 743).

The trial court in the present case determined that defendant received notice of the statements "sufficiently in advance of the offering of the hearsay to allow the defense to prepare to meet the statement[s]." A pretrial hearing concerning the admissibility of the challenged statements was held on 19 October 1998, but the trial judge deferred his final ruling until the defense had an opportunity to review and inspect the files of the Greensboro Police Department for any evidence of a recantation. In addition, the trial court specifically noted that the Public Defender's office, which had an attorney serving as counsel for the defendant in this case, had an investigator on staff. *See Ali*, 329 N.C. at 410, 407 S.E.2d at 193 (notice was sufficient to inform the defendant of the substance of the declarant's state-

ments when it was delivered eleven days prior to trial, and the defendant had a private investigator who interviewed the witness). Based on the foregoing, we conclude the trial court's reasoning was sufficient to support its determination that the notice of the State's intent to offer the challenged statements into evidence was adequate.

Defendant also contends the trial court failed to make sufficient findings of fact to establish that the statements at issue possessed "equivalent circumstantial guarantees of trustworthiness" and, therefore, should not have been admitted into evidence. The record reveals that the trial court addressed each of the challenged statements separately under Rule 804(b)(5) and found them to be trustworthy and reliable.

Pennix and Hayes both made very similar statements to the police on 11 September 1988. As previously noted, Pennix and Hayes gave statements to the authorities indicating that they played bingo with the victim shortly before she was killed. Both Pennix and Hayes observed defendant outside of a bingo parlor speaking with the victim. On the date of their statements, Pennix and Hayes had personal knowledge of both the victim and defendant, as well as the nature of their relationship. Both witnesses saw defendant lead the victim by the arm to the side of the bingo parlor. In addition, both witnesses heard defendant state that he would take the victim home.

Ample evidence of the reliability and trustworthiness of Pennix's and Hayes' statements was proffered by the State. Both Pennix and Hayes were motivated to tell the truth because both women were close friends of the victim's and also knew defendant. Moreover, neither woman had ever expressed any ill will towards defendant, there was no indication that either woman was biased against defendant, and neither had any motivation to lie.

The trial court properly determined that the nature of both women's statements made them reliable and trustworthy. Pennix and Hayes were two of the last people to see the victim alive. Both women made their statements separately to an officer of the law, approximately fourteen hours after last seeing the victim and defendant together. In addition, there is no record of Pennix or Hayes ever recanting their stories. In short, the trial court made sufficient findings of fact to conclude that Pennix's and Hayes' statements to the police possessed "equivalent circumstantial guarantees of trustworthiness."

We likewise conclude that the challenged statements of Pennix and Hayes were more probative than any other evidence that the State could have produced through reasonable means and were otherwise necessary to the prosecution of defendant. Although the statements by Pennix and Hayes do corroborate the statement of Foushee, who testified at trial, Pennix's and Hayes' statements are more probative on some points than any other evidence that the State could reasonably produce. Specifically, Pennix and Hayes left the bingo parlor with the victim and personally observed defendant lead the victim to the side of the building and begin speaking with her. Foushee, however, left the bingo parlor approximately ten minutes later and only observed defendant speaking with the victim, while "boxing [the victim] in." In addition, Hayes personally asked the victim whether she was leaving with Pennix and Hayes, and defendant told them he would take the victim home. Accordingly, the findings of fact by the trial court support the admission of the statements made by Pennix and Hayes under Rule 804(b)(5).

Alston made his statement to police on 13 September 1988. As previously noted, Alston spent time with defendant in the days leading to the murder and last saw defendant at approximately 11:30 p.m. on 10 September 1988. Defendant enlisted Alston to help him reconcile with the victim. In addition, Alston observed a .22-caliber revolver over the sun visor in defendant's vehicle.

Ample evidence of the trustworthiness and reliability of Alston's statements was introduced at trial. Alston had personal knowledge of defendant, the victim, and the condition of their marriage. Alston was in the presence of defendant for extended periods of time during the days and hours before the murder and witnessed defendant's extensive efforts to have someone speak with his wife on his behalf. Alston was motivated to tell the truth because he had expressed no ill will toward defendant. To the contrary, Alston was defendant's cousin, as well as his confidant, negating any motive to incriminate defendant falsely. Alston spoke with the police within sixty hours after victim was killed, while the events were still fresh on his mind. Like Pennix and Hayes, there is no record of Alston ever recanting his story. Alston closely witnessed the turmoil defendant was experiencing over his wife. His statement was a narrative of the week before the murder, and there is no significant reason to suspect inaccuracy or lack of trustworthiness. Therefore, the trial court's findings of fact support its conclusion that Alston's statements to the police possessed "equivalent circumstantial guarantees of trustworthiness."

Furthermore, the statements of Alston were more probative than other evidence reasonably available to the State and were otherwise necessary to the prosecution of defendant. Alston was one of two people whose testimony could establish that defendant actually possessed a .22-caliber weapon prior to the murder. In addition, Alston was the only witness found who could describe how defendant was repeatedly seeking help to reestablish his relationship with his wife. Based on the foregoing, we conclude the trial court's findings were sufficient to support the admission of Alston's challenged statements under Rule 804(b)(5).

Durham made his challenged statements to the police on 12 September 1988. As previously noted, Durham and defendant had served time in prison together prior to the murder. In the days before the murder, defendant asked Durham questions about a .22-caliber gun. Specifically, defendant asked "if you put a 22 against somebody's head, will you kill them?" to which Durham responded in the affirmative, saying, "[Y]es. That's a deadly weapon."

The trial court determined that Durham's statements were reliable and trustworthy. On the day of his statement, Durham knew defendant personally but did not know that the victim was defendant's wife. The trial court determined that Durham's statements were reliable and that Durham was motivated to tell the truth. The trial court specifically noted that Durham spoke with police within two days after the murder and within several days of his conversation with defendant about the effect of a .22-caliber weapon on a human head, indicating that the events were still fresh on his mind. The trial court also noted that Durham apparently never recanted his story. In addition, Durham had expressed no ill will toward defendant, was not biased against defendant, and had no motivation to lie. The trial court noted that, because Durham and defendant had served prison time together and were friends, they would have had unguarded conversations. Based on this evidence, the trial court's findings were sufficient to support its conclusion that Durham's statements to the police possessed "equivalent circumstantial guarantees of trustworthiness."

The trial court also properly determined that the statements of Durham were more probative than other evidence reasonably available to the State and were otherwise necessary to the prosecution of defendant. Durham's statements supported witness Betty James' testimony that defendant had a .22-caliber revolver and was talking about killing the victim. Based on the foregoing, we conclude the trial

court's findings of fact were sufficient to support the admission of Durham's challenged statements under Rule 804(b)(5).

We note that the trial court thoroughly addressed the admissibility of the challenged statements under Rule 804(b)(5) and properly determined that the statements of all four witnesses were admissible. We conclude that the evidence before the trial court supports its findings of fact, which in turn supports its conclusions of law. These assignments of error are overruled.

[7] By assignment of error, defendant contends the trial court erred by denying defendant's request to instruct the jury on the lesser-included offense of second-degree murder. We disagree.

First-degree murder is defined as "the intentional and unlawful killing of a human being with malice and with 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). Second-degree murder is defined as " 'the unlawful killing of a human being with malice, but without premeditation and deliberation.' " *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (quoting *Flowers*, 347 N.C. at 29, 489 S.E.2d at 407), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 976 (2001).

A defendant is " 'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). This Court has explained the test for determining whether an instruction on second-degree murder is required as follows:

> "The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder."

State v. Gary, 348 N.C. 510, 524, 501 S.E.2d 57, 66-67 (1998) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986)).

In the present case, the State's uncontradicted evidence tends to show that defendant killed the victim with premeditation and deliberation. Defendant purchased a .22-caliber weapon and ammunition several days before the murder. When defendant test-fired the weapon and found that it was not properly functioning, he had it repaired. Defendant also made several statements prior to the murder evidencing a premeditated and deliberate intent to kill. Defendant asked a friend whether he could kill someone by putting a .22-caliber weapon to her head and shooting her. Defendant also repeatedly announced his intent to kill the victim to his girlfriend, Betty, in the days leading up to the murder. Further, defendant inquired about borrowing someone's car on the day of the murder although his vehicle was functioning properly. Shortly before the murder, defendant was observed talking to the victim while placing his arms on either side of her, "boxing her in" against a building. Finally, the victim was shot seven times, including four wounds to the head and two close-contact wounds.

Notwithstanding the State's positive and uncontradicted evidence of each element of first-degree murder, defendant argues that, based on his desire to reconcile with the victim, it is "possible" that a conflict erupted between defendant and the victim that resulted in her death. As this Court has previously recognized, however, "mere speculation is not sufficient to negate evidence of premeditation and deliberation." *Gary*, 348 N.C. at 524, 501 S.E.2d at 67. Accordingly, the trial court properly refused to submit an instruction on second-degree murder. This assignment of error is overruled.

SENTENCING PROCEEDING

[8] By assignment of error, defendant contends the trial court erred by failing to submit to the jury the (f)(1) mitigating circumstance: "The defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988) (amended 1994).

In determining whether to submit the (f)(1) mitigating circumstance, the trial court must decide " 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. Blakeney*, 352 N.C. 287, 318, 531 S.E.2d 799, 821 (2000) (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *cert. denied*, — U.S. —, 148 L. Ed. 2d 780 (2001); *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). When evaluating whether a defendant's history is "significant" under subsection

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, 569, 528 S.E.2d 575, 580, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 543 (2000). "[T]he nature and age of the prior criminal activities are important, and the mere number of criminal activities is not dispositive." *Id.* at 570, 528 S.E.2d at 580; *accord State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

During the sentencing proceeding in the present case, the State presented testimonial and documentary evidence that defendant had previously been convicted of the first-degree murder of his former wife, Shirley Harris King, and was sentenced to life imprisonment (defendant was later paroled). The State's evidence tended to show that, in 1967, defendant killed his then twenty-year-old wife by shooting her in the head with a shotgun.

Based on this evidence, the trial court properly concluded that no rational juror could have concluded that defendant's prior criminal activity was insignificant and, therefore, that defendant's criminal history "would not have influenced or had an effect upon the jury verdict as a mitigating circumstance." *Greene*, 351 N.C. at 570, 528 S.E.2d at 580-81. We note this Court has previously recognized that the (f)(1) mitigating circumstance is not properly submitted in cases, such as the present case, that involve "a prior criminal history which includes a violent felony involving death." *State v. McNeil*, 350 N.C. 657, 684, 518 S.E.2d 486, 503 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). Accordingly, this assignment of error is overruled.

[9] By assignment of error, defendant contends the trial court erred in its response to the jury's question concerning whether a recommendation of a life sentence had to be unanimous. Defendant argues the trial court's instruction to the jury in this regard was contrary to controlling precedent. We disagree.

At the conclusion of the sentencing proceeding in the present case, the trial court instructed the jury in accordance with N.C.G.S. § 15A-2000 and the North Carolina Pattern Instructions. N.C.P.I.—Crim. 150.10 (2000). Each juror had a written "Issues and Recommendation as to Punishment" form to use as a guide as the trial court gave the appropriate instruction. At the conclusion of the jury charge, but prior to jury deliberations, the jury passed a note to the trial court, which reads as follows: "Your Honor, Is it required to

be a unanimous decision for the life term?" In response to that question, the trial court instructed the jury as follows:

> Now, you are participating, members of the jury, in a process. And that process is a step-by-step process. And you begin the process from the top, from the beginning, and you take it step-by-step. You don't sit down and first say what shall the punishment be. You consider the various issues that are before you.
>
> I instruct you that your answers to issues one, three, and four must be unanimous.
>
> As you go along, if you have questions, have things to report to me, you can certainly do that, and I'll consider all of the requests and any report that you give me as you go along.

The jury then retired. Based on defendant's repeated requests, however, the trial court brought the jurors back in and further instructed them consistent with *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987).

In *Smith*, we held that if the jurors have reached an impasse in deliberations and they inquire about unanimity, "the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court." *Id.* at 422, 358 S.E.2d at 339.

Here, the trial court further instructed the jury as follows:

> THE COURT: I bring you back in . . . to report to you that after you left the courtroom, it was brought to my attention that some further instructions are necessary to add to the previous instructions I gave you with regard to the question which is, "Is it required to be unanimous decision for the life term?"
>
> I instruct you that if you—if you are unable to reach a unanimous answer to issues one, three, or four, that should not be a concern. You should simply report that to the Court. If you are unable to reach a unanimous recommendation as to punishment, that should not be your concern. You should simply report that to the Court.

Defendant did not suggest an amendment or correction to the instruction given by the trial court when prompted. Thereafter, the jury deliberated and returned a recommendation for a sentence of death.

"In a capital sentencing proceeding, any jury recommendation requiring a sentence of death or life imprisonment must be unanimous." *State v. McCarver*, 341 N.C. 364, 389, 462 S.E.2d 25, 39 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *see also* N.C. Const. art. I, § 24; N.C.G.S. § 15A-2000(b). In this regard, we have stated:

> Since the sentence recommendation, if any, must be unanimous under constitutional and statutory provisions, and particularly in light of the overwhelming policy reasons for a unanimity requirement, we conclude that any issue which is outcome determinative as to the sentence a defendant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury. That is, the jury should answer Issues One, Three, and Four on the standard form used in capital cases either unanimously "yes" or unanimously "no."

McCarver, 341 N.C. at 390, 462 S.E.2d at 39, *quoted in State v. Cheek*, 351 N.C. 48, 85, 520 S.E.2d 545, 566-67 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000). This requirement of jury unanimity on Issues One, Three, and Four

> ensures that the jury *properly* fulfills its duty to deliberate *genuinely* for a *reasonable* period of time in its efforts to exercise guided discretion in reaching a unanimous sentencing recommendation, as required by the Constitution of North Carolina and by our death penalty statute itself.

McCarver, 341 N.C. at 392, 462 S.E.2d at 41.

Based on the foregoing, we conclude the trial court's response to the jury's question in the present case was correct. Specifically, the trial court properly informed the jury, in accordance with *McCarver* and the pattern jury instruction, that its "answers to issues one, three, and four must be unanimous." We also note that the trial court's instruction in accordance with our decision in *State v. Smith* was unwarranted. *See Smith*, 320 N.C. 404, 358 S.E.2d 329. An instruction pursuant to *Smith* is necessary only if the jury is divided or has reported an inability to reach a unanimous verdict. *Id.* at 422, 358 S.E.2d at 339. In this case, however, the jury had not yet begun deliberations when the question at issue was presented to the trial court. Accordingly, neither of the events triggering a *Smith* instruction could have occurred. In any event, the trial court, out of an abundance of caution, gave the additional instruction requested and

agreed to by defendant. "Therefore, if there was error in the charge, it was invited error and not subject to review." *State v. Cagle*, 346 N.C. 497, 509, 488 S.E.2d 535, 544, *cert. denied*, 522 U.S. 1032, 139 L. Ed. 2d 614 (1997). This assignment of error is overruled.

[10] By assignment of error, defendant contends the trial court erred by allowing the State to introduce testimony and photographs dealing with defendant's prior murder conviction. Defendant argues that the evidence unduly prejudiced the jury against him and was completely unnecessary to establish the (e)(3) aggravating circumstance. We disagree.

As previously noted, defendant was convicted of first-degree murder in 1967 for the murder of his first wife, Shirley Harris King, and was sentenced to life imprisonment. During the sentencing proceeding in the present case, the State introduced testimony about the earlier murder and photographs of the crime scene and the victim's body in that case. The photographs illustrated the testimony of the investigating officer, R.C. Booth, and supported the existence of the (e)(3) aggravating circumstance, that defendant had been previously convicted of a felony involving the use of violence to a person. N.C.G.S. § 15A-2000(e)(3). Three photographs were admitted into evidence. The first photograph depicted a shotgun, which was the murder weapon, lying on the ground outside of that victim's apartment. The second photograph shows that victim's body lying on the floor of her kitchen near the sink. The third photograph was of that victim's body at the morgue.

At the outset, we note that the Rules of Evidence do not apply in capital sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1999). Therefore, the trial court has " 'great discretion to admit any evidence relevant to sentencing.' " *Blakeney*, 352 N.C. at 315, 531 S.E.2d at 819 (quoting *State v. Thomas*, 350 N.C. 315, 359, 514 S.E.2d 486, 513, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999)). "Any evidence that the trial court 'deems relevant to sentenc[ing]' may be introduced in the sentencing proceeding." *State v. Heatwole*, 344 N.C. 1, 25, 473 S.E.2d 310, 322 (1996) (quoting *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996)), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). This Court has previously determined that

> "the State must be permitted to present any competent evidence supporting the imposition of the death penalty," [*Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322], including photographs of the vic-

> tim. The State may introduce photographs and videotapes to illustrate the testimony of a witness regarding the manner of a killing. *State v. Kandies*, 342 N.C. 419, 444, 467 S.E.2d 67, 80, *cert. denied*, [519] U.S. [894], 136 L. Ed. 2d 167 (1996). Further, the State may present evidence of the circumstances surrounding a defendant's prior felony, notwithstanding the defendant's stipulation to the record of conviction, to support the existence of aggravating circumstances. *Heatwole*, 344 N.C. at 19, 473 S.E.2d at 319.

State v. Warren, 347 N.C. 309, 316, 492 S.E.2d 609, 612 (1997) (post-mortem photographs of defendant's prior victim were admissible to support the existence of the (e)(3) aggravating circumstance), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998).

Specific photographs of the victim that depict the injuries to the body and illustrate the manner of death are relevant in sentencing issues and may be used to illustrate a witness' testimony. *Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322. " '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.' " *Smith*, 352 N.C. at 555, 532 S.E.2d at 789 (quoting *State v. Williams*, 350 N.C. 1, 34, 510 S.E.2d 626, 648, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999)). Ultimately, "[w]hether photographic evidence is more probative than prejudicial is within the trial court's discretion." *Warren*, 347 N.C. at 316, 492 S.E.2d at 612-13 (citing *Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322).

The trial court in the present case did not abuse its discretion in allowing admission of the challenged testimony and photographs concerning defendant's prior murder conviction. The trial court carefully reviewed all of the proposed testimony and each photograph that was offered into evidence and weighed the probative value against the danger of unfair prejudice. The trial court ultimately denied admission of the photographs that showed blood and brain matter throughout the murder scene and limited the testimony of the investigating officer. However, the trial court allowed limited evidence regarding the murder weapon used by defendant, the condition of that victim's body, and the location of the body and the wound because the evidence was relevant to establish the existence of the (e)(3) aggravating circumstance. Both the testimony and the photographs illustrated the significant injury that was inflicted on that

victim, thereby demonstrating the violence used to commit the felony. The trial court correctly determined that the probative value of the challenged evidence outweighed the danger of unfair prejudice. Accordingly, defendant has failed to show that the trial court abused its discretion by admitting the testimony and the photographs during the sentencing proceeding. This assignment of error is overruled.

[11] By assignment of error, defendant contends the trial court committed plain error by instructing the jury on Issue Three in a manner that allowed the jury to impose a death sentence by merely finding mitigation and aggravation of equal weight. We disagree.

Issue Three on the issues and recommendation form that was provided to the jury in this case required that the jury answer the following question: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance found by you?" In addition, the trial court similarly instructed the jury to "decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstance so valued against the mitigating circumstance or circumstances so valued, and finally determine whether the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance."

We have repeatedly rejected precisely the same argument. Specifically, we have stated as follows:

> "The defendant says [Issue Three] is deficient because if the jury is in equipose it must answer the issue 'yes' and impose the death penalty. We do not believe that the defendant['s] . . . analysis of the issue is correct. If the jury must be satisfied beyond a reasonable doubt before finding the mitigating circumstances are insufficient to outweigh the aggravating circumstances and the jury is in a state of equipose as to the issue it would answer the issue 'no.' We hold [that Issue Three] was properly submitted."

State v. Keel, 337 N.C. 469, 493-94, 447 S.E.2d 748, 762 (1994) (quoting *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)) (alterations in original), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995); *accord State v. Stephens*, 347 N.C. 352,

366-67, 493 S.E.2d 435, 444 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998). Defendant has presented no compelling basis for us to revisit our prior holdings on this issue. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises ten additional issues that he concedes this Court has previously decided contrary to his position: (1) the trial court committed plain error by telling the sentencing jury that it must be unanimous to answer "no" at Issues One, Three, and Four on the issues and recommendation sheet; (2) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's constitutional rights because they used the inherently ambiguous and vague terms "satisfaction" and "satisfy," thus permitting jurors to establish for themselves the legal standard to be applied to the evidence; (3) the trial court committed reversible error in denying defendant the right to open and close the penalty phase arguments; (4) the trial court committed reversible error in denying defendant's request for allocution during the penalty phase of his capital case; (5) the trial court committed reversible constitutional error by failing to require the State to disclose the aggravating circumstances on which it intended to rely at sentencing; (6) the trial court committed reversible error by instructing jurors to decide whether nonstatutory mitigating circumstances have mitigating value; (7) the trial court committed reversible error in allowing death-qualification of the jury by excusing for cause certain jurors who expressed an unwillingness to impose the death penalty, as this process created a conviction-prone jury and denied defendant a fair trial; (8) the trial court committed reversible error by its use of the term "may" in sentencing issues Three and Four, thereby making consideration of proven mitigation discretionary with the sentencing jurors; (9) the trial court committed reversible error in its penalty phase instructions, which allowed each juror in deciding Issues Three and Four to consider only the mitigation found by that juror at Issue Two, thereby limiting the full and free consideration of mitigation required by the state and federal Constitutions; and (10) the North Carolina death penalty statute is unconstitutional. Defendant makes these arguments to allow this Court to reexamine its prior holdings and to preserve these issues for any possible further judicial review. We have thoroughly considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, 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 are required to review and determine: (1) whether the record supports the jury's finding of any aggravating circumstances upon which the sentence of death was based; (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 premeditation and deliberation. Following a capital sentencing proceeding, the jury found one aggravating circumstance: defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3).

Two statutory mitigating circumstances were submitted for the jury's consideration: (1) the capital felony was committed while the defendant was under the influence of emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (2) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of these statutory mitigating circumstances, the jury found only (f)(2) to exist. Of the eight nonstatutory mitigating circumstances submitted by the trial court, one or more jurors found the following: that defendant had feelings of abandonment by his parents and was raised by his grandparents.

After thoroughly examining the record, transcript, and briefs in this case, we conclude the evidence fully supports the aggravating circumstance found by the jury. Further, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn now to our final statutory duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298

N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting our 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).

We have found the death sentence disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by Gaines*, 345 N.C. 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. Defendant was convicted of first-degree murder on the basis of premeditation and deliberation. We have repeatedly recognized 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). Here, the jury also found the (e)(3) aggravating circumstance based on defendant's prior murder conviction for shooting and killing his first wife. We have recognized that the jury's finding of the prior conviction of a violent felony aggravating circumstance "is significant in finding a death sentence proportionate." *Id.* None of the cases in which the death sentence was determined to be disproportionate have included this aggravating circumstance. *Id.*

We also compare the present case with cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of 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 support a sentence of death. *Warren*, 347 N.C. at 328, 492 S.E.2d at 619. The (e)(3) statutory aggravating circumstance, which the jury found here, is among those four. *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). Therefore, we conclude that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

Whether a sentence of death is "disproportionate in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). 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 present case is not disproportionate.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. The sentence of death recommended by the jury and entered by the trial court must therefore be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. ANTOINE DEPRAY JACKSON

No. 427PA00

(Filed 8 June 2001)

Firearms and Other Weapons— possession by felon—operability

The trial court did not err in a prosecution for possession of a firearm by a felon by denying defendant's requested instruction that inoperability constituted an affirmative defense. Although N.C.G.S. § 14-415.1 addresses the size of handguns or firearms which fall under its purview, it does not address whether the handgun or firearm has to be operational at the time of the charge. Cases relied upon by the Court of Appeals in holding to the contrary are not determinative because they involved other

statutes or dicta; however, *In re Crowley*, 120 N.C. App. 274, involved a similar issue, similar statute, and similar analysis. The focus of the words "purchase, own, possess, or have in custody, care, or control" in N.C.G.S. § 14-415.1 is on the felon's access to the firearm and not the firearm's operability at any given point, and this focus is consistent with the logical objective of preventing a show of force by felons, real or apparent. Finally, it is illogical to conclude that the legislature intended that a felon in possession of an unloaded firearm was not in violation of the prohibition of possession of firearms by felons.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 139 N.C. App. 721, 535 S.E.2d 48 (2000), finding no error in part and ordering a new trial in part for judgments entered 29 October 1998 by Bridges, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 14 March 2001.

Roy A. Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State-appellant.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellee.

LAKE, Chief Justice.

Defendant was arrested on 24 March 1998 by Mecklenburg County police on charges of carrying a concealed weapon, possession of a firearm by a felon, and resisting a public officer. He was tried at the 28 October 1998 Criminal Session of Superior Court, Mecklenburg County, and was found guilty of all charges. The trial court sentenced defendant to an active term of imprisonment of fifteen to eighteen months for the consolidated possession and concealed weapon charges and to a suspended sentence of forty-five days for the resisting a public officer charge and a second-degree trespassing charge, to which defendant had previously pled guilty. From these judgments and convictions, defendant gave timely notice of appeal.

On appeal, the Court of Appeals found no error in defendant's conviction of resisting a public officer and in the trial court's admission of evidence regarding defendant's prior voluntary manslaughter conviction, used to establish that defendant was a felon for the purposes of the possession of a firearm charge. *State v. Jackson*, 139 N.C. App. 721, 732-33, 535 S.E.2d 48, 55 (2000). However, with regard

to defendant's conviction of the firearm possession charge, the Court of Appeals concluded that inoperability of a firearm is an affirmative defense, and that defendant was therefore entitled to a jury instruction in that regard, and reversed and remanded for a new trial. *Id.* at 728, 535 S.E.2d at 52.

This Court granted the State's petition for discretionary review on the issue of whether inoperability of a firearm is in fact an affirmative defense to the charge of possession of a firearm by a felon. After careful review, we hold that it is not, and therefore, we reverse the decision of the Court of Appeals as to that issue.

The State's evidence at trial showed that at approximately 7:10 a.m. on 24 March 1998, Officers Jeffrey Troyer and John Robert Garrett of the Charlotte-Mecklenburg Police Department were dispatched to a public housing area to investigate a complaint that an individual was waving a gun in the air. Upon arriving at the scene, the officers approached a man fitting the description given by the complainant. Officer Garrett asked the suspect, later identified as defendant, if they could talk with him and informed him that someone had called in about a guy waving a gun around. Defendant responded, "Oh, I know who you mean; I'll show you where he is." Officer Garrett asked defendant if he could search him first, and defendant agreed. During the search, Officer Troyer retrieved a loaded chrome-plated handgun, which defendant had tucked in the waistband of his pants. The officers were in the process of arresting defendant for carrying a concealed weapon when he broke free and ran. The officers apprehended and arrested defendant after a brief chase.

It was later confirmed that defendant had previously been banned from the public housing premises after pleading guilty to a charge of second-degree trespassing.

At trial, defendant called Todd Nordoff, a firearms and toolmark examiner with the Charlotte-Mecklenburg Crime Laboratory. Nordoff testified that he examined the handgun identified as having been recovered from defendant, and that the gun lacked an internal pin and spring. Nordoff responded affirmatively to questions about whether the missing spring played an "integral" role in the chain reaction permitting the gun to fire and whether without the spring the gun "was not normally operable." On cross-examination, however, Nordoff testified that the gun could be fired by removing the grip and manually tripping the internal mechanism. He also stated that the gun

could possibly be fired by hitting it hard on the top of the weapon, but that he had not attempted to do so.

Relying on Nordoff's testimony, defendant moved to dismiss the possession of a firearm charge, based on the assertion that there was insufficient evidence that the gun in question was operable. The trial court denied defendant's motion, and defendant further moved for a jury instruction that inoperability constituted an affirmative defense to possession of a firearm. The trial court denied defendant's request for instruction, and after deliberation, the jury found defendant guilty of all charges.

The only issue before this Court is whether "operability" is an essential element of a "handgun or other firearm" such that "inoperability" is an affirmative defense to a charge of "possession of a firearm by a felon," as such offense is defined by N.C.G.S. § 14-415.1. Pursuant to that section,

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).
>
> Every person violating the provisions of this section shall be punished as a Class G felon.
>
> Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.

N.C.G.S. § 14-415.1(a) (1999).

Although the statute addresses the size of handguns or firearms which fall under its purview, it does not address whether the handgun or firearm has to be operational at the time of the charge, or whether it suffices that the handgun or firearm was designed to be operational at some point in the past or could be made to be operational at some point in the future.

One of the cases on which the Court of Appeals relied in reaching its interpretation that inoperability is an affirmative defense to the charge of possession of a firearm by a felon is *State v. Fennell*, 95 N.C. App. 140, 382 S.E.2d 231 (1989). In *Fennell*, the defendant was in

possession of a disassembled sawed-off shotgun and was convicted of possession of a "weapon of mass death and destruction," in violation of N.C.G.S. § 14-288.8. *Id.* at 141, 382 S.E.2d at 232. One of the issues raised on appeal in *Fennell* was in fact whether the jury should have been instructed "that a weapon which will not fire cannot be a weapon of mass death and destruction." *Id.* However, although the issue raised in *Fennell* is similar to the issue raised in the instant case, the areas of law and the statutory construction of the sections in question are dissimilar.

Unlike section 14-415.1, addressing possession of a firearm by a felon, section 14-288.8, addressing possession of weapons of mass death and destruction by anyone, does not require statutory interpretation to determine that "inoperability" alone is not a defense. Section 14-288.8 specifically defines "weapon of mass death and destruction" to include "[a]ny combination of parts either designed or intended for use in converting any device into any weapon [of mass death and destruction] and from which a weapon of mass death and destruction may readily be assembled." N.C.G.S. § 14-288.8(c)(4) (1999). Therefore, a weapon of mass death and destruction clearly does not have to be "operable" at the time of arrest, as the pieces themselves can constitute a "weapon of mass death and destruction." Although the Court of Appeals stated in *Fennell* that inoperability is an affirmative defense to a charge under N.C.G.S. § 14-288.8, we read this to mean inoperability is a defense to the extent that the defendant can prove the pieces seized were not "designed or intended for use in converting any device" into a weapon of mass death and destruction.

Additionally, the fact that the legislature defined "weapon" in section 14-288.8 of article 36A as including "parts either designed or intended for use in converting any device into any weapon" is not indicative that the legislature would have defined "firearm" as including pieces of a firearm in article 54A had it meant to do so. The nature of some weapons of mass death and destruction, such as bombs, make them conducive to being kept in parts, whereas a firearm clearly has the appearance of a firearm, whether it is missing an internal mechanism or not, and indeed its use as a threatening weapon can rely solely on its appearance as a firearm.

In reaching its determination in *Fennell*, the Court of Appeals referenced its holding in *State v. Baldwin*, 34 N.C. App. 307, 237 S.E.2d 881 (1977), and stated that the holdings in *Fennell* and *Baldwin* were consistent. In *Baldwin*, the felon defendant was stopped by police

and was in possession of a twelve-gauge sawed-off shotgun. The only issue raised on appeal was whether the State was required to submit evidence that the gun which the defendant was charged with possessing was operable in order to prove, under N.C.G.S. § 14-415.1, that the felon was in possession of a "firearm." *Id.* at 308, 237 S.E.2d at 881. The defendant never presented any evidence that the shotgun was inoperable, nor did he assert that inoperability was an affirmative defense. Therefore, the actual holding in *Baldwin*, that the State did not have to submit evidence of operability, was not on point with the question regarding inoperability raised in *Fennell*, and despite defendant's assertions to the contrary, it also is not on point with the question now before this Court.

The court in *Baldwin* did discuss, in dicta, cases from other jurisdictions addressing whether inoperability is an affirmative defense. However, "[i]t is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision." *Moose v. Board of Comm'rs of Alexander County*, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916). Therefore, dicta in *Baldwin* regarding inoperability as an affirmative defense to N.C.G.S. § 14-415.1 is not determinative of the issue before us.

Based on the foregoing, the holdings in *Fennell* and *Baldwin* are not determinative to the issue in the case at hand. However, to the extent that language in *Fennell* or *Baldwin* conflicts with our holding in the instant case, it is disavowed.

Another case referenced by the Court of Appeals in reaching its determination in the case at bar is *In re Cowley*, 120 N.C. App. 274, 461 S.E.2d 804 (1995). Although the court differentiated its holding in *Cowley*, we find the issue raised in *Cowley*, the statute from which the issue was raised, and the analysis necessary to reach a determination to be similar to the instant case.

In *Cowley*, the defendant was in possession of a handgun on school property and was charged with a violation of N.C.G.S. § 14-269.2, which makes it a felony to carry a firearm on educational property. *Id.* at 274-75, 461 S.E.2d at 805. The question raised on appeal was specifically whether inoperability of the handgun was an affirmative defense. The Court of Appeals relied on its interpretation of the legislative intent behind the statute in holding that inoper-

ability was not an affirmative defense because the purpose of N.C.G.S. § 14-269.2 was "to deter students and others from bringing any type of gun onto school grounds" due to "the increased necessity for safety in our schools." *Id.* at 276, 461 S.E.2d at 806.

Both *Cowley* and the instant case raise the question of whether inoperability is an affirmative defense to a charge pursuant to a statute which addresses a specific issue of public concern. Just as there is heightened risk and public concern associated with firearms on educational property, which the legislature addressed through N.C.G.S. § 14-269.2, there is also heightened risk and public concern associated with convicted felons possessing firearms, which the legislature addressed through N.C.G.S. § 14-415.1. Both are exceptional situations, which have been addressed through dedicated statutory law. The statutory law in each case does not specifically address operability or inoperability of weapons and requires judicial interpretation of the legislative objective and intent which resulted in the initiation of the legislation.

"When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). If a statute is unclear or ambiguous, however, courts must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress. *Id.* at 239, 244 S.E.2d at 389.

In determining whether the legislature intended inoperability of the firearm to be an affirmative defense to N.C.G.S. § 14-415.1, we find the breadth of acts which the legislature included as violations under the statute to be instructive. The statute provides that "[i]t shall be unlawful for any person who has been convicted of a felony to *purchase, own, possess, or have in his custody, care, or control* any handgun or other firearm." N.C.G.S. § 14-415.1(a) (emphasis added). The focus of the words "purchase, own, possess, or have in custody, care, or control" is on the felon's access to the firearm and not the firearm's operability at any given point in time.

Additionally, the interpretation that operability is not a necessary component of a "firearm" is also consistent with the intuitively logical objective of the statute to prevent a show of force by felons,

either real or apparent. An unloaded or inoperable firearm has " 'the same effect on victims and observers when pointed or displayed, tending to intimidate, and also increase the risk of violence by others who may respond to the perceived danger represented' " as a presumably operational gun. *United States v. Hunter*, 101 F.3d 82, 86 (9th Cir. 1996) (quoting *United States v. Martinez*, 912 F.2d 419, 421 (10th Cir. 1990)), *cert. denied*, 520 U.S. 1133, 137 L. Ed. 2d 360, *and cert. denied*, 520 U.S. 1161, 137 L. Ed. 2d 505 (1997). "[T]he display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue." *McLaughlin v. United States*, 476 U.S. 16, 17-18, 90 L. Ed. 2d 15, 18 (1986) (footnote omitted).

Defendant contends this Court should rely on definitions of "firearm" and "handgun" in N.C.G.S. § 14-409.39, the definition section in article 53B, Firearm Regulation, in reaching its determination. That section defines "firearm" as "[a] handgun, shotgun, or rifle which expels a projectile by action of an explosion," and defendant argues that if the firearm in question cannot expel a projectile at the time of possession, it does not fit under the statutory definition of "firearm." N.C.G.S. § 14-409.39(2) (1999). However, defendant's rationalization could also be applied to an unloaded firearm. We do not agree with the illogical conclusion that our legislature intended that a felon who is in possession of an unloaded firearm is not in violation of the prohibition of possession of firearms by felons. " 'It begs reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they are unloaded, or so long as they are temporarily in disrepair, or so long as they are temporarily disassembled, or so long as for any other reason they are not immediately operable.' " *State v. Padilla*, 95 Wash. App. 531, 535, 978 P.2d 1113, 1115 (quoting *State v. Anderson*, 94 Wash. App. 151, 162, 971 P.2d 585, 591 (1999), *rev'd on other grounds*, 141 Wash. 2d 357, 5 P.3d 1247 (2000)), *rev. denied*, 139 Wash. 2d 1003, 989 P.2d 1142 (1999).

Although the question of whether inoperability of a firearm is an affirmative defense under N.C.G.S. § 14-415.1 is one of first impression in this state, many other states have reached the question with varying degrees of decisiveness. Some state courts have specifically held that inoperability is immaterial. *See People v. Hester*, 271 Ill. App. 3d 954, 649 N.E.2d 1351 (1995) (finding no error in trial court's instruction to the jury that the weapon's operability is immaterial). Some courts have applied a more fact-specific test requiring the State to prove, through direct or circumstantial evidence, that the firearm

is operational or that it may readily be made operational. *See Williams v. Commonwealth*, 33 Va. App. 796, 807, 537 S.E.2d 21, 26 (2000). Other states have the advantage of having statues which have clear language stating that a "firearm" under the statute can be loaded, unloaded, operable or inoperable. *See State v. Middleton*, 143 N.J. Super. 18, 22, 362 A.2d 602, 603 (1976) (possession statute specifically states "any firearm, whether or not capable of being discharged"), *aff'd*, 75 N.J. 47, 379 A.2d 453 (1977); *see also Fortt v. State*, 767 A.2d 799, 803 (2001) (citing Delaware statute which defines firearm as including operable, inoperable, loaded or unloaded); *State v. Webster*, 94 Haw. 241, 243, 11 P.3d 466, 468 (2000) (citing Hawaii statute which defines firearm as including operable, inoperable, loaded or unloaded); *Hughes v. State*, 12 P.3d 948, 950 (2000) (citing Nevada statute which defines firearm as including operable, inoperable, loaded or unloaded).

It is also noteworthy that federal circuit courts addressing the question of inoperability of a firearm as an affirmative defense have reached the conclusion that it is not a defense. *See United States v. Adams*, 137 F.3d 1298, 1300 (11th Cir. 1998) (holding nothing in the statutory language of 18 U.S.C. §§ 922(g)(1) or 921(a)(3) or legislative history indicates that an unlawfully possessed firearm must be operable for purposes of the statute); *United States v. Maddix*, 96 F.3d 311, 316 (8th Cir. 1996) (holding 18 U.S.C. § 921(a)(3) does not require a firearm to be operable); *United States v. Yannott*, 42 F.3d 999, 1006 (6th Cir. 1994) (stating "the law is clear that weapon does not need to be operable to be a firearm"), *cert. denied*, 513 U.S. 1182, 130 L. Ed. 2d 1125 (1995); *United States v. Willis*, 992 F.2d 489, 491 (4th Cir.) (finding no merit to the claim that an inoperable firearm is not a firearm under 18 U.S.C. § 921(a)(3)), *cert. denied*, 510 U.S. 857, 126 L. Ed. 2d 127 (1993); *United States v. Morris*, 904 F.2d 518, 519 (9th Cir. 1990) (stating " '[t]he statute imposes no requirement that the gun be loaded or operable' ") (quoting *United States v. Gonzalez*, 800 F.2d 895, 899 (9th Cir. 1986)); *United States v. Perez*, 897 F.2d 751, 754 (5th Cir.) (stating "[a]n inoperable firearm is nonetheless a firearm"), *cert. denied*, 498 U.S. 865, 112 L. Ed. 2d 141 (1990).

Based on the foregoing, we hold that inoperability of a "handgun or other firearm" is not an affirmative defense to a charge of possession of a firearm by a felon under N.C.G.S. § 14-415.1. We therefore reverse the Court of Appeals' holding with regard to that issue.

REVERSED.

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

STATE OF NORTH CAROLINA v. ANTIONE DENARD ALLEN

STATE OF NORTH CAROLINA v. MARSHALL DEWONE GILLESPIE

No. 68A00

(Filed 8 June 2001)

Criminal Law— prosecutor's argument—credibility of hearsay statements—communication of judge's ruling

A prosecutor violated N.C.G.S. § 15A-1230(a) in a first-degree murder prosecution by traveling outside the record in his closing argument to disclose the legal opinion of the trial court as to the credibility of hearsay evidence where a witness had returned to Mexico and was unavailable, the court allowed an officer to testify as to her statements, and the prosecutor argued that the court had found the statements to be trustworthy and reliable. The jurors were not entitled to hear the trial judge's legal findings and conclusions regarding the admissibility of these hearsay statements, the argument clearly conveyed an opinion as to the credibility of the evidence attributed directly to the trial judge in his presence, and the judge then overruled defendant's objection. Special care must be taken against expressing or revealing to the jury legal rulings which have been made by the trial court; although this court did not convey an improper opinion in its own words, it did allow the prosecutor to convey the court's opinion with virtually the same effect. Much of the State's evidence was circumstantial and this evidence was possibly determinative; it cannot be said that there is no reasonable possibility of a different result without this argument.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a sentence of death upon each defendant entered by Cornelius, J., on 5 August 1999 in Superior Court, Forsyth County, upon jury verdicts finding defendants guilty of first-degree murder. On 22 February 2000 and 10 April 2000, the Supreme Court allowed

defendant Gillespie's and defendant Allen's respective motions to bypass the Court of Appeals as to their appeals of additional judgments. Heard in the Supreme Court 12 February 2001.

Roy A. Cooper, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Robert K. Leonard and Teresa L. Hier for defendant-appellant Allen.

F. Kevin Mauney and Nils E. Gerber for defendant-appellant Gillespie.

LAKE, Chief Justice.

Defendants Antione Denard Allen and Marshall Dewone Gillespie were indicted for the murders of Feliciano Noyola and Esmeralda Noyola, and were tried capitally at the 12 July 1999 Criminal Session of Superior Court, Forsyth County. The jury found each defendant guilty of two counts of first-degree murder under the felony murder rule. Following a capital sentencing proceeding, for the murder of Esmeralda Noyola, the jury recommended a sentence of death for defendant Gillespie and life imprisonment without parole for defendant Allen. For the murder of Feliciano Noyola, the jury recommended a sentence of death for defendant Allen and life imprisonment without parole for defendant Gillespie. On 5 August 1999, the trial court sentenced each defendant to one sentence of death and one sentence of life imprisonment, in accordance with the jury's recommendations.

After a thorough review of the issues raised on appeal and for the reasons discussed herein, we conclude that defendants are entitled to a new trial.

The State's evidence at trial tended to show that the victims resided in an apartment at 1231-B Gholson Street in Winston-Salem, North Carolina. At approximately 7:10 p.m. on the evening of 27 January 1998, Officer T.G. Brown of the Winston-Salem Police Department arrived at this apartment in response to a reported shooting. Officer Brown entered the apartment and found two Hispanic women, later identified as Maria Santos and Justina Dominguez. Both women were crying and agitated, and neither woman spoke English. Ms. Santos showed Officer Brown a child, later identified as Esmeralda Noyola, who was lying on the floor inside one of the bedrooms. She exhibited no signs of life. Officer

Brown also saw the body of a man, later identified as Feliciano Noyola, lying on the kitchen floor. The officer placed Ms. Santos and Ms. Dominguez in a vacant bedroom and called for an ambulance and additional officers.

United States Secret Service Agent Rafael Barros responded to Officer Brown's request for additional officers. Agent Barros testified at trial that he was employed by the Winston-Salem Police Department in January 1998 and that he speaks Spanish fluently. At approximately 7:20 p.m., he arrived at the scene of the incident and spoke with Ms. Santos and Ms. Dominguez. Ms. Santos told him that she was the mother of Esmeralda Noyola. Ms. Santos also told him that three black males entered the apartment through the front door, demanded money and shot Feliciano Noyola and her daughter. Agent Barros also testified that Ms. Santos appeared confused and was unable to provide an accurate description of the suspects at that time.

Ms. Dominguez told Agent Barros that she was the wife of Feliciano Noyola. She also told him that while she was in a bedroom feeding her baby, a black male entered, grabbed the gold chain she was wearing from her neck and left the room. Ms. Dominguez then heard people arguing and heard gunshots, but she never left the bedroom while the intruders were in the apartment.

On 28 January 1998, Agent Barros showed a photographic lineup to Ms. Santos and Ms. Dominguez. Agent Barros testified that Ms. Santos identified the picture of defendant Gillespie as the man who shot her daughter, but he also stated that she was not positive in her selection. Ms. Dominguez did not identify defendant Gillespie. Neither woman identified defendant Allen.

Both women subsequently returned to Mexico. Agent Barros testified that he attempted to persuade them to return to the United States for trial. He told the two women that he would travel to Mexico and assist them in returning to the United States, including entering the country legally for the trial. He informed them that transportation and accommodations would be arranged and paid for by a governmental agency, and that child-care assistance would be provided. Despite these efforts, both women refused to return for the trial. Ms. Santos told Agent Barros that she could not return because she had to care for her sick mother. Ms. Dominguez stated that she could not return because she had to care for her three children. Subpoenas

were issued for both Ms. Santos and Ms. Dominguez, but they were returned unserved.

Stephon Hairston and Kenyon Grooms also testified as witnesses for the State. Hairston admitted his involvement in the robbery. He testified that five men, including Grooms, the two defendants and himself, proceeded to Gholson Street to commit the robbery on the evening of 27 January. He also stated that defendant Gillespie carried a nine-millimeter semiautomatic pistol the night of the murders. Both Hairston and Grooms testified that defendant Allen carried an assault rifle before he entered the apartment.

On 28 January 1998, Dr. Patrick E. Lantz, a forensic pathologist, performed autopsies on both victims. Dr. Lantz found entrance and exit gunshot wounds and multiple projectile fragments in the abdomen area of Feliciano Noyola. Dr. Lantz stated that the bullet entered on the right side of the abdomen and hit the liver, right kidney and spine, where it fragmented and hit the aorta and left kidney, and exited at the hipbone. The wounds to Feliciano Noyola and bullet fragmentation found in his body were characteristic of a high-powered rifle. Dr. Lantz also found an entrance gunshot wound over the left shoulder blade and an exit wound on the right side of the neck of Esmeralda Noyola. The wounds were consistent with having been caused by a nine-millimeter bullet.

On appeal, defendants contend that the trial court committed reversible error in allowing the prosecutor to improperly convey to the jury a ruling made by the trial court concerning the admissibility of Ms. Santos' statements, in violation of N.C.G.S. § 15A-1230. Specifically, the trial court ruled on *voir dire* that the first statements made by Ms. Santos and Ms. Dominguez to the officer at the scene on the evening of 27 January 1998 were admissible, through the testimony of Agent Barros, under Rules 803(1) and 803(2) of the North Carolina Rules of Evidence, which establish the admissibility of hearsay evidence conveying present-sense impressions and excited utterances, respectively. N.C.G.S. § 8C-1, Rules 803(1)-(2) (1999). The trial court also ruled that the statements and photographic identification made by Ms. Santos on 28 January 1998 were admissible, through the agent's testimony, under Rule 804(b)(5) of the North Carolina Rules of Evidence, which establishes the residual exception to the prohibition of hearsay evidence. N.C.G.S. § 8C-1, Rule 804(b)(5) (1999). The trial court made these rulings outside the presence of the jury.

We note the assignments of error brought forward on appeal by defendants with respect to these rulings themselves, and while we have some reservation as to the rationales proffered by the trial court for the underlying admissibility of several of the hearsay statements given to Agent Barros, we conclude these issues are not dispositive and, in any event, will be unlikely to arise at retrial. We therefore address the more fundamental issue of undue prejudicial error in the prosecutor's closing argument concerning these same statements.

During closing arguments in the guilt-innocence phase of the trial, the prosecutor stated, in part:

> We told you in the beginning we didn't have an eyewitness, but we do have an eyewitness, we have Maria Santos. She's an eyewitness in this case and she spoke through you—to you through the words of Rafael Barros who talked to her that night. She described what she saw, how many people entered her house. And you heard her words through Officer Barros, because the Court let you hear it, because the Court found they were trustworthy and reliable. . . . If there had been anything wrong with that evidence, you would not have heard that.

Counsel for defendant Gillespie objected to this portion of the argument, and the trial court overruled the objection. Defendants now contend that the prosecutor's argument impermissibly traveled outside the record, and the trial court's ruling in allowing this argument to go forward over objection was error. We agree.

We have repeatedly stated that "[i]n both the guilt-innocence and the sentencing phases of a capital trial, counsel is permitted wide latitude in his argument to the jury. He may argue the facts in evidence and all reasonable inferences therefrom as well as the relevant law." *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994) (citations omitted). " 'Counsel may not, however, place before the jury incompetent and prejudicial matter by expressing personal knowledge, beliefs, and opinions not supported by evidence.' " *State v. Wilson*, 335 N.C. 220, 225, 436 S.E.2d 831, 834 (1993) (quoting *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)). The determination of " '[w]hether counsel has abused this right is a matter ordinarily left to the sound discretion of the trial court.' " *Id.* (quoting *Anderson*, 322 N.C. at 37, 366 S.E.2d at 468). Upon objection, however, " 'the trial court has the duty to censor remarks not warranted by the evidence or law.' " *Id.* (quoting *Anderson*, 322 N.C. at 37, 366 S.E.2d at 468).

Specifically, N.C.G.S. § 15A-1230(a) provides as follows:

> During 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 except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C.G.S. § 15A-1230(a) (1999). In this regard, this Court has repeatedly stressed that counsel may not "travel outside the record" by arguing facts or matters not included in the evidence of record. *State v. Smith*, 352 N.C. 531, 560, 532 S.E.2d 773, 791-92 (2000), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 360 (2001); *Sanderson*, 336 N.C. at 15-16, 442 S.E.2d at 42; *Wilson*, 335 N.C. at 224-25, 436 S.E.2d at 834; *Anderson*, 322 N.C. at 37, 366 S.E.2d at 468; *State v. Covington*, 317 N.C. 127, 130-31, 343 S.E.2d 524, 526-27 (1986); *State v. Williams*, 314 N.C. 337, 358, 333 S.E.2d 708, 722 (1985); *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975).

In order to demonstrate prejudicial error, a defendant must show that there is a reasonable possibility a different result would have been reached had the error not occurred. N.C.G.S. § 15A-1443(a) (1999); *State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988). During closing arguments in the instant case, the prosecutor traveled well beyond the record when he stated to the jury that not only had the trial court let the jury hear these statements, but also that the court had "found" the statements of Ms. Santos "trustworthy and reliable." This portion of the argument was not part of the evidence presented to the jurors. Rather, it was a second-hand statement or revelation of the trial judge's legal determination or opinion on the evidence made during a hearing properly held outside the jury's presence. The jurors were not entitled to hear the trial judge's legal findings and conclusions regarding the admissibility of these hearsay statements. This argument clearly conveyed an opinion as to the credibility of evidence that was before the jury. This opinion was attributed directly to the trial judge in his presence, and he then overruled defendant's objection to this revelation.

Parties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial

court, as any such disclosures will have the potential for special influence with the jurors. *See* N.C.G.S. § 15A-1222 (1999) (stating that "[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"). As we have stated: " 'The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury.' " *State v. Belk*, 268 N.C. 320, 324, 150 S.E.2d 481, 484 (1966) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)); *accord McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988).

> "In *State v. Simpson*, 233 N.C. 438, 442, 64 S.E.2d 568, [571 (1951)], this Court said: "It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. . . . 'The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial.'—*Walker, J.* in *[State] v. Ownby*, 146 N.C. 677, [678-79,] 61 S.E. 630[, 630 (1908)]."

State v. Williamson, 250 N.C. 204, 207, 108 S.E.2d 443, 445 (1959).

The prosecutor's argument in the instant case spoke to and disclosed a legal opinion of the trial court on the admissibility and credibility of evidence, an opinion which was specifically outside the record. This argument may not be characterized as a reasonable "analysis of the evidence" or as argument for "any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a). As this Court stated in *State v. Williamson*, it does not matter "in what way or manner" an opinion of the trial court is conveyed to the jury, "whether directly or indirectly." *Williamson*, 250 N.C. at 207, 108 S.E.2d at 445. The potential for prejudicial influence remains, even if the opinion is conveyed indirectly through a party's closing argument to the jury. Although the trial court in the instant case did not convey, through its own words, an improper opinion to the jury, it did allow

the prosecutor to convey the court's opinion, with virtually the same effect.

In view of the foregoing, we cannot say that there is or can be no reasonable possibility that a different result would have been reached had this argument not occurred. Much of the State's evidence in the trial of these cases was circumstantial and placed both defendants at the scene of the crimes. Ms. Santos' statements to Agent Barros provided eyewitness evidence about the perpetrators and the events that transpired inside the apartment on the night of the murders. Although her credibility was at issue, particularly as to the identity of the perpetrators, her statements were possibly determinative of the verdicts in this trial as to both defendants.

We therefore conclude that the prosecutor violated N.C.G.S. § 15A-1230(a) by traveling outside the record during his closing argument and in so doing disclosing the legal opinion of the trial court as to the credibility of the evidence before the jury. For the reasons stated, the trial court's allowance of the prosecutor's argument, over objection, was error. Defendants are entitled to and must be awarded a new trial.

NEW TRIAL.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 240 GREGORY R. HAYES, RESPONDENT

No. 139A01

(Filed 8 June 2001)

Judges— misconduct—removal from office—remand for rehearing—videotaping of testimony

A proceeding to remove a district court judge from office for misconduct based upon allegations that he physically assaulted a deputy clerk of court and made inappropriate sexual remarks to her in the judge's chambers is remanded to the Judicial Standards Commission for a rehearing in which the testimony shall be videotaped where the evidence before the Supreme Court in the form of a written record is such that the Court cannot properly carry out its responsibilities for independently evaluating the evidence.

This matter is before the Supreme Court of North Carolina pursuant to N.C.G.S. § 7A-376 upon the recommendation of the Judicial Standards Commission dated 18 January 2001 that respondent Gregory R. Hayes, a judge of the General Court of Justice, District Court Division, Twenty-Fifth Judicial District, be removed from office. Heard in the Supreme Court 14 May 2001.

William N. Farrell, Jr., Special Counsel, for the Judicial Standards Commission.

Sigmon, Sigmon & Isenhower, by W. Gene Sigmon; and Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by E. Fielding Clark, II, and Forrest A. Ferrell, for respondent-appellant.

ORDER.

The following facts are based upon the record as tendered by the Judicial Standards Commission and the transcript of the proceedings before it: On 18 March 1999, the Commission, in accordance with its Rule 7, notified respondent that it had ordered a preliminary investigation to determine if it should institute formal proceedings against him under Rule 9 of the Rules of the Judicial Standards Commission. On 4 August 1999 and 24 September 1999, the Commission advised respondent that it had expanded the preliminary investigation to include additional allegations of misconduct and told respondent what specific allegations it would investigate. It also informed him that the investigation would remain confidential in accordance with N.C.G.S. § 7A-377 and Commission Rule 4 and that he had the right to present any relevant matters for the Commission's consideration.

On 14 September 2000, the Commission filed a formal notice of complaint and a complaint; respondent was served with these documents on 20 September 2000. In its complaint, the Commission explained that it had concluded that formal proceedings should be instituted against respondent. Respondent filed an answer on 6 October 2000, categorically denying the allegations that he had committed any act or made any statement that legally or ethically constitutes grounds for removal from office.

While the preliminary investigation dealt with three separate and unrelated incidents, the complaint and hearing dealt with only two of

the matters investigated.[1] The complaint and hearing addressed allegations that respondent acted improperly towards a fellow judge at a private party and allegations that respondent acted improperly towards a deputy clerk of court in respondent's chambers. Only the allegations concerning the deputy clerk, however, formed the basis of the Commission's recommendation to remove respondent from office.

The proceedings leading up to the formal hearing produced numerous controversies. Those controversies included the quashing of a subpoena compelling the appearance of Larry A. Ballew, a resident of Georgia and an attorney licensed to practice law in North Carolina. Those controversies also included the admission of evidence at the hearing concerning respondent's alleged verbal misconduct toward Judge Nancy Einstein at a private party.

After conducting a formal hearing in this matter, the Commission found facts and concluded that respondent's conduct as found by the Commission constituted:

a. conduct in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct;

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute as defined in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976); and

c. willful misconduct in office as defined in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Commission then recommended to this Court that we remove respondent from his position as judge.

The Judicial Standards Commission is created by statute. N.C.G.S. § 7A-375 (1999). It investigates complaints against sitting judges and candidates for judicial office. It can compel the attendance of witnesses and the production of evidence; conduct a hearing; and recommend to this Court what disciplinary action, if any, should be taken. N.C.G.S. § 7A-377(a) (1999). The Commission " 'functions as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.' " *In re Tucker*, 348 N.C. 677, 679, 501 S.E.2d 67,

1. We note, however, that respondent, in his answer, alleges that the three individuals involved in these separate events had conspired to wrongfully remove the respondent from office.

69 (1998) (quoting) *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)). However, final authority to discipline judges lies solely with the Supreme Court. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation." N.C.G.S. § 7A-377(a).

When reviewing recommendations from the Commission this Court sits not as an appellate court, but rather as a court of original jurisdiction. *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Thus, this Court may adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or it may make its own findings. *In re Hardy*, 294 N.C. at 98, 240 S.E.2d at 373. In the case of *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246, this Court rejected a claim that the Commission's combination of investigative and judicial functions violated respondent's due process rights under both the federal and North Carolina Constitutions. The basis for the Court's decision upholding constitutionality was that the Commission's "recommendations are not binding upon the Supreme Court, which will consider the evidence of both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either." *Id.* at 244, 237 S.E.2d at 252. In the words of the Texas Supreme Court, "Any alleged partiality of the Commission is cured by the final scrutiny of this adjudicative body." *In re Brown*, 512 S.W.2d 317, 321 (Tex. 1974). Thus, the key requirement supporting a determination of the constitutionality of the Commission's procedure is that this Court exercise independent judgment and not merely rely upon the Commission's findings, conclusions, and recommendations.

Respondent contends that the Commission committed numerous procedural and constitutional violations. We decline to address these arguments at this time and instead remand this case for a rehearing for the reasons stated below. While we give great respect to the findings of the Commission, this case rests on the allegations of the deputy clerk that respondent physically assaulted her and made inappropriate sexual remarks in the privacy of the judge's chamber. This case turns on the credibility of the two antagonists, only one of whom is telling the truth. The evidence now before us in the form of a written record is such that the Court concludes that it cannot properly carry out its responsibilities for independently evaluating the evidence.

As Justice I. Beverly Lake, Sr., acknowledged in a separate opinion in the disciplinary case of *In re Hardy*, removal of a judge is a matter of the most serious consequences where

> [the judge] is, thereby, not only deprived of the honor, power and emoluments of the office for the remainder of his term, but is also permanently disqualified from holding further judicial office in this State and G.S. 7A-376 expressly provides that he "receives no retirement compensation," regardless of how many years he has served with fidelity and distinction or how much he has paid into the State Retirement Fund pursuant to the provisions of the Retirement Act.

In re Hardy, 294 N.C. at 100-01, 240 S.E.2d at 374 (Lake, J., concurring in part and dissenting in part). Justice Lake added:

> The more serious consequence is that the people, who elected him to be their judge, are deprived of his services for the remainder of his term. It is not a light thing for this Court to assume the power to say to the people of North Carolina, "You have lawfully elected this judge, but we have determined that he cannot serve you."

Id. at 101, 240 S.E.2d at 374-75.

Therefore, we remand the matter to the Judicial Standards Commission for further proceedings not inconsistent with this order. Such proceedings shall be conducted and a recommendation, if any, made to this Court as quickly as possible.

Furthermore, because the decision by this Court must rest on our own independent evaluation of the testimony of the two critical witnesses in this case, we instruct the Commission as follows:

(1) The Commission shall videotape all testimony pertaining to the two alleged incidents involving the deputy clerk.

(2) The Commission shall also videotape and consider all other relevant evidence, admissible under the Rules of Evidence, that bears upon the allegations made by the deputy clerk.

(3) The Commission shall hear only evidence relevant to the allegations of the deputy clerk. The Commission, having previously determined that "there was not clear and convincing evidence to support the allegations" as to the alleged incident between respondent

and Judge Einstein, should not consider evidence as to that allegation at the rehearing.

(4) We reverse the decision to quash the subpoena for attorney Larry A. Ballew.

So ordered by the Court in Conference, this the 7th day of June, 2001.

s/G. K. Butterfield, Jr., J.
For the Court

STATE OF NORTH CAROLINA v. CHRISTOPHER DAVID STEWART

No. 550PA99

(Filed 8 June 2001)

Sexual Offenses— date of offense—variance between indictment and evidence—prejudicial

The trial court erred in a prosecution for a first-degree sexual offense against a juvenile under the age of thirteen by not granting defendant's motion to dismiss where the indictment listed only the month of July 1991 as the time of the assaults, defendant presented evidence of his whereabouts for each day of that month, the prosecutor introduced evidence concerning sexual encounters between the victim and defendant over a two- and one-half-year period, and the prosecutor presented no evidence of a specific act occurring during July of 1991. Generally, the time listed in the indictment is not an essential element of the crime charged, but here the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him of an opportunity to adequately present his defense.

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

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous, unpublished decision of the Court of Appeals, 118 N.C. App. 339, 455 S.E.2d 499 (1995), finding no error in a judgment entered by

Britt (Joe Freeman), J., on 16 February 1994 in Superior Court, Robeson County. Heard in the Supreme Court 16 October 2000.

Michael F. Easley, Attorney General, by T. Brooks Skinner, Jr., Assistant Attorney General, for the State.

North Carolina Prisoner Legal Services, Inc., by Susan H. Pollitt, for defendant-appellant.

WAINWRIGHT, Justice.

On 4 December 1991, Christopher David Stewart (defendant), then sixteen years old, was charged in a juvenile petition with first-degree sex offense against a child under the age of thirteen. On 29 January 1992, the case was transferred to Superior Court, Robeson County, for defendant's trial as an adult. On 16 March 1992, defendant was indicted on one count of first-degree statutory sexual offense upon a male child under the age of thirteen years. The indictment alleged that between 1 July 1991 and 31 July 1991, defendant engaged in a sex offense with J. (the victim), a child under the age of thirteen years. Defendant was tried before a jury at the 14 February 1994 Criminal Session of Superior Court, Robeson County. The jury returned a verdict of guilty on 16 February 1994, and the trial court sentenced defendant to life imprisonment. On appeal, a unanimous panel of the Court of Appeals found no error. On 23 November 1999, defendant filed a petition for writ of certiorari in this Court, which we allowed on 2 March 2000.

Defendant contends that the trial court erred when it denied defendant's motion to dismiss at the close of evidence based on the dramatic variance between the thirty-one day time period of the offense alleged in the indictment and the evidence introduced by the State at trial, which encompassed a two and one-half year period. For the reasons that follow, we agree and reverse the Court of Appeals.

An indictment must include a designated date or period of time within which the alleged offense occurred. N.C.G.S. § 15A-924(a)(4) (1999); *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). However, this Court has recognized that a judgment should not be reversed when the indictment lists an incorrect date or time " 'if time was not of the essence' " of the offense, and " 'the error or omission did not mislead the defendant to his prejudice.' " *Everett*, 328 N.C. at 75, 399 S.E.2d at 306 (quoting N.C.G.S. § 15A-924(a)(4)). Generally,

the time listed in the indictment is not an essential element of the crime charged. *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). This general rule, which is intended to prevent

> a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.

Id.

We have held that "[a] variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense." *State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984). When, as here, the defendant relies on the date set forth in the indictment to prepare his defense, and the evidence produced by the State substantially varies to the prejudice of the defendant, defendant's motion to dismiss must be granted. *See State v. Christopher*, 307 N.C. 645, 650, 300 S.E.2d 381, 384 (1983) (new trial ordered as the "wide ranging discrepancies" between the indictment and the State's evidence forced the defendant to face a "trial by ambush"); *State v. Booth*, 92 N.C. App. 729, 731, 376 S.E.2d 242, 244 (1989) (approximate three-month variance prejudiced defendant where defendant relied on date in indictment to present his alibi defense).

In sexual abuse cases involving young children, some leniency surrounding the child's memory of specific dates is allowed. *Everett*, 328 N.C. at 75, 399 S.E.2d at 306. "Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs." *Id.*; *see also State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987).

In the case at hand, the indictment listed the date of the offense as "7-01-1991 to 7-31-1991," and defendant prepared and presented alibi evidence in direct reliance on those dates. The indictment listed only the month of July 1991 as the period of time of the assaults, and defendant presented evidence of his whereabouts for each day of that month. Defendant's evidence tended to show that he helped roof a house in Parkton, North Carolina, with a church group during the first three days of July 1991. Further, on 4 July 1991, defendant was at home with his stepfather and youngest brother during the day and stayed at his grandmother's house in Fayetteville that evening, with his aunt and cousin from Virginia. On 5 July 1991, defendant's father

took him back to training school, where he remained until 25 August 1991. Defendant also presented reverse alibi evidence that the victim and his family were out of town the first week of July 1991.

During the State's case-in-chief, the prosecutor introduced evidence concerning sexual encounters between the victim and defendant over a two and one-half year period. However, the prosecutor presented no evidence of a specific act occurring during July 1991. The victim testified that the assaults began in 1989 and continued for two and one-half years. The victim did not testify to any offense occurring in July 1991. Further, Robert Durden, an acquaintance of defendant, testified about one offense that occurred "before August 1991," but could not remember whether it occurred during July 1991.

Under the unique facts and circumstances of this case, we conclude that the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him "of an opportunity to adequately present his defense." *Price*, 310 N.C. at 599, 313 S.E.2d at 559. Therefore, the trial court erred by failing to grant defendant's motion to dismiss. Accordingly, the decision of the Court of Appeals is reversed and this case is remanded to that court for remand to the Superior Court, Robeson County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

LEONARD LARRAMORE, EMPLOYEE v. RICHARDSON SPORTS LIMITED PARTNERS, D/B/A CAROLINA PANTHERS, EMPLOYER, AND LEGION INSURANCE COMPANY, CARRIER

No. 67A01

(Filed 8 June 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 250, 540 S.E.2d 768 (2000), affirming in part and reversing and remanding in part an opinion and award entered 4 August 1999 by the North Carolina Industrial Commission. Heard in the Supreme Court 15 May 2001.

Lore & McClearen, by R. James Lore; and Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Sharon E. Dent, for defendant-appellants.

PER CURIAM.

AFFIRMED.

KAY SMITH v. YOUNG MOVING AND STORAGE, INC.

No. 22A01

(Filed 8 June 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. ——, 540 S.E.2d 383 (2000), reversing and remanding an order entered 11 August 1999 by Hight, J., in Superior Court, Johnston County. Heard in the Supreme Court 15 May 2001.

Hinton, Hewett & Wood, P.A., by Alan B. Hewett, for plaintiff-appellant.

McGuireWoods LLP, by Fred M. Wood, Jr.; Melissa M. Kemmer; and C. Marshall Lindsay, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

ROBERT BACON, ELTON McLAUGHLIN AND RICHARD EUGENE CAGLE, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED PLAINTIFFS v.	)	ORDER
R.C. LEE, WARDEN, NORTH CAROLINA CENTRAL PRISON; MICHAEL F. EASLEY, GOVERNOR OF NORTH CAROLINA; AND ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA DEFENDANTS	)	

No. 209A91-4

(Filed 15 May 2001)

(11:37 a.m.)

This matter is before the Court upon the State's Emergency Petitions for Writs of Certiorari, Prohibition, and Supersedeas and Motion to Vacate Superior Court's Order and to Dismiss Bacon's Civil Complaint. The State specifically petitions this Court, pursuant to N.C. R. App. P. 2, to vacate the temporary restraining order entered by the Honorable David Q. LaBarre, Superior Court Judge Presiding, on Monday, 14 May 2001, effectively prohibiting the Governor of North Carolina from proceeding with meetings scheduled to commence on Tuesday, 15 May 2001, at 1:30 p.m. to allow the Governor to gather information from the parties as to the appropriateness of executive clemency in the case of Robert Bacon, Jr.

Upon consideration of the State's emergency petition, pursuant to N.C. R. App. P. 2, the temporary restraining order entered by the trial court is hereby vacated to the extent it prohibits or restrains the Governor from conducting a clemency hearing in the case of Robert Bacon, Jr., pursuant to his express authority under Article III, Section (6) of the Constitution of North Carolina.

By order of the Court in Conference, this 15th day of May, 2001, at 11:37 a.m.

s/ G.K. Butterfield, Jr., J.
For the Court

JOHN R. GOODWIN, JR. AND LINDA K. GOODWIN, HUSBAND AND WIFE	)	
v.	)	ORDER
SCHNEIDER NATIONAL, INC. AND KEITH (NMN) GAULT	)	

No. 181P99

(Filed 7 June 2001)

Upon consideration of plaintiffs' fourth motion for reconsideration of the denial of petition for discretionary review, the following order was entered:

"Having carefully considered plaintiffs' properly aligned petition and thoroughly reviewing petitioners' merits for the petition for discretionary review, the same is hereby denied.

By order of the Court in Conference, this 7th day of June, 2001."

s/ G.K. Butterfield, Jr., J.
For the Court

STATE v. STROUD

[353 N.C. 524 (2001)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ISAAC JACKSON STROUD	)	
	)	

No. 165A95-3

(Filed 7 June 2001)

After carefully considering defendant's pro se motion requesting that this Court void a previously filed petition for writ of certiorari, it appears to the Court that defendant is attempting to represent himself despite being currently represented by court-appointed counsel. Therefore, we dismiss the pro se filing.

By order of the Court in Conference, this 7th day of June, 2001.

s/ G.K. Butterfield, Jr., J.
For the Court

BURGESS v. BUSBY

No. 196PA01

Case below: 142 N.C. App. 393

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex motu 7 June 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 June 2001.

DAVIDSON v. UNIV. OF N.C. AT CHAPEL HILL

No. 243P01

Case below: 142 N.C. App. 544

Motion by defendant for temporary stay allowed 20 May 2001.

FERRETIZ v. PARKWAY FORD, INC.

No. 212P01

Case below: 142 N.C. App. 522

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

IN RE DULA

No. 266A01

Case below: 143 N.C. App. 16

Motion by respondent for temporary stay denied 7 June 2000. Petition by respondent for writ of supersedeas denied 7 June 2001.

JONES v. WEYERHAEUSER CO.

No. 87P01

Case below: 141 N.C. App. 482

Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 7 June 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001. Justice Edmunds recused.

LAGIES v. MYERS

No. 191P01

Case below: 142 N.C. App. 239

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

NORTHEAST CONCERNED CITIZENS, INC. v. CITY OF HICKORY

No. 260P01

Case below: 143 N.C. App. 272

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

ROBINSON, BRADSHAW & HINSON, P.A. v. SMITH

No. 388P00

Case below: 139 N.C. App. 1

Motion by plaintiff to withdraw petition for discretionary review allowed 5 June 2001. Motion by defendant (Bonita Harris Smith) to withdraw petition for discretionary review allowed 5 June 2001.

STATE v. AIKEN

No. 283P98-2

Case below: 143 N.C. App. 185

Petition by Attorney General for writ of supersedeas denied 7 June 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. BARNETT

No. 283P01

Case below: 142 N.C. App. 706

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. BARNETT

No. 64A01

Case below: 141 N.C. App. 378

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 June 2001. 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 7 June 2001.

STATE v. BETHEL

No. 144P01

Case below: 142 N.C. App. 213

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 June 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. CLOYD

No. 207A01

Case below: 142 N.C. App. 391

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 7 June 2001.

STATE v. COLEMAN

No. 245P01

Case below: 142 N.C. App. 706

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 June 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. DUNCAN

No. 252P01

Case below: 142 N.C. App. 522

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. ELLIOTT

No. 214P01

Case below: 142 N.C. App. 522

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. ELSTON

No. 251P01

Case below: 142 N.C. App. 706

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. FAIRCLOTH

No. 418P00-2

Case below: 139 N.C. App. 451

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 7 June 2001. Petitions by defendant pro se for writ of certiorari to review the order of the North Carolina Court of Appeals dismissed 7 June 2001.

STATE v. GILLEY

No. 228P01

Case below: 135 N.C. App. 519

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. HAMMONDS

No. 65A01

Case below: 141 N.C. App. 152

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 June 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001. Justice Edmunds recused.

STATE v. HUNTER

No. 230P01

Case below: 142 N.C. App. 707

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. LEGRANDE

No. 215A96-10; Reassigned number 462P01-1

Case below: Stanly County Superior Court

Motion by plaintiff pro se for civil complaint lawsuit against the State of N.C. for malicious & deliberate back-to-back erroneous convictions, imprisonments and sentence to death dismissed 7 June 2001. Motion by plaintiff pro se for civil claim against the State of N.C. for malicious & deliberate back-to-back erroneous convictions, imprisonments and sentence to death dismissed 7 June 2001. Motion by plaintiff pro se superseding civil claim against the State of N.C. for malicious and deliberate back-to-back erroneous convictions, imprisonments and sentence to death dismissed 7 June 2001.

STATE v. LEGRANDE

No. 215A96-11; Reassigned number 462P01-2

Case below: Stanly County Superior Court

Petition by plaintiff pro se for writ of habeas corpus denied 7 June 2001.

STATE v. McDONALD

No. 130P01

Case below: 136 N.C. App. 668

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. REED

No. 232PA01

Case below: 143 N.C. App. 155

Petition by the Attorney General for writ of supersedeas allowed 7 June 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 June 2001. Conditional petition by defendant pursuant to G.S. 7A-31 as to additional issues denied 8 June 2001.

STATE v. RICCARD

No. 195P01

Case below: 142 N.C. App. 298

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. ROBINSON

No. 158P01

Case below: 142 N.C. App. 392

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. SACKETT

No. 262P01

Case below: 142 N.C. App. 707

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. SARTORI

No. 215P01

Case below: 142 N.C. App. 523

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. SCANLON

No. 480A99-2

Case below: Durham County Superior Court

Petition by defendant for writ of supersedeas of the judgment of the Superior Court, Durham County, denied 10 May 2001. Petition by defendant for writ of certiorari to review the order of the Superior Court, Durham County, denied 10 May 2001. Motion by defendant to review the discovery order of the Superior Court, Durham County, denied 10 May 2001. Motion by defendant for temporary stay dissolved 10 May 2001.

STATE v. SCOTT

No. 267P01

Case below: 142 N.C. App. 707

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. SMITH

No. 188P01

Case below: 142 N.C. App. 391

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001.

STATE v. STROUD

No. 165A95-3

Case below: Durham County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Durham County, denied 7 June 2001.

STATE v. TENCH

No. 171P01

Case below: 127 N.C. App. 210

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 June 2001. Justice Martin recused.

STATE v. WASHINGTON

No. 239P01

Case below: 142 N.C. App. 657

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 June 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

STATE v. WILSON

No. 199P01

Case below: 142 N.C. App. 392

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

TEW v. E.B. DAVIS ELEC. CO.

No. 135P01

Case below: 142 N.C. App. 120

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 May 2001. Conditional notice of appeal by defendant pursuant to G.S. 7A-30 (based upon a dissent) dismissed as moot 16 May 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 16 May 2001.

THOMPSON v. BRADLEY

No. 242P01

Case below: 142 N.C. App. 636

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

TURNAMICS, INC. v. ADVANCED ENVIROTECH SYS., INC.

No. 181P01

Case below: 142 N.C. App. 391

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 June 2001.

PETITION TO REHEAR

STATE v. CUMMINGS

No. 510A99

Case below: 353 N.C. 281

Petition by defendant for rehearing pursuant to Rule 31 dismissed 7 June 2001.

STATE OF NORTH CAROLINA v. JAMES EDWARD JAYNES

No. 194A92-2

(Filed 20 July 2001)

1. **Jury— capital resentencing—selection—failure to follow statutory procedure**

The trial court did not commit prejudicial error in a capital resentencing proceeding by allowing prospective jurors to be selected by a procedure in violation of N.C.G.S. § 15A-1214 whereby defendant examined prospective jurors on individual voir dire prior to the State's exercising its challenges and passing the panel, because: (1) the trial court repeatedly advised defendant that he would have the opportunity to conduct his regular questioning once the panel was passed and that it would not prevent defendant from conducting further individual voir dire later if he so desired; and (2) any prejudice to defendant was the result of defendant's voluntary election to question the jurors before the State passed the panel since defendant was provided the opportunity to follow the procedure as set forth in the statute.

2. **Jury— capital resentencing—challenge for cause—knowledge of defendant's prior death sentence—personal knowledge of victim**

The trial court did not abuse its discretion in a capital resentencing proceeding by failing to excuse for cause two prospective jurors under N.C.G.S. § 15A-1212, because: (1) although one of the prospective jurors stated she doubted she could put defendant's prior death sentence completely out of her mind, she stated consistently that she could render an impartial and fair decision based solely on the evidence and law presented to her in court; and (2) the other prospective juror stated he could set aside his personal knowledge of the victim and could base his sentencing decision solely on the information that was presented in court.

3. **Constitutional Law— effective assistance of counsel—failure to exercise peremptory challenge—trial strategy**

A defendant was not deprived of his constitutional right to effective assistance of counsel in a capital resentencing proceeding by his counsel's failure to exercise a peremptory challenge to

excuse a juror after defense counsel unsuccessfully attempted to get the juror removed for cause, because: (1) defendant's complaint is essentially a request that the court should second-guess his counsel's trial strategy; and (2) counsel is free to allocate his peremptory challenges as he sees fit, and counsel is not required to exercise a peremptory challenge each time a challenge for cause is denied.

4. Jury— capital resentencing—life-qualifying questions

The trial court did not abuse its discretion in a capital resentencing proceeding by failing to allow defendant to ask two prospective jurors life-qualifying questions during voir dire, because: (1) the challenged questions constituted improper efforts to pin down the prospective jurors regarding which specific mitigating circumstances would sway them towards a life sentence; and (2) defendant was given ample opportunity to question the prospective jurors regarding whether they would automatically vote for the death penalty.

5. Jury— capital resentencing—excusal for cause

The trial court did not abuse its discretion in a capital resentencing proceeding by excusing for cause two prospective jurors based on their opposition to the death penalty, because: (1) one prospective juror repeatedly indicated that she could not set aside her personal beliefs about the death penalty and consider both punishments fairly and impartially; and (2) the other prospective juror's responses demonstrated that he could not temporarily set aside his personal convictions about the death penalty and follow the law.

6. Appeal and Error— appealability—failure to raise constitutional issue

Although defendant contends the trial court violated his constitutional rights to introduce mitigating evidence and answer the evidence presented against him in a capital resentencing proceeding by refusing to allow defendant to testify on redirect about the length of several consecutive sentences imposed on him for crimes committed during the same transaction as the murder, defendant waived review of the constitutionality of the trial court's actions because defendant never asserted any constitutional argument concerning the exclusion of this evidence at the resentencing proceeding.

7. Constitutional Law— right to confront witnesses—unavailable witness

The trial court did not violate defendant's constitutional right to confront the witnesses against him in a capital resentencing proceeding by allowing the State to read the testimony of an unavailable witness who previously testified at defendant's 1992 trial concerning defendant approaching the witness about purchasing some property, defendant taking the witness to the location where the stolen cars were hidden, and defendant telling the witness how the killing occurred, because: (1) admission of prior sworn testimony does not violate the Confrontation Clause where a witness was unavailable and his prior testimony bore sufficient indicia of reliability and afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement; and (2) even though defendant contends he was unable to fully cross-examine the witness based on the fact that he was unable to use another witness's statement when questioning the pertinent witness, defendant's right to cross-examine the witnesses against him was not infringed upon since the statement did not provide any information about which defendant was entitled to cross-examine the unavailable witness at the capital resentencing proceeding.

8. Sentencing— capital—mitigating circumstance—no significant history of prior criminal activity

The trial court did not err in a capital sentencing proceeding by instructing the jury that submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity was required by law when defendant had requested that this mitigating circumstance be submitted, because the use of this additional language to the pattern instruction that the circumstance was required by law, although improper, was harmless beyond a reasonable doubt when it was an accurate statement of the law and essentially told the jury that the evidence could reasonably support a conclusion this mitigating circumstance existed.

9. Criminal Law— prosecutor's opening statement—victim's statements to assailants

The trial court did not err in a capital resentencing proceeding by failing to intervene ex mero motu during the State's opening statement that the victim told his assailants to take anything

they want and to just not kill him, because: (1) this evidence had been admitted under oath at defendant's trial and the same witness was expected to testify at defendant's capital resentencing proceeding; (2) it was reasonable for the State to expect that this evidence would be brought out in questioning and that it would be admissible; (3) the fact that the witness never actually testified to that statement during the resentencing proceeding under the circumstances of this case did not require the trial court to intervene ex mero motu; (4) the prosecutor never mentioned the statement again after his opening statement and did not refer to it in his closing argument; and (5) the trial court twice instructed the jury that opening statements were not evidence.

10. Criminal Law— prosecutor's argument—lack of provocation as an aggravating circumstance

The State did not improperly argue in its closing argument that lack of provocation was an aggravating circumstance, because the prosecutor actually argued that the reason a killing committed in the course of a robbery or burglary is considered aggravated is its arbitrariness, which was a proper comment on the nature of the aggravating circumstances to be submitted in this case.

11. Criminal Law— prosecutor's argument—execution necessary since prison not harsh enough

The trial court did not err in a capital resentencing proceeding by failing to intervene ex mero motu during the State's closing argument that defendant should be executed since prison conditions are not harsh enough in North Carolina, because: (1) the comments merely emphasized the State's position that defendant deserved the death penalty rather than a comfortable life in prison; and (2) the prosecutor's references to prison conditions were drawn directly from defense testimony.

12. Criminal Law— prosecutor's argument—general deterrence

The trial court did not err in a capital resentencing proceeding by failing to intervene ex mero motu during the State's closing argument allegedly concerning general deterrence, because the State merely asked the jury not to be numb to the violence involved in the crime it was considering.

13. Sentencing— capital—nonstatutory mitigating circumstance—other persons bear some of the responsibility for the victim's death

The trial court did not err in a capital resentencing proceeding by refusing to submit defendant's requested nonstatutory mitigating circumstance that other persons bear at least some of the responsibility for the victim's death, because: (1) the circumstance was so broadly worded that it could have been interpreted as referring to anyone; (2) the wording of this circumstance made it impossible to tell whether it was subsumed into other submitted circumstances; and (3) evidence underlying the requested circumstance was fully argued to the jury by defense counsel during closing argument, and the jury was free to deem it to have mitigating value and consider it under the catchall mitigating circumstance of N.C.G.S. § 15A-2000(f)(9).

14. Sentencing— capital—nonstatutory mitigating circumstances—codefendant's treatment by the justice system

The trial court did not err in a capital resentencing proceeding by refusing to submit three nonstatutory mitigating circumstances relating to the codefendant's treatment by the justice system and his punishment for his involvement in the offense, because: (1) our Supreme Court has consistently held that a codefendant's sentence for the same murder is irrelevant in the sentencing proceedings; and (2) the treatment of an accomplice by the criminal justice system is not a proper subject for consideration by a capital jury.

15. Sentencing— capital—nonstatutory mitigating circumstances—consideration by jury

The trial court did not err in a capital resentencing proceeding by its instruction to the jurors as to how they should consider nonstatutory mitigating circumstances, because our Supreme Court has repeatedly rejected defendant's argument that it was improper for the trial court to instruct that jurors could reject nonstatutory mitigating circumstances they found had no mitigating value.

16. Sentencing— capital—death penalty—proportionate

The trial court did not err by sentencing defendant to the death penalty for his first-degree murder conviction, because: (1) defendant was convicted on the basis of malice and premeditation and deliberation and under the felony murder rule; (2)

defendant planned ahead, broke into the victim's home and shot and killed the unarmed victim, set the victim's body and trailer on fire, and sold the victim's property afterwards; (3) the jury found two aggravating circumstances under N.C.G.S. § 15A-2000(e)(5); and (4) the fact that a codefendant received a life sentence for the same crime is not determinative of proportionality.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a 4 June 1999 judgment imposing a sentence of death entered by Johnston, J., at a resentencing proceeding held in Superior Court, Polk County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 15 March 2001.

Roy A. Cooper, Attorney General, by Mary D. Winstead, Assistant Attorney General, for the State.

Janine Crawley Fodor for defendant-appellant.

MARTIN, Justice.

On 28 January 1991 defendant James Edward Jaynes (defendant) was indicted for the first-degree murder of Paul Frederick Acker. Defendant was also indicted for first-degree arson, first-degree burglary, robbery with a dangerous weapon, and two counts of larceny of an automobile. Defendant was tried capitally at the 6 April 1992 Criminal Session of Superior Court, Polk County. 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 all other charges. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. 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.

On appeal, this Court arrested judgment on the larceny convictions, affirmed the remaining convictions, and granted defendant a new capital sentencing proceeding based on error in the jury instructions. *State v. Jaynes*, 342 N.C. 249, 286, 464 S.E.2d 448, 470 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). At defendant's capital resentencing proceeding, the jury again recommended a death sentence for the first-degree murder conviction, and the trial court sentenced defendant to death pursuant to that recommendation.

The state presented evidence at the resentencing proceeding which tended to show the following. In the late 1980s Acker moved from New York to North Carolina to start a farming business, intending to raise cattle. He purchased land in Polk County and brought horses from New York. He put a trailer on the land and was in the process of building a house. Acker had previously run a construction business and owned a lot of carpentry, basic construction, and farming tools. He owned a Volvo and a Ford pickup truck that he kept on the property.

Lawrence Marelli (Marelli), who moved with his family to North Carolina from New York at Acker's suggestion, worked with Acker to prepare the land for cattle. Acker also employed a local man, Jerry Nelon (Nelon), to log the land. Nelon employed prison inmates on work release to help him in his logging operations. One of the inmates was Dan Marr, defendant's uncle.

On 11 October 1990 Marelli arrived for work about 7:50 a.m. and found Acker's trailer on fire. Marelli noticed that the barn door was open and that Acker's two cars were missing. He looked inside the trailer and saw a body, later identified as that of Paul Acker. Marelli went home, called 911, and then returned to the property once law enforcement had arrived. The trailer was badly damaged by fire, and a gasoline can was found inside. There were pry marks on the back door, and the telephone line had been cut. At that point, Marelli noticed that a welder, a generator, two compressors, and all of the victim's carpentry and mechanic's tools were missing. A few days later, Marelli accompanied officers to a location in the woods where various items had been found by a hunter. He identified the items as belonging to Acker.

A few weeks before the victim's death, the Rutherford County Sheriff's Department had been contacted by Phillip Doster (Doster) about some stolen property. Doster was a manager at the trailer park where defendant lived. Defendant introduced Doster to Shane Smith, one of defendant's friends. Defendant and Smith brought Doster some property, including a typewriter with a New York address on it. Defendant then told Doster that he knew of a millionaire from New York and that they should check out his place together some time. He also told Doster he was going to kill someone and get rich. Doster called the Sheriff's Department and was informed by investigator Ransom "Firpo" Epley (Epley) that none of the property had been reported stolen.

Upon learning the victim was from New York, Epley approached Doster on 13 October 1990 for more information. Doster took Epley to a logging road where a blue Volvo was parked. He told Epley that the car contained stolen property and that defendant claimed to have shot a man. The pickup truck was found about a mile further down the road. Doster told Epley that defendant and Smith would come back that night to get more of the property out of the Volvo.

Epley and other law enforcement officers set up surveillance. Around 8:30 p.m. that night, a Datsun stopped near the Volvo. Two men got out and one opened the trunk of the Volvo with a key. Officers subsequently arrested the two men, identified as defendant and Smith. Officers recovered the Volvo keys from defendant's pockets. A search of the two vehicles produced a television set, a cattle-injection device, a computer, a camera, a microwave, and other electronic equipment.

Doster's testimony from defendant's 1992 trial was read to the jury as follows. Doster explained that on 11 October 1990, defendant came to Doster's house and tried to sell him some tools. They drove to a pickup truck which was loaded with carpenter's tools. They next went to a Volvo, which had a computer and stereo in the trunk. Doster bought a chainsaw, a weed eater, and a car battery from defendant for $100.00. These items were later recovered by law enforcement. When Doster asked defendant where he had obtained the property, defendant laughed and said he had to kill a guy to get it.

Defendant told Doster he had developed a plan with Shane Smith to rob the victim. Defendant said he had waited while Smith knocked on the door. When the victim opened the door, Smith told him that his truck was broken and that he needed help. Defendant entered the trailer first, armed with a .22-caliber rifle. When the victim moved towards the back of the trailer, defendant shot him but did not kill him. Defendant reloaded and shot the victim again, telling Smith to do the same before the man could shoot them. Smith was carrying a .25-caliber pistol. Defendant said he shot the victim once in the head and once in the shoulder. He then poured gas on the victim and set him on fire. Doster told defendant that he did not believe him but that if anything ever came of this, he would tell the police. Defendant told him that was alright because the authorities did not have any evidence against him.

A forensic pathologist performed an autopsy on the victim's body. The pathologist testified that the body was badly burned and was

identified through dental records. The cause of death was two gunshot wounds to the head, one of the bullets being a .25-caliber. There was no evidence of smoke inhalation, showing that the victim was not alive at the time his body was burned.

After Smith was arrested, he received several letters from defendant which he turned over to police. In one, defendant told Smith he knew Smith was scared but that he had gotten them an alibi. He told Smith to write down everything he had told the police. In another letter, defendant told Smith he had seen a newspaper report that one of them had confessed and that he hoped Smith had not said anything. He told Smith that if Smith remained silent, they could "beat it" in court. He then told Smith to tear up the letter after he read it. In a third letter defendant told Smith, "This is what we're going to say." He then wrote that he had received a call at his grandmother's home, that the caller had told him to take the car and truck to Charlotte, and that his payment would be the guns and other property in the vehicles. Defendant continued, stating that they should say that they had already been to the vehicles and taken property out, which would explain their fingerprints. Defendant then told Smith not to tell the police they were communicating and to remember they had an alibi.

Defendant was detained at the Polk County jail after his arrest. There he met David Barker, a trustee in the jail. Defendant asked him to deliver the letters to Smith. He also told Barker about how he had planned and carried out the break-in, including killing Acker, stealing his property, and setting his trailer on fire.

After his trial, defendant was confined at Central Prison. In 1998 he was housed next to Tony Duckworth, another inmate. During that time, defendant talked to Duckworth about the murder and showed him newspaper clippings about his arrest. Defendant told Duckworth he had killed the victim for money. He said the victim was a millionaire and owned a nice car and truck as well as a new trailer. He also said he had surveilled the victim's residence for two or three days before killing him. Defendant told Duckworth he "got a rush" out of killing the victim and had also planned to kill his accomplice.

Defendant presented evidence from prison personnel regarding their observations of him during incarceration. A forensic psychiatrist who treated defendant while at Central Prison from 1992 to 1996 said defendant did not have psychopathic traits and was unlikely to be violent in prison. He said he met defendant when other inmates

invited defendant to participate in a group designed to help higher functioning inmates cope with life in prison. The psychiatrist said defendant was a positive member of the group, took responsibility for his own actions, and encouraged others to do the same. A program facilitator at the prison testified defendant was courteous, cooperative, and nonviolent.

Several witnesses explained defendant's childhood and family circumstances. Among them was defendant's mother, who explained that her husband was an abusive alcoholic who abused defendant more than the other children because defendant was the oldest. She also said that her husband would shoot his gun in the house and frighten the children. Defendant's father testified he used to drink at least a case of beer per day when defendant was growing up. He admitted beating defendant.

Defendant testified that, prior to these crimes, he had been convicted of possession of marijuana, common law robbery resulting from a purse snatching, attempting to obtain controlled substances by false pretenses, and traffic tickets. He said he knew Smith from school. He dropped out of high school in his sophomore year and became addicted to a variety of drugs. After his release from prison for common law robbery, defendant worked at Broyhill Furniture Company but quit when he started having drug problems again.

Defendant testified that in February 1990 he and Smith started breaking into homes to make money. Defendant was charged in some of the break-ins, and Smith paid his bond so that he could be released. Defendant agreed to help Smith break into the Acker trailer so that he could get some money to pay Smith back for the bond money. They had heard about Acker's property from defendant's uncle, Dan Marr.

Defendant testified that on 10 October 1990 he and Smith went to the Acker property, parked on the road, and walked to the trailer. Defendant carried a .22-caliber rifle, and Smith carried a .25-caliber automatic pistol. According to defendant, this was the first time they had carried guns on a break-in. They both entered the trailer through the unlocked front door. Defendant went into a bedroom where there was computer equipment. Smith exited the trailer, then knocked on the front door. When Acker answered, Smith told him that his truck had broken down and that he needed to use a phone. Acker agreed and stepped into the bedroom where defendant was located. Defendant said he assumed Acker had a gun and shot him in the

shoulder. Smith fired three shots, and defendant fired one more at Acker's head. They then loaded Acker's vehicles with goods. After driving the pickup truck to a location along a logging road, they returned in the Volvo to pick up Smith's car. At Smith's suggestion, defendant found a gas can, poured gas on the trailer and the victim's body, and lit them on fire. They drove the Volvo to the same area on the logging road, then went home. Smith hid the guns in his mother's house.

Defendant testified he had been drinking and using drugs the day of the murder. He admitted writing the letters to Smith but said he now felt great remorse for what had happened and continued to suffer nightmares about the crime. He said he had not intended to kill anyone but only intended to commit a robbery.

JURY SELECTION

[1] Defendant first contends the trial court erred by allowing prospective jurors to be selected by a procedure in violation of N.C.G.S. § 15A-1214. Pursuant to that statute, the state is required to question prospective jurors, exercise its challenges, and then pass a panel of twelve to the defendant. N.C.G.S. § 15A-1214(d) (1999). The defendant then questions these same twelve prospective jurors and exercises his or her challenges. N.C.G.S. § 15A-1214(e) (1999). In this case defendant moved for individual *voir dire*. The trial judge, after consultation with the prosecutor and defense counsel in a pretrial conference and at trial, concluded that during jury selection individual *voir dire* would be conducted with regard to the issues of pretrial publicity, death qualification, and any other sensitive issues. *See* N.C.G.S. § 15A-1214(j) (1999). During jury selection, the state asked some general questions of the initial panel and then began individual *voir dire*. A procedure evolved whereby after the state completed its individual *voir dire* questioning of a prospective juror, defendant was permitted to question the prospective juror on these issues. After defendant had asked his questions, the state exercised its challenges and eventually passed a panel of twelve to defendant. Defendant then further examined the prospective jurors in that panel of twelve. Defendant did not object to this procedure.

This procedure did not comply with the mandate of N.C.G.S. § 15A-1214 in that it allowed defendant to examine prospective jurors prior to the state's exercising its challenges and passing the panel. Although defendant failed to object to this procedure, this Court has held that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's

action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); *see also State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000).

Defendant argues that he was prejudiced by the jury selection procedure in that the state was allowed to hear defendant's questions on individual *voir dire* before exercising its challenges or passing the panel. Defendant cites to one instance where defendant speculates that a prospective juror who answered questions favorably to defendant would not have been excused by the prosecutor had the statutory procedure been followed.

The record reveals, however, that the trial court repeatedly advised defendant that he would have the opportunity to conduct his regular questioning once the panel was passed and that it would not prevent defendant from conducting further individual *voir dire* later if he so desired. Thus, defendant was not compelled to ask questions on individual *voir dire* before the state passed the panel. As defendant was provided the opportunity to follow the procedure as set forth in the statute, prejudice to defendant, if any, was the result of defendant's voluntary election to question the jurors before the state passed the panel. On appeal, a party cannot claim to be prejudiced by "his own conduct" at trial. N.C.G.S. § 15A-1443(c) (1999); *see State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993); *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971). Accordingly, because defendant has failed to demonstrate prejudice on this record, his contentions fail.

[2] In his next assignment of error, defendant contends the trial court erred by failing to excuse for cause prospective jurors Eugenia Barber (Barber) and Howard Green (Green) in violation of his constitutional right to a fair and impartial jury. First, defendant argues Barber should have been removed for cause because she was aware defendant had previously received a sentence of death. Barber admitted during *voir dire* that she had read a newspaper article about the history of the case. In response to questioning by the trial court, Barber said she could put aside her knowledge of defendant's previous sentence and render an impartial and fair decision based solely on the evidence and law presented to her in court. She further said she understood the prior proceeding was legally flawed and had no bearing on the current hearing, and she indicated she would not discuss what she knew with the other jurors. In response to questioning by defense counsel, Barber said she "would try to go on what [she]

heard in this hearing," but doubted she could completely put the information out of her mind. Barber then responded to the trial court as follows:

> THE COURT: The language that I used was even if you remembered it—
>
> [BARBER]: Right.
>
> THE COURT: If you could put that aside—
>
> [BARBER]: Aside.
>
> THE COURT: —and base your determination on the evidence—
>
> [BARBER]: On what I hear here.
>
> THE COURT: —that comes out at this hearing, because the prior proceeding was legally flawed and should have no bearing on what this jury does. Are you comfortable with that?
>
> [BARBER]: I will do my best.

N.C.G.S. § 15A-1212 provides in part that "[a] challenge for cause to an individual juror may be made by any party on the ground that the juror: . . . (9) For any other cause is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (1999). Whether to grant a challenge for cause under N.C.G.S. § 15A-1212(9) is a matter left to the sound discretion of the trial court. *See Jaynes*, 342 N.C. at 270, 464 S.E.2d at 461. "The trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment to determine whether a juror can be fair and impartial." *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997).

"[M]ere knowledge by the jurors of the prior death sentence does not necessarily demonstrate prejudice to the defendant." *State v. Bacon*, 337 N.C. 66, 92, 446 S.E.2d 542, 555 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). When the trial court is able to reasonably conclude "the 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, excusal is not mandatory." *State v. Simpson*, 331 N.C. 267, 272, 415 S.E.2d 351, 354 (1992); *see also Mu'Min v. Virginia*, 500 U.S. 415, 430, 114 L. Ed. 2d 493, 509 (1991) (relevant inquiry regarding pretrial publicity is not whether jurors remember the case but whether they have such fixed opinions that they cannot judge defendant impartially); *State v. Green*, 336 N.C. 142, 166, 443 S.E.2d 14,

28-29 (challenge for cause properly denied where juror said he would try "to the best of [his] ability" to set aside his knowledge of the defendant's prior death sentence and base his decision on the evidence presented to him, although he did not "believe there [was] any way [he] could be absolutely sure"), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In the present case, although Barber doubted she could put the prior sentence completely out of her mind, she stated consistently that she could set her knowledge of it aside and base her judgment on the evidence presented in court. Accordingly, the trial court did not abuse its discretion by denying defendant's challenge of Barber for cause.

Defendant also contends the trial court erred by failing to excuse Green for cause. The victim was a regular customer at Green's furniture store. Green had sold the victim furniture which burned in the fire. During *voir dire*, however, Green told the trial court he could be equally fair and impartial to both sides, could set aside his personal knowledge of the victim, and could base his sentencing decision solely on the information that was presented in court. He further told the prosecutor he had no opinion yet on what the appropriate punishment should be and that he would do what the law and circumstances dictated. Finally, he told defense counsel he understood the importance of being fair to both sides and was not leaning one way or the other. These answers support the trial court's conclusion "that [Green] could put [his personal knowledge] aside and rule on the basis of the law." Accordingly, the trial court did not abuse its discretion when it denied defendant's challenge of Green for cause.

[3] Defendant next contends he was deprived of his constitutional right to effective assistance of counsel because defense counsel failed to exercise a peremptory challenge against juror Green. Defense counsel challenged Green for cause, as noted above, and argued accordingly that Green could not be fair and impartial. Defendant now asserts that because his counsel felt Green could not be fair, their failure to challenge him peremptorily constituted unconstitutionally deficient performance entitling defendant to a new sentencing hearing.

"A defendant's right to counsel includes the right to effective assistance of counsel." *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000). We analyze claims of ineffective assistance of counsel using a two-part test, originally articulated in *Strickland v.*

Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). *See State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). First, defendant must show his counsel's performance "fell below an objective standard of reasonableness." *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998). Such a performance would include "errors so serious that [his] counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. After satisfying the first part of the test, defendant must next show he was prejudiced by the error such that "a reasonable probability exists that the trial result would have been different absent the error." *Lee*, 348 N.C. at 491, 501 S.E.2d at 345.

The decision to exercise a peremptory challenge is necessarily a tactical one for trial counsel. *See, e.g., State v. Ali*, 329 N.C. 394, 403-04, 407 S.E.2d 183, 189 (1991). Counsel are "given wide latitude in these matters." *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

Defendant's complaint about his counsel's failure to peremptorily challenge Green is essentially a request that this Court second-guess his counsel's trial strategy. The decision to refrain from using a peremptory challenge on Green could very well have been a valid tactical choice. As noted above, Green repeatedly stated he could be fair to both sides, and a variety of his answers could have been construed as favoring life imprisonment instead of the death penalty. Trial counsel are free to allocate their peremptory challenges as they see fit, within constitutional boundaries, and are not required to exercise them each time a challenge for cause is denied regardless of whether they argued strenuously that grounds for a challenge for cause existed. Accordingly, the first prong of the *Strickland* test has not been satisfied. *See, e.g., Grooms*, 353 N.C. at 64, 540 S.E.2d at 722. This assignment of error is rejected.

[4] Defendant next assigns as error the trial court's failure to allow him to ask two prospective jurors certain "life-qualifying" questions during *voir dire* in violation of his constitutional right to a fair and impartial jury. The trial court sustained the state's objections to the following questions posed to prospective juror Tom Cantrell (Cantrell):

> [DEFENDANT]: What would you need to hear to vote for life?
>
> . . . .

[DEFENDANT]: What sort of mitigating evidence would you listen to?

Prospective juror Walter Bryant (Bryant) was asked the following questions, to which objections were also sustained:

[DEFENDANT]: . . . What would you need to hear to even consider a life sentence? What kinds of things?

. . . .

[DEFENDANT]: Can you imagine—can you imagine that there's anything that you could hear that would make you consider a life sentence?

. . . .

[DEFENDANT]: What would make you disagree with imposing the death penalty?

Defendant contends the challenged questions inquired into Cantrell and Bryant's ability to follow the law and consider mitigating evidence. He argues these questions should have been permitted pursuant to *Morgan v. Illinois*, 504 U.S. 719, 735, 119 L. Ed. 2d 492, 506 (1992) ("Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law."). *See also State v. Conner*, 335 N.C. 618, 644, 440 S.E.2d 826, 841 (1994) (defendant entitled to inquire under *Morgan* into whether a prospective juror would automatically vote for the death penalty irrespective of the facts and circumstances). In allowing inquiry into whether a juror would automatically vote for the death penalty, however, the trial court has broad discretion over "the extent and manner" of questioning during *voir dire*. *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). Defendant must show an abuse of discretion before we will reverse the trial court's rulings on this matter. *State v. Robinson*, 336 N.C. 78, 102, 443 S.E.2d 306, 317 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

We have held repeatedly that attempts to "stake out" a prospective juror in advance regarding what his decision might be under certain specific factual scenarios are improper. *See, e.g., Simpson*, 341 N.C. at 336, 462 S.E.2d at 202; *State v. Skipper*, 337 N.C. 1, 20, 446 S.E.2d 252, 262 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). This principle was perhaps best articulated in *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980): "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."

The challenged questions in the instant case constituted improper efforts to pin down the prospective jurors regarding which specific mitigating circumstances defendant would need to present in order for them to impose life imprisonment rather than the death penalty. The questions reflect improper efforts to pin down the prospective jurors regarding specific mitigating circumstances that would sway them towards a life sentence. *See Mitchell*, 353 N.C. at 319, 543 S.E.2d at 837 (" 'staking out' what the jurors' decision will be under a particular set of facts is improper"). These questions do not amount to proper inquiries into whether the prospective jurors could follow the law or the trial court's instructions. *See State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993).

The record indicates the trial court allowed defendant ample opportunity to question both Cantrell and Bryant regarding whether they would automatically vote for the death penalty, as required by *Morgan*, 504 U.S. at 734-35, 119 L. Ed. 2d at 506. Both prospective jurors stated they could consider both punishments and follow the law as the trial judge gave it to them. Defendant was not entitled to inquire as to which specific circumstances would cause the jurors to consider a life sentence. Accordingly, defendant has not shown any abuse of discretion by the trial court in its handling of the *voir dire* in this case. This assignment of error is without merit.

[5] In his next assignment of error, defendant contends the trial court erred by excusing two prospective jurors for cause based on their opposition to the death penalty. Defendant argues that, although both prospective jurors opposed the death penalty, neither was unable to follow the law of North Carolina, making them qualified to serve on his jury.

A prospective juror is properly excused for cause because of his views on capital punishment when 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)). Nonetheless, this Court is also guided by the principle

> that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986).

This Court has 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 ordinarily "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*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000). The trial court's decision to excuse a juror for cause "is discretionary and will not be disturbed absent an abuse of discretion." *State v. Blakeney*, 352 N.C. 287, 299, 531 S.E.2d 799, 810 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 780 (2001).

In the present case, prospective juror Lois Searcy (Searcy) first told the prosecutor she had given a lot of thought to how she felt about capital punishment and did not think she could ever vote to impose death regardless of the circumstances. The prosecutor then questioned Searcy as follows:

> [PROSECUTOR]: Have you always felt that way?
>
> [SEARCY]: No.
>
> [PROSECUTOR]: Well, has your thinking about this changed over the years or could you tell me about that?
>
> [SEARCY]: Well, I don't reckon there's anything to tell. I just, I don't know, I know this kid's father, he used to work with my ex-husband.

The next day, Searcy told the prosecutor she had been awake at three o'clock in the morning thinking about how she felt about the death penalty. The following exchange occurred:

> [PROSECUTOR]: Okay, tell me what your thinking is now about that?
>
> [SEARCY]: I don't like it.
>
> [PROSECUTOR]: How strong is your feeling that way?

[SEARCY]: Very.

. . . .

[PROSECUTOR]: If you can explain it and I know it's hard to do, but explain why you feel that way?

[SEARCY]: Well, I have two children and I don't think I would like for them to be put to death, you know.

Searcy then said her feelings would interfere to the extent she could not be fair to each side, and she again said that she could never vote for the death penalty under any circumstances. She then told the trial court that, although she could not say she would automatically vote against the death penalty in every first-degree murder case, she would not consider it as a punishment in this case. Later, Searcy told defense counsel she could listen to the evidence and follow the law regarding weighing of aggravating and mitigating circumstances. She ultimately told the trial court, however, that she could not set aside her personal beliefs and fairly consider both life imprisonment and death as possible punishments in this case based on the law.

These responses show prospective juror Searcy's views of the death penalty would have prevented or substantially impaired the performance of her duties in this sentencing proceeding. She repeatedly indicated she could not set aside her personal beliefs about the death penalty and consider both punishments fairly and impartially. Therefore, the trial court did not abuse its discretion in excusing her for cause.

Prospective juror Burton Baer (Baer) began his *voir dire* by informing the prosecutor that he had "given a lot of thought to this in the last 24 hours and [he had] done some research, and [he] would say [his] position is that [he does] not support death as a form of criminal punishment." Later, Baer told the trial court he had done quite a bit of reading and reviewing of statistics and had decided the death penalty was unnecessary when life imprisonment was available as an alternative punishment. Baer discussed his personal views with the trial court extensively, resolving that based on his background in the military, his research, and his concern for civil rights, "unless my emotions were stirred up to the point that they overruled my logical thought pattern, then I would say I could not vote for death." He said he was willing to serve as a juror, but could not be equal or unbiased in his judgment, and did not "think it's going [to] change in any discussion we have here." He continued, saying that although he had not

made his mind up already about the case, he could not imagine any circumstances under which he would consider voting for a death sentence. When asked by defense counsel whether he could follow the trial court's instructions and the law, Baer replied, "[I]t would be difficult for me, if not impossible, to vote for death." Baer reiterated that he would listen to the state's case but could not set aside his personal feelings to consider death as a possible punishment.

Prospective juror Baer's responses reveal that his views of the death penalty would have prevented or substantially impaired the performance of his duties as a juror in this sentencing proceeding. His responses demonstrated that he could not temporarily set aside his personal convictions about the death penalty and follow the law. Therefore, the trial court did not abuse its discretion in excusing Baer for cause.

CAPITAL SENTENCING PROCEEDING

[6] Defendant next argues the trial court erred by refusing to allow him to testify, on redirect, about the length of several consecutive sentences imposed on him for crimes committed during the same transaction as the murder. Defendant contends the trial court's actions violated his state and federal constitutional rights to introduce mitigating evidence and answer the evidence presented against him.

A review of the record, however, demonstrates that defendant never asserted a constitutional argument concerning the exclusion of this evidence at the resentencing proceeding. "Constitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal." *Cummings*, 353 N.C. at 292, 543 S.E.2d at 856. As a result, defendant waived review of the constitutionality of the trial court's actions here. *See id.*

[7] By another assignment of error, defendant argues the trial court erred by allowing the state to introduce the testimony of Philip Doster from defendant's 1992 trial, in violation of defendant's state and federal constitutional right to confront the witnesses against him. Doster, who was unavailable to testify at the capital resentencing proceeding, had testified at the trial that defendant had approached him about purchasing some property, had taken him to the location where the stolen cars were hidden, and had told him how the killing occurred.

After his 1992 trial and capital sentencing proceeding, defendant filed a motion for appropriate relief (MAR) alleging improprieties relating to this trial. At the MAR evidentiary hearing, Shane Smith testified he had told the prosecutor and a police officer, prior to defendant's trial, that Doster had helped plan and organize the break-in at the Acker property. Specifically, he testified that Doster had visited the property with him and defendant several times prior to the murder and had planned to help them break in and steal the property while Acker was out of town.

At his capital resentencing proceeding, defendant contended the state should have provided him with Smith's statement about Doster's involvement, pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), prior to his 1992 trial. Defendant argued he had been unable to fully cross-examine Doster at trial because he had been unable to use Smith's statement to impeach Doster. Consequently, he contended, Doster's statement should be excluded from defendant's capital resentencing proceeding to protect his right to confront the witnesses against him. The trial court, however, allowed Doster's prior testimony to be read to the jury. We conclude this evidence was properly admitted.

The Confrontation Clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. A "primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418, 13 L. Ed. 2d 934, 937 (1965). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 353 (1974).

The Confrontation Clause has been interpreted as operating

> in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accu-

> racy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." *Snyder v. Massachusetts*, 291 U.S. [97], 107, 78 L. Ed. 674, [679 (1934)].

Ohio v. Roberts, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 607 (1980) (citations omitted). Further, this Court has noted

> the Confrontation Clause is not violated by the admission of a witness' recorded prior testimony where the witness
>
> > was under oath[;] [defendant] was represented by counsel . . . [;] [defendant] had every opportunity to cross-examine [the witness] as to his statement[;] and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.
>
> *California v. Green*, 399 U.S. 149, 165, 26 L. Ed. 2d 489, 501 (1970)), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996).

State v. McLaughlin, 341 N.C. 426, 458-59, 462 S.E.2d 1, 19 (1995); *see also Mancusi v. Stubbs*, 408 U.S. 204, 216, 33 L. Ed. 2d 293, 303 (1972) (admission of prior sworn testimony did not violate Confrontation Clause where witness was unavailable and prior testimony "bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement' ").

In the instant case, the trial court found that Doster was unavailable to testify at defendant's capital resentencing proceeding. Defendant does not contest that finding. Moreover, Doster's testimony at defendant's 1992 trial was given under oath and was subjected to cross-examination by defendant's counsel. Such evidence would normally be presumed admissible at a later proceeding. *See, e.g., United States v. Inadi*, 475 U.S. 387, 394-95, 89 L. Ed. 2d 390, 398 (1986). Defendant contends, however, that he was unable to fully cross-examine Doster at his trial because he had not been able to use Smith's statement when questioning Doster. Resolution of this question turns on an analysis of Smith's statement.

At the hearing on defendant's MAR, Smith testified that Doster had helped defendant and Smith organize the break-in by visiting the property with them and planning how to get the goods. If Smith's statement were true, defendant would have been privy to this infor-

mation prior to his trial and could have questioned Doster about it then. *See United States v. Owens*, 484 U.S. 554, 559, 98 L. Ed. 2d 951, 957 (1988) (Confrontation Clause guarantees only the opportunity for effective cross-examination). If Smith's statement were false, on the other hand, it was not relevant and using it to cross-examine Doster would not effectively serve the purposes of cross-examination, i.e., to test the "believability of a witness and the truth of his testimony." *Davis*, 415 U.S. at 316, 39 L. Ed. 2d at 353. Consequently, in neither case would defendant's right to cross-examine the witnesses against him be infringed upon by the introduction of Doster's prior sworn testimony.

The trial court properly allowed Doster's prior testimony to be read into evidence at the capital resentencing proceeding. Defendant's confrontation rights were not violated by the introduction of the testimony because Smith's later statement did not provide any information about which defendant was entitled to cross-examine Doster at the capital resentencing proceeding. Accordingly, this assignment of error is without merit.

[8] By another assignment of error, defendant contends the trial court committed reversible constitutional error by instructing the jury in the instant resentencing proceeding that the mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (1999), was required by law. Defendant requested that this statutory mitigating circumstance be submitted but did not specifically request that the North Carolina pattern jury instruction language be used. The trial court agreed to submit the (f)(1) mitigating circumstance.

Although no explicit request was made that the instruction be given in conformance with the North Carolina Pattern Jury Instruction, during the charge conference all parties referred to the pattern instruction when discussing the submission of the (f)(1) mitigator. The trial court drew the parties' attention to specific language in the pattern instruction and led a discussion on whether any varying language should be used. Given these circumstances, defendant had no reason to make his own request that the pattern instruction be used or to request that no variations other than those discussed be given. Accordingly, when the instruction actually given by the trial court varied from the pattern language, defendant was not required to object in order to preserve this question for appellate review. *See State v. Keel*, 333 N.C. 52, 56, 423 S.E.2d 458, 461 (1992) (once trial court agreed to give pattern instruction, defendant not required to

request it be given; requirements of N.C. R. App. P. 10(b)(2) satisfied to preserve review); *cf. State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992) (written request for pattern instruction sufficient to preserve review of variant actually given).

When the trial court instructed on the (f)(1) mitigating circumstance, it prefaced the instruction with the following language: "Now with respect to the first, submission of this is required as a matter of law." This language, not part of the pattern instruction, is normally included only when the defendant has objected to the submission of this circumstance despite the presence of evidence to support it. *See* N.C.P.I.—Crim. 150-10 (1998); *State v. Walker*, 343 N.C. 216, 223-24, 469 S.E.2d 919, 923, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996). Defendant contends the inclusion of this language amounted to a judicial comment that the submission of the (f)(1) circumstance was unjustified. Defendant also asserts that the variation from the pattern language was constitutional error, depriving him of his right to the standard pattern instruction. The jury did not find this circumstance to exist.

We believe the use of this additional language in the instruction, although improper, was harmless beyond a reasonable doubt. The statement that submission of the circumstance was required by law was an accurate statement of the law. The trial court's statement essentially told the jury that the evidence could reasonably support a conclusion this mitigating circumstance existed. Accordingly, defendant was not prejudiced by the additional language. This assignment of error fails.

Defendant next assigns error to various portions of the state's opening and closing arguments, arguing that the cumulative effect of alleged improprieties deprived him of his due process right to a fair sentencing proceeding. Defendant did not object to these arguments during his resentencing proceeding. Thus, we review the arguments "to determine [only] whether they were so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct the errors." *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). We have previously stated that "the trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. 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). In the instant case, the record reveals that the contested portions of the state's opening and closing arguments

did not require *ex mero motu* intervention, nor did their cumulative effect unfairly prejudice defendant.

[9] First, defendant contends the trial court erred by allowing the state's opening statement to include matters outside the record. The prosecutor argued the victim said to his assailants, "Take anything you want, just don't kill me." This evidence was presented at defendant's trial by Curtis Barker, who testified defendant told him Acker had made that statement. Although Barker was also called as a witness at defendant's resentencing proceeding, he never repeated this statement.

Before opening statements, the trial court instructed the jury as follows: "Now opening statements are not evidence, but they're given before the proceeding so the lawyers will be able to tell you what they think the evidence is going to show." The trial court again reminded the jury that opening statements were not evidence when it instructed prior to closing arguments that "[c]losing arguments are not evidence, like opening statements are not evidence."

This Court has previously noted that

> "[w]hile the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it."

State v. Paige, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (quoting *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636, *appeal dismissed and disc. rev. denied*, 311 N.C. 765, 321 S.E.2d 148 (1984)). Further, in " 'previewing the evidence, counsel generally should not (1) refer to inadmissible evidence, (2) 'exaggerate or overstate' the evidence, or (3) discuss evidence he expects the other party to introduce.' " *Jaynes*, 342 N.C. at 282, 464 S.E.2d at 468 (quoting *State v. Freeman*, 93 N.C. App. 380, 389, 378 S.E.2d 545, 551 (citations omitted), *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989)).

In the present case, the prosecutor's statement regarding what the victim allegedly told his attackers was within the proper scope of an opening statement. The evidence had been admitted under oath at defendant's trial, and the same witness was expected to testify at defendant's capital resentencing proceeding. It was reasonable for the state to expect that this evidence would be brought out in questioning and that it would be admissible. In any event, the fact that

Barker never actually testified to that statement during the resentencing proceeding, under the circumstances of this case, did not require the trial court to intervene *ex mero motu* to prevent alleged prejudice to defendant. A review of the record reveals the state questioned Barker extensively at the resentencing proceeding about what defendant had told him about the killing. Despite several questions about his communication with defendant, Barker never repeated the information he had given at the trial about what Acker had said to his assailants. The prosecutor never mentioned the statement again after his opening statement and did not refer to it in closing argument. Finally, the trial court twice instructed the jury that opening statements were not evidence. Accordingly, defendant was not prejudiced by the trial court's failure to further instruct the jury to disregard the statement.

[10] Second, defendant contends the state improperly argued that lack of provocation was an aggravating circumstance in its closing argument. Defendant objects to the following portion of the state's closing argument:

> This is worse than a killing where two people fought over a boundary line for years and years and years, and one of them wakes up one morning and says I've had it; I'm going over there and do away with Harold. And that happens, and that's first-degree murder. But it's not aggravated. There's at least some rational explanation for that killing, why that person had to die. There is no rational explanation for why poor Mr. Acker had to die. And that's why it's an aggravating circumstance.

Nonetheless,

> statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.

Green, 336 N.C. at 188, 443 S.E.2d at 41. In the instant case, the portion of the state's argument to which defendant now objects was given in the middle of a discussion about the aggravating circumstances to be submitted and what made this killing aggravated. The prosecutor argued that the reason a killing committed in the course of a robbery or burglary is considered aggravated is its arbitrariness, *i.e.*, in such a case the killing is done not because of who the victim

is or what he has done to provoke it but merely because the killer is interested in getting the victim's property. This argument was a proper comment on the nature of the aggravating circumstances to be submitted in this case. The challenged portion of the state's argument served to explain why, because of the arbitrary nature of the crime, the law considers it to be an aggravating circumstance that the killing was done in the course of a burglary or robbery. It did not suggest the jury should consider a new, nonstatutory aggravating circumstance. We note "[c]ounsel are afforded wide latitude in arguing hotly contested cases" such as this one and conclude that this argument was reasonable when considered in context. *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672.

[11] Next, defendant contends the state improperly argued that defendant should be executed because prison conditions are not harsh enough in North Carolina. In closing argument, the prosecutor pointed out that if sentenced to life imprisonment, defendant would continue to have access to various prison amenities, such as art classes, a library, counseling, and correspondence courses. As we have held in several prior cases, these comments reasonably "served to emphasize the [s]tate's position that the defendant deserved the penalty of death rather than a comfortable life in prison." *State v. Alston*, 341 N.C. 198, 252, 461 S.E.2d 687, 717 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996); *see also, e.g., State v. Holden*, 346 N.C. 404, 430, 488 S.E.2d 514, 528 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998); *State v. Reeves*, 337 N.C. 700, 732, 448 S.E.2d 802, 817 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995).

Defendant contends, however, that because this Court has previously held a defendant may not inform jurors about execution procedures in order to persuade them to return a life sentence, the state should not be allowed to argue that comfortable conditions in prison provide a reason to execute defendant. The cases to which defendant refers have held evidence on execution procedures to be inadmissible because it "was in no way connected to defendant, his character, his record or the circumstances of the charged offense." *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *see also, e.g., State v. Holden*, 321 N.C. 125, 163, 362 S.E.2d 513, 536 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In contrast, at the instant trial, the prosecutor's references to prison conditions were drawn directly from defense testimony. "A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence as well

as any reasonable inferences therefrom." *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672. Defendant's argument fails.

[12] Finally, defendant contends the prosecutor improperly argued general deterrence when he stated:

> Now I ask you, please do not take a casual approach to this notion of murder. We hear that in this country we see that, the pundits tell us that people are becoming immune to violence such as this. If that's true, woe be unto us. But the State of North Carolina doesn't look at it this way, and you shouldn't either.
>
> Do not be casual in your approach to violent crime such as this.

Defendant correctly points out that the state may not argue general deterrence in its summation, despite the wide latitude afforded it in closing argument. *See, e.g., State v. Golphin*, 352 N.C. 364, 470, 533 S.E.2d 168, 236 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d —, 69 U.S.L.W. 3618 (2001). Here, however, it appears the state merely asked the jury not to be numb to the violence involved in the crime it was considering. This argument was not improper.

In summary, the arguments to which defendant assigns error were not improper. Thus, whether viewed individually or in the aggregate, these arguments did not result in a denial of due process or fundamental fairness to defendant. This assignment of error is meritless.

[13] Defendant next assigns error to the trial court's refusal to submit his requested nonstatutory mitigating circumstance, "[o]ther persons bear at least some of the responsibility for the death of Mr. Acker."

To show that a requested nonstatutory mitigating circumstance should have been submitted, defendant must demonstrate 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. Upon such showing by the defendant, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues.

State v. Benson, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988) (footnote omitted). We have previously defined a mitigating circumstance as

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

State v. Irwin, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981). Further, "[t]he U.S. Supreme Court has held that any aspect of defendant's character, record or circumstance of the particular offense which defendant offers as a mitigating circumstance should be considered by the sentencer . . . . However, evidence irrelevant to these factors may be properly excluded by the trial court." *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978)).

In the instant case, the trial court properly declined to submit defendant's proposed nonstatutory mitigating circumstance. First, the circumstance was so broadly worded that, depending on its interpretation, it could have referred to anyone, from defendant's accomplice Shane Smith to anyone who had contact with defendant during his life prior to the killing. A mitigating circumstance should direct the jurors to *specific* aspects of the crime, defendant's character, or defendant's record which could serve as a basis for finding the defendant is less deserving of the death penalty. Further, because of the way this circumstance was worded, it is impossible to tell whether it was subsumed into other, submitted, circumstances. *See, e.g.*, *McLaughlin*, 341 N.C. at 447-48, 462 S.E.2d at 12 (not error to fail to submit nonstatutory mitigating circumstances which are subsumed in other, submitted, circumstances). The trial court submitted thirty-eight mitigating circumstances in this case. Many of those circumstances dealt with whether defendant acted under the domination of another or under duress, with defendant's troubled childhood, and with the lack of treatment defendant received while in prison prior to committing this crime. Accordingly, it is likely that any aspects of the requested circumstance which reflected on defendant's culpability for the crime were subsumed into the submitted circumstances.

Assuming error *arguendo*, we believe that failure to submit this circumstance was harmless beyond a reasonable doubt. Defendant

presented extensive evidence regarding others' involvement in and responsibility for the crime, including testimony from himself, his family, and his therapists. The record reveals that "evidence underlying the requested circumstance was fully argued to the jury by defense counsel during closing argument." *Blakeney*, 352 N.C. at 317-18, 531 S.E.2d at 820. Further, the trial court submitted N.C.G.S. § 15A-2000(f)(9), the catchall mitigating circumstance, to the jury. Consequently, the mitigating information proffered by defendant was before the jurors, and they were free to "deem it to have mitigating value and consider it under N.C.G.S. § 15A-2000(f)(9)." *Gregory*, 340 N.C. at 415, 459 S.E.2d at 667. Accordingly, any error by the trial court was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1999).

[14] In a similar vein, defendant next argues the trial court erred by refusing to allow him to submit three nonstatutory mitigating circumstances relating to his codefendant's treatment by the justice system and punishment for his involvement in the offense. In a written request, defendant asked the trial court to submit the following:

> 41. The co-defendant, Shane Smith, was allowed to plead to second degree murder and receive a sentence of life in prison.
>
> 42. The defendant and co-defendant, Shane Smith, have been treated differently by the criminal justice system.
>
> . . . .
>
> 46. . . . [T]he co-defendant, Shane Smith, was allowed to escape a jury deciding whether or not he should receive the death penalty . . . .

Defendant argues these circumstances were relevant mitigating evidence under *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 498 (2000), and *Parker v. Dugger*, 498 U.S. 308, 112 L. Ed. 2d 812 (1991). He further suggests we overrule our prior holdings to the contrary, as expressed in *Irwin*, 304 N.C. 93, 282 S.E.2d 439, and subsequent cases.

This Court has consistently held that "a codefendant's sentence for the same murder is irrelevant in the sentencing proceedings." *State v. Meyer*, 353 N.C. 92, 102, 540 S.E.2d 1, 7 (2000); *see also State v. Sidden*, 347 N.C. 218, 231, 491 S.E.2d 225, 232 (1997), *cert. denied*, 523 U.S. 1097, 140 L. Ed. 2d 797 (1998); *State v.*

Williams, 305 N.C. 656, 687, 292 S.E.2d 243, 261-62, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Similarly, we have held "that the treatment of an accomplice by the criminal justice system is not a proper subject for consideration by a capital jury." *State v. Womble*, 343 N.C. 667, 688, 473 S.E.2d 291, 303 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). We have analyzed and rejected the claim that *Parker* requires a different holding. *See, e.g., State v. Ward*, 338 N.C. 64, 114-15, 449 S.E.2d 709, 737 (1994) (*Parker* interpreted Florida law and did not imply as a general matter that evidence of a codefendant's sentence is uniformly relevant mitigating evidence), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995).

Despite this precedent, defendant argues that *Roseboro* signaled an acknowledgment by this Court that evidence regarding a codefendant's sentence may properly be considered in mitigation. We rejected this same contention in *Meyer*, 353 N.C. at 103, 540 S.E.2d at 7, and continue to so hold here. This assignment of error is rejected.

[15] By another assignment of error, defendant contends the trial court improperly instructed the jurors as to how they should consider nonstatutory mitigating circumstances. Defendant's argument has two components. First, he argues the trial court improperly instructed the jurors they could reject nonstatutory mitigating circumstances they found had no mitigating value. This Court has repeatedly rejected this argument. *See, e.g., State v. Keel*, 337 N.C. 469, 495-97, 447 S.E.2d 748, 762-63 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995); *Hill*, 331 N.C. at 417-18, 417 S.E.2d at 780. We decline to revisit this issue.

Defendant also argues that, regardless of the propriety of a general instruction that jurors were free to reject nonstatutory mitigating circumstances if they found they had no mitigating value, such an instruction was error in reference to the circumstance that defendant had adjusted well to incarceration. Defendant contends that circumstance was found to have mitigating value as a matter of federal constitutional law in *Skipper v. South Carolina*, 476 U.S. 1, 7, 90 L. Ed. 2d 1, 8 (1986), and so it should be treated like a statutory mitigating circumstance here. Defendant did not object to this instruction at his resentencing proceeding but asks that we review this issue for plain error.

We have consistently rejected this argument in prior cases. *See, e.g., State v. Burr*, 341 N.C. 263, 311, 461 S.E.2d 602, 628 (1995), *cert.*

denied, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *State v. Basden*, 339 N.C. 288, 303-04, 451 S.E.2d 238, 246-47 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995). Accordingly, the trial court properly instructed the jurors on consideration of nonstatutory mitigating circumstances. This assignment of error is overruled.

PRESERVATION

Defendant raises seven additional issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving these issues for possible further judicial review: (1) the trial court lacked jurisdiction to try or impose judgment on defendant for first-degree murder because the short-form murder indictment did not allege all the elements of first-degree murder or any aggravating circumstance making defendant eligible for the death penalty; (2) the trial court erred by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance twice, for each of the two felonies in which defendant was engaged when the murder was committed; (3) the trial court erred in instructing that each juror "may," rather than "must," consider any mitigating circumstances the juror determined to exist when deciding sentencing Issues Three and Four; (4) the trial court erred by placing the burden of proof on defendant to satisfy the jury with respect to mitigating circumstances and by failing to instruct jurors that proof by the preponderance of the evidence is proof which indicates it is more likely than not that a mitigating circumstance exists; (5) the trial court erred by instructing the jury it had to be unanimous to answer "no" to Issues Three and Four on the issues and recommendation as to punishment form; (6) the trial court erred by instructing the jury at Issues Three and Four that each juror could consider only mitigating circumstances previously found by that juror at Issue Two; and (7) the trial court erred by failing to instruct the jury that a life sentence would be imposed unless it found the aggravating circumstances outweighed the mitigating circumstances.

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

[16] Having concluded that defendant's capital resentencing proceeding was 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 two aggravating circumstances: (1) the murder was committed while defendant was engaged in the commission of first-degree burglary, N.C.G.S. § 15A-2000(e)(5); and (2) the murder was committed while defendant was engaged in the commission of armed robbery, N.C.G.S. § 15A-2000(e)(5).

Of the thirty-eight statutory and nonstatutory mitigating circumstances submitted, one or more jurors found the existence of the following nonstatutory circumstances in mitigation: (1) defendant has no significant history of prior violent criminal activity; (2) defendant's mental and emotional age at the time of the murder was a mitigating circumstance; (3) defendant was physically and mentally abused as a child; (4) defendant began to abuse alcohol and drugs at an early age; (5) defendant, while at a young age, observed his mother being abused by his father; (6) defendant grew up in poverty; (7) defendant never received any emotional support from his parents; and (8) defendant did not finish high school.

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. *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 *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537). We have found the death penalty disproportionate in seven cases.

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 (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. 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). Here, defendant planned ahead, broke into the victim's home in the hopes of getting "rich," shot and killed the unarmed victim, set his body and trailer on fire, and sold his property afterward. We note particularly that the conduct of defendant that led to the victim's death was carried out in the victim's own 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 compare the present case with cases in which this Court has found the death penalty proportionate. *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).

This Court has previously held that the (e)(5) statutory aggravating circumstance, standing alone, is sufficient to sustain a death sentence. *See, e.g.*, *Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8; *State*

v. Zuniga, 320 N.C. 233, 274-76, 357 S.E.2d 898, 923-24, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). In the present case, the jury found two aggravating circumstances, both of which were the (e)(5) circumstance. Thus, this 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.

Defendant further contends his death sentence was disproportionate because Shane Smith received a life sentence whereas defendant received a death sentence. However, this Court has determined that "the fact that a defendant is sentenced to death while a codefendant receives a life sentence for the same crime is not determinative of proportionality." *State v. McNeill*, 349 N.C. 634, 655, 509 S.E.2d 415, 427 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). Further, "[d]isparity in the sentences imposed upon codefendants does not result in cruel and unusual punishment and is not unconstitutional." *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672.

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. 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.

Accordingly, the judgment of the trial court sentencing defendant to death must be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIAM RASHAD LUCAS

No. 278PA00

(Filed 20 July 2001)

1. Aiding and Abetting— instructions—specific intent

The Court of Appeals erred by holding improper a trial court's instructions on aiding and abetting a kidnapping and burglary where the offense occurred when *State v. Blankenship*, 337 N.C. 543, was in effect and the court instructed the jury that it had

to find that defendant "knowingly encouraged or aided" in the burglary and kidnapping in order to convict. These instructions are similar to those approved in *State v. Allen*, 339 N.C. 545, and adequately convey the requirement that defendant had to have the specific intent to aid in the underlying offenses.

2. Burglary— aiding and abetting—sufficiency of evidence—underlying murder—intent

The trial court properly denied defendant's motion to dismiss a charge of first-degree burglary by aiding and abetting where defendant contended that there was insufficient evidence that he possessed the specific intent to aid the principal (Lawrence) in committing the murder underlying the burglary, but defendant mistakenly relied upon his own testimony. Taken in the light most favorable to the State, the evidence showed that defendant was a friend of Lawrence and spent the day with him at a cookout; defendant, clad in black, accompanied Lawrence that night to the home of the victim (McLean), arming himself with a sawed-off shotgun after seeing that Lawrence was carrying a pistol; defendant stood by with his shotgun at McLean's home while Lawrence argued with his former girlfriend, Morrison; defendant followed Lawrence into McLean's home and stood inside the doorway with his shotgun while Lawrence shot McLean numerous times; defendant drove the vehicle away from the scene with Lawrence and the abducted Morrison, remarking that Lawrence should have killed Morrison also; defendant hid the murder weapon; and a search of defendant's vehicle yielded several nine-millimeter rounds and twenty-gauge shotgun shells.

3. Kidnapping— aiding and abetting—intent—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of kidnapping by aiding and abetting where, although defendant argued that the evidence at most showed that he assisted in escorting the victim to a hotel for a consensual sexual encounter, a reasonable juror could have inferred that defendant knew a sexual assault was in the offing; testimony established that the victim, barely dressed and in obvious distress, was removed at gunpoint from her home immediately after she saw her boyfriend murdered and was then kept in the vehicle while the principal (Lawrence) checked in at the hotel; and the victim noticed soon after that a loaded shotgun had been brought into the hotel room. Defendant's behavior both encouraged and pro-

tected Lawrence and also ensured that others would not witness or hinder the commission of the rape.

4. Kidnapping— instructions—theory not alleged in indictment—not prejudicial or plain error

The trial court erred in a kidnapping prosecution by instructing the jury on removal when the indictment alleged only confinement. However, the erroneous instructions did not constitute prejudicial or plain error where the court's instructions on purpose did not differ from that listed in the indictment, the evidence of confinement, restraint and removal was compelling, and a different result would not have been reached by the jury had the trial court instructed on confinement rather than removal.

5. Aiding and Abetting— instructions—mere presence

There was no plain error in a prosecution for first-degree burglary and first-degree kidnapping as an aider and abettor where defendant contends that the court should have instructed on "mere presence." There is no obligation to instruct on mere presence when the evidence is undisputed that defendant participated in the crime and was not just a bystander. Moreover, read as a whole, the instructions adequately conveyed the principle that defendant's presence alone is not sufficient to support a conviction for burglary or kidnapping as an aider and abettor.

6. Sentencing— firearms enhancement—determination of maximum sentence

A first-degree burglary and kidnapping defendant's motion for appropriate relief in the Supreme Court was granted, his sentences were vacated, and the matter was remanded where the trial court's application of the firearms enhancement provision of N.C.G.S. § 15A-1340.16A added sixty months to the longest minimum sentence, resulting in the addition of at least sixty months to the corresponding statutory maximum sentence and an enhanced maximum exceeding that set out in the sentencing charts for a defendant in the highest criminal history category convicted of an aggravated offense. In every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in the indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. Although this defendant's prior record level and actual sentencing range was toward the low end of the sen-

tencing tables, the statutory maximum is determined by assuming that the offense was aggravated and that defendant had a criminal history level of VI. It was noted that the General Assembly intended that the trial court add 60 months to the minimum sentence and then refer to the sentencing charts to determine the corresponding maximum sentence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 138 N.C. App. 226, 530 S.E.2d 602 (2000), finding error in judgments entered 24 February 1998 by Bowen, J., in Superior Court, Harnett County, and ordering a new trial. On 12 July 2000, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. On 5 October 2000, the Supreme Court agreed to hear defendant's motion for appropriate relief and ordered both parties to file supplemental briefs. Heard in the Supreme Court 14 February 2001.

Roy A. Cooper, Attorney General, by K.D. Sturgis and Robert C. Montgomery, Assistant Attorneys General, for the State-appellant and -appellee.

Staples Hughes, Appellate Defender, by Danielle M. Carman, Assistant Appellate Defender, for defendant-appellant and -appellee.

EDMUNDS, Justice.

Defendant William Rashad Lucas was indicted for first-degree murder, first-degree burglary, first-degree kidnapping, possession of a weapon of mass death and destruction, conspiracy to commit murder and conspiracy to commit kidnapping. He was tried before a jury at the 16 February 1998 Criminal Session of Superior Court, Harnett County. On 24 February 1998, the jury returned verdicts convicting defendant of first-degree burglary as an aider and abettor, second-degree kidnapping as an aider and abettor, and possession of a weapon of mass destruction, while acquitting him of first-degree murder and the conspiracy charges. The trial court sentenced defendant to consecutive terms of imprisonment of 124 to 146 months for first-degree burglary, 85 to 99 months for second-degree kidnapping, and 16 to 20 months for possession of a weapon of mass death and destruction.

Defendant appealed to the North Carolina Court of Appeals, which ordered a new trial based on the trial court's failure to convey

adequately the concept of specific intent necessary to support convictions of first-degree burglary and second-degree kidnapping under the theory of aiding and abetting. On 12 July 2000, we allowed both the State's petition for discretionary review and defendant's conditional petition for discretionary review as to additional issues, and on 5 October 2000, we agreed to consider defendant's motion for appropriate relief. For the reasons that follow, we reverse the Court of Appeals as to the issue raised by the State. As to the additional issues raised by defendant in his conditional petition for discretionary review, we find no error. Finally, we grant defendant a new sentencing hearing on the firearm enhancement issue raised in defendant's motion for appropriate relief.

At defendant's trial, the State's evidence showed that on 18 January 1997, Dale Jerome McLean; his girlfriend, Gwendolyn Annette Morrison; and his two children, Chastity Latrice McLean and Dale Jerome McLean, Jr., were at McLean's home in Harnett County, North Carolina. Upon hearing a knock on the back door at approximately 8:00 p.m., McLean, who was in the back bedroom with Morrison, looked out the window and saw Jimmy Wayne Lawrence, Morrison's former boyfriend. Morrison told McLean that she would "handle it." Wearing only a coat covering a nightgown and slippers, Morrison stepped outside to speak with Lawrence. Lawrence asked Morrison to leave with him, and when she refused, he pointed a nine-millimeter pistol at her. Morrison turned around and saw defendant standing nearby, holding a sawed-off shotgun across his body. Morrison told Lawrence that she "didn't want no trouble" and that she would get dressed and go with him.

Morrison went back into McLean's home. As she was closing the door, Lawrence "busted his way through" the doorway and pushed Morrison out of the way. When McLean emerged from the bedroom, Lawrence aimed his pistol at him. Morrison struggled with Lawrence, and Lawrence began shooting. The pistol at first misfired, but Lawrence's second shot struck McLean in the head. McLean fell, and Lawrence fired eight more shots at him from close range. Morrison saw defendant standing inside the doorway of the home, holding the shotgun.

Lawrence then stated to Morrison, "Come on. Let's go." When Morrison refused, Lawrence threatened to kill her if she did not leave with him, then grabbed her and took her to his vehicle. She was still wearing only an overcoat over a nightgown and slippers. Lawrence forced Morrison to sit in the back of the vehicle while he sat in the

front passenger seat and defendant drove. As they were driving, Lawrence stated to defendant, "Slow down. We don't want to make it look like we're doing something wrong." Defendant later commented to Lawrence, "Jimmy, you should have killed her too because she's going to tell it." They stopped at the home of Lawrence's father where Lawrence went inside. Morrison remained in the car as defendant stood behind the vehicle. Lawrence emerged from his father's house, spoke to defendant briefly, then made Morrison move from Lawrence's car to the back seat of defendant's vehicle. When they left Lawrence's father's house, Lawrence again sat in the front passenger seat while defendant drove.

They arrived at a Comfort Inn, where Lawrence checked in while defendant and Morrison remained in the vehicle. The three then entered the rented room, and defendant's shotgun was placed on the bed. After Lawrence and defendant talked briefly, defendant left for about thirty-five to forty minutes. At some point that evening, Lawrence raped Morrison at the Comfort Inn. Although the sequence of events is not clear from the record, it appears that the rape occurred during defendant's absence. When defendant returned, he brought clothes for Morrison. After talking to Lawrence, defendant departed again. Thereafter, Lawrence telephoned his father to pick him up. Once Lawrence left the room, Morrison called the police.

Chastity, the victim's daughter, corroborated Morrison's version of events. She testified that defendant was dressed entirely in black, held a long gun, and was "half inside and half outside" McLean's house during the shooting. She identified defendant in the courtroom as the man present at the scene of the murder, and she testified that Lawrence "snatched" Morrison when he was leaving and that Morrison was "fussing" as she was forced to leave. Chastity telephoned her grandmother, Eloise McLean Swann, after Lawrence, defendant and Morrison left McLean's residence and reported that her father had been shot. Swann arrived at McLean's home shortly thereafter, and when Swann asked Chastity who was responsible, Chastity told her that "it was two men." Swann's testimony at trial corroborated Chastity.

North Carolina State Bureau of Investigation Agent Sam Pennica photographed the scene of the shooting and collected cartridge cases and projectiles from the area around and under McLean's body. After processing the crime scene, Agent Pennica went to the Comfort Inn and determined that Lawrence had registered there. By that time,

Lawrence was in custody at the Lee County Sheriff's Department where he signed a waiver of rights form and consented to a search of the hotel room. Agent Pennica conducted the search and found a loaded sawed-off twenty-gauge shotgun under the box springs of one of the beds.

Agent Pennica then assisted other investigators in interviewing Lawrence, who had been moved to the Harnett County Sheriff's Department. As a result of the questioning, Lawrence identified defendant as the second man at the crime scene. In addition, North Carolina State Bureau of Investigation Special Agent Wayne Truax obtained the telephone records from the room registered to Lawrence at the Comfort Inn and determined that a call had been made from that room to defendant. Defendant subsequently was arrested at the residence of his girlfriend and transported to the Sanford Police Department where he waived his *Miranda* rights and consented to a search of his vehicle. Defendant gave a statement to Agent Pennica in which he admitted traveling with Lawrence to the victim's home, but he denied knowing why Lawrence was going there or what Lawrence planned to do. Defendant also denied having a weapon while at the home and claimed that he did not know what happened inside. During this interrogation, defendant revealed that the nine-millimeter handgun used by Lawrence to kill McLean was at his (defendant's) girlfriend's house. Agent Truax searched defendant's vehicle and recovered a pager along with several nine-millimeter rounds and twenty-gauge shotgun shells.

Tomeka Goins, defendant's girlfriend, stated that on the evening in question, defendant came to her house in an agitated state and said that "Jimmy was in trouble." While there, defendant received a page from Lawrence, then left with some of Goins' clothes. When he returned, defendant hid a nine-millimeter pistol at the foot of Goins' bed. She subsequently turned the weapon over to the investigators.

North Carolina State Bureau of Investigation Special Agent Thomas Trochum testified that ten shell casings retrieved from the crime scene had been fired in the nine-millimeter pistol recovered from Goins' home. Pathologist Keith Lehman found seven gunshot wounds to McLean's head and two gunshot wounds to his right arm. He concluded that the cause of death was gunshot wounds to the head and added that gunpowder markings on McLean's face indicated that bullets were fired from a distance between one-half inch to three and one-half feet.

Three witnesses testified during defendant's case in chief. Linda Dowdy, Lawrence's aunt, testified that defendant was at a cookout on 18 January 1997 and left with Lawrence in Lawrence's vehicle. She also testified that she had purchased the nine-millimeter pistol used in the shootings from a pawn shop and had given it to Lawrence.

Defendant testified in his own behalf. He stated that he spent 18 January 1997 with Lawrence at a cookout at Lawrence's father's house. While there, Lawrence received three pages from a female. The female apparently was Morrison, who testified that she paged defendant several times earlier in the day. Lawrence called the female in response to the pages, then asked defendant to drive him home. After arriving at Lawrence's home, Lawrence asked defendant to ride with him to the house of a female with whom he was "supposed to get a room." Defendant noticed that Lawrence "wasn't acting right" and had a gun. When defendant asked Lawrence why he had a weapon with him, Lawrence responded, "[Y]ou never know. Anything can happen." Defendant then obtained his shotgun and placed it on the floor of Lawrence's vehicle.

Lawrence drove to a house near the woods and told defendant to get out. Defendant stood off to the side by himself with his shotgun while Lawrence knocked on the door. Morrison came out and spoke with Lawrence for approximately five minutes. Defendant "played with the dirt" during this time. The conversation became heated, and defendant heard Morrison tell Lawrence that she would leave with him. Morrison reentered the house, and Lawrence followed her. Defendant did not see anything until he heard the first shot. He then ran to the house, looked through the closed screen door, and saw Lawrence and Morrison "tangling with each other." Defendant heard more shots as he ran back to Lawrence's vehicle where he "froze." Lawrence and Morrison emerged from the house, and Lawrence told defendant to drive because he wanted to talk with Morrison. Lawrence gave defendant directions to Lawrence's father's home. When they arrived, defendant was ready to leave, but Lawrence "begg[ed]" defendant to wait and give him a ride to the hotel. After Lawrence spent approximately five minutes in his father's house, he, defendant and Morrison changed cars and left in defendant's vehicle.

Lawrence told defendant to take him to the Comfort Inn in Sanford, North Carolina, where Lawrence checked in and asked defendant to return his pistol to his father's house. Defendant hid the

pistol in the back of his car, then left. Ten minutes later, in response to a page, defendant called Lawrence from his girlfriend's house. When Lawrence "begg[ed]" him to bring some clothes to the hotel room, defendant took some of his girlfriend's clothes to the Comfort Inn, then returned to his girlfriend's home. Defendant claimed that he was unaware of what happened to his shotgun after he initially arrived at the hotel and that he never entered the room registered to Lawrence. On cross-examination, defendant admitted that the last time he saw the nine-millimeter pistol was at his girlfriend's house.

Finally, forensic psychologist James H. Hilkey testified on defendant's behalf. Dr. Hilkey diagnosed defendant as suffering from generalized anxiety disorder. He also discerned in defendant a pattern consistent with depressive personality disorder and traits characteristic of dependent personality disorder. He testified that defendant functions psychologically as a twelve-, thirteen- or fourteen-year old, especially in stressful situations, and is particularly susceptible to peer pressure. He believed the shots fired by Lawrence represented a pivotal point beyond which defendant found it difficult to extricate himself.

STATE'S PETITION FOR DISCRETIONARY REVIEW

[1] We first address the single issue raised by the State. At trial, defendant requested the trial court to instruct the jury that, in order to convict him under the theory of aiding and abetting Lawrence, the jury must find defendant had the specific intent to commit the underlying offenses of kidnapping and burglary. As detailed below, the trial court instead instructed that, in order to convict defendant as an aider and abettor, the jury had to find he "knowingly encouraged or aided" Lawrence in the burglary and "knowingly encouraged and aided" Lawrence in the kidnapping. The Court of Appeals held that these instructions failed to convey the requisite intent and ordered a new trial.

At the close of all the evidence, defendant made a written request for the following instruction on specific intent:

> That as to the charges of conspiracy, kidnapping and burglary and murder under all theories for any offense, that all references to the defendant and/or Jimmy Lawrence intending to commit the felonies be stricken and that the following be inserted:

> That the defendant, William Rashad Lucas, intended to commit (the felony). That is he had the specific intent to (name elements of felony). It is not sufficient that the State prove that Jimmy Lawrence intentionally committed (the felony); rather the State must prove beyond a reasonable doubt that William Rashad Lucas, himself, had a specific intent to commit (the felony).

The trial court denied defendant's request and instead instructed the jury in pertinent part:

> Now, as to aiding and abetting in the charge of burglary and first- or second-degree kidnapping, a person may be guilty of a crime although he personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of the crime just as if he had personally done all the acts necessary to constitute the crime. For you to find the Defendant guilty of another crime because of aiding and abetting the State must prove generally three elements beyond a reasonable doubt: First, that the crime was committed by some other person, in this case Jimmy Wayne Lawrence. Secondly, that the Defendant *knowingly encouraged or aided* the other person to commit that crime. And third, that the Defendant's actions or statements caused or contributed to the commission of the crime by Jimmy Wayne Lawrence. So as to burglary by aiding and abetting I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date Jimmy Wayne Lawrence committed burglary and that the Defendant was actually present at the time the crime was committed and that the Defendant *knowingly encouraged or aided* Jimmy Wayne Lawrence to commit the crime and that in so doing the Defendant's actions or statements caused or contributed to the commission of the crime by Jimmy Wayne Lawrence, your duty would be to return a verdict of guilty of burglary by aiding and abetting. . . . As to second-degree kidnapping by aiding and abetting, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date Jimmy Wayne Lawrence committed second-degree kidnapping and that the Defendant was actually present at the time the crime was committed and that the Defendant *knowingly encouraged and aided* Jimmy Wayne Lawrence to commit the crime and that in so doing the Defendant's actions or statements caused or contributed to

> the commission of the crime by Jimmy Wayne Lawrence, your duty would be to return a verdict of guilty of second-degree kidnapping by aiding and abetting.

(Emphases added.)

When a defendant makes a written request for an instruction that is timely, correct in law, and supported by the evidence, the trial court must give such an instruction. *State v. Dodd*, 330 N.C. 747, 412 S.E.2d 46 (1992). However, the trial court is not required to give a requested instruction verbatim, *State v. Brown*, 335 N.C. 477, 439 S.E.2d 589 (1994), so long as the instruction actually provided adequately conveys the substance of the requested instruction, *State v. Green*, 305 N.C. 463, 290 S.E.2d 625 (1982). Accordingly, we must determine whether the trial court's instructions were correct in law and adequately conveyed the substance of defendant's request.

We review the instructions given here in conjunction with our holding in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *overruled by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *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), which was controlling at the time this case was tried. In *Blankenship*, the defendant raised a similar issue on appeal, and we held that the trial court's instructions on acting in concert were erroneous because they

> permit[ted] defendant to be convicted of premeditated and deliberated murder when he himself did not inflict the fatal wounds, did not share a common purpose to murder with the one who did inflict the fatal wounds and had no specific intent to kill the victims when the fatal wounds were inflicted.

Id. at 557, 447 S.E.2d at 736. Specifically, we noted that the doctrine of acting in concert requires that "one may not be criminally responsible under the theory of acting in concert for a crime . . . which requires a specific intent, unless he is shown to have the requisite specific intent." *Id.* at 558, 447 S.E.2d at 736.

The principles set out in *Blankenship* regarding the doctrine of acting in concert subsequently were applied to the doctrine of aiding and abetting in *State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996), and *State v. Allen*, 339 N.C. 545, 453 S.E.2d 150 (1995), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S.

900, L. Ed. 2d 177 (1997). Although *Blankenship* has been overruled, as noted above, the overruling was not retroactive. *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). Because the instant offense occurred while *Blankenship* was in effect, we apply the *Blankenship* acting in concert rule to defendant's case. *State v. Barrow*, 350 N.C. 640, 517 S.E.2d 374 (1999).

Defendant was convicted under a theory of aiding and abetting both first-degree burglary and second-degree kidnapping, each of which is a specific intent crime. *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) ("kidnapping is a specific intent crime"); *State v. Warren*, 313 N.C. 254, 262, 328 S.E.2d 256, 262 (1985) (one of the essential elements of first-degree burglary "is that the breaking and entering must have been accompanied by the intent to commit a felony"). Defendant argues that the trial court's instructions that he must have "knowingly encouraged and aided" and "knowingly encouraged or aided" Lawrence in the commission of the crimes were inadequate and misleading. Specifically, defendant contends that the instructions permitted the jury to find him guilty of burglary and kidnapping without specific findings that he individually possessed the requisite *mens rea* for those crimes. However, we have previously approved instructions similar to those given here. In *Allen*, decided while *Blankenship* was controlling, the trial court instructed the jury that to find the defendant guilty of aiding and abetting, it would have to find in part that the defendant "knowingly aided Thomas Mitchell" in committing first-degree murder or involuntary manslaughter. *State v. Allen*, 339 N.C. at 555, 453 S.E.2d at 156. We found these instructions adequate and stated:

> Despite the court's erroneous use of the phrases "should have known" and "reasonable grounds to believe," we conclude that the instructions as a whole conveyed that under the theory of aiding and abetting, Mitchell had to have the specific intent to kill the victim; defendant had to know this was Mitchell's intent when he handed him the gun; and defendant, with that knowledge, intended to aid Mitchell in committing the crime. The court conveyed this principle by its overall instructions and specifically by its use of the phrase "knowingly aided." The probable interpretation of "knowingly aided" by the jury was that before it could find defendant guilty, it would have to determine that defendant knowingly participated in the crime based on an intent to assist Mitchell in committing it. We also note that this phrase is used to

describe the intent element in the North Carolina Pattern Jury Instructions on aiding and abetting.

Id. at 558-59, 453 S.E.2d at 158 (citation omitted).

Citing *Allen*, we reiterated this holding in *Buckner*, which also was decided while *Blankenship* was controlling. We stated:

> Here, the trial court used the phrase "knowingly advised, instigated, encouraged, procured or aided the other person or persons to commit the crime." . . . We conclude these instructions clearly convey that for the jury to find defendant guilty under the theory of aiding and abetting, defendant had to have knowingly participated in the murder based on an intent to assist Bivens in committing the crimes for which defendant was charged. The instructions were not erroneous, and defendant's assignment of error is overruled.

State v. Buckner, 342 N.C. at 227, 464 S.E.2d at 430.

In the case at bar, the trial court instructed the jury that it could convict defendant only if it found that, in addition to the other elements, defendant "knowingly encouraged or aided" Lawrence in committing first-degree burglary and "knowingly encouraged and aided" Lawrence in committing second-degree kidnapping. These instructions adequately conveyed the requirement that to convict under a theory of aiding and abetting, defendant had to have the specific intent to aid Lawrence in those offenses. Accordingly, the Court of Appeals erred in holding that the trial court's instructions were improper, and we reverse the decision of the Court of Appeals.

DEFENDANT'S CONDITIONAL PETITION FOR DISCRETIONARY REVIEW

[2] Defendant's first issue on review is whether the trial court erred when it denied his motion to dismiss the charges of burglary and kidnapping made at the close of the State's evidence and renewed at the close of all the evidence. Defendant contends that there was insufficient evidence to support the convictions.

When such a motion is made, the only issue for the trial court is "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Substantial evidence is such relevant evidence as a reason-

able mind might accept as adequate to support a conclusion. *State v. Vick*, 341 N.C. 569, 461 S.E.2d 655 (1995). In reviewing a motion to dismiss, the trial court should be concerned only with the sufficiency of the evidence, not with its weight. *State v. Sokolowski*, 351 N.C. 137, 522 S.E.2d 65 (1999). The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence. *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). The defendant's evidence is not considered unless favorable to the State. *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360 (1994). Determination of any witness' credibility is for the jury, *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988), and contradictions and discrepancies in the evidence are resolved in favor of the State, *State v. Gibson*, 342 N.C. 142, 463 S.E.2d 193 (1995). Review of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981).

We now apply the foregoing principles to the case at bar. The elements of first-degree burglary are: (1) breaking, (2) and entering, (3) at night, (4) into the dwelling, (5) of another, (6) that is occupied, (7) with the intent to commit a felony therein. N.C.G.S. § 14-51 (1999); *State v. Singletary*, 344 N.C. 95, 472 S.E.2d 895 (1996). Here, the felony underlying the burglary was murder. Although aiding and abetting may be found in a number of circumstances, *see* Thomas H. Thornburg, *North Carolina Crimes: A Guidebook on the Elements of Crime* (Institute of Gov't 4th ed. 1995), the elements of aiding and abetting for purposes of the instant case are that defendant: (1) was present at the scene of the crime, (2) intended to aid Lawrence in the crime if necessary, and (3) communicated to Lawrence his intent to provide aid. *State v. Johnson*, 310 N.C. 574, 313 S.E.2d 560 (1984). "The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). In addition, "the motives tempting [him] to assist in the crime . . . and [his] conduct before and after the crime are circumstances to be considered." *State v. Birchfield*, 235 N.C. 410, 414, 70 S.E.2d 5, 8 (1952). Moreover, "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *State v. Goode*, 350 N.C. at 260, 512 S.E.2d at 422. Therefore, "a

defendant may be guilty of a crime by his mere presence if the perpetrator knows the friend's presence will be regarded as encouragement and protection." *State v. Lemons*, 348 N.C. 335, 377, 501 S.E.2d 309, 334 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999). We have referred to this doctrine as the "friend" exception to the general rule that a defendant's mere presence at the scene of a crime is insufficient to establish guilt. *Id.*

Defendant argues that there was insufficient evidence that he possessed the specific intent to aid Lawrence in committing the murder underlying the burglary and that there was insufficient evidence that he communicated any intent to Lawrence. However, defendant's reliance on his own testimony to support this argument is misplaced. *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360 (unless favorable to the prosecution, defendant's evidence is not to be considered when reviewing the sufficiency of the evidence). Taken in the light most favorable to the State, the evidence reveals that defendant was Lawrence's friend and on 18 January 1997, spent the day with him at a cookout. Defendant, clad in black, accompanied Lawrence that night to McLean's home. When defendant saw that Lawrence was taking a pistol, defendant armed himself with a loaded sawed-off shotgun. After arriving at McLean's home, defendant stood by, holding his shotgun while Lawrence argued with Morrison and pointed his pistol at her. Defendant then followed Lawrence into McLean's home and stood inside the doorway, still holding his shotgun, while Lawrence shot McLean numerous times. As defendant drove the vehicle away from the scene of the crime with Lawrence and the abducted Morrison, he remarked that Lawrence should have killed Morrison also. Defendant later hid Lawrence's murder weapon at his girlfriend's home, and a search of his vehicle yielded several nine-millimeter rounds and twenty-gauge shotgun shells.

From this evidence, the jury readily could have inferred that defendant had the requisite criminal intent to aid Lawrence in committing the felony of murder while inside the victim's residence and that such intent was communicated to Lawrence. This evidence also is sufficient to support an inference that defendant both encouraged and protected Lawrence. Accordingly, the trial court properly denied defendant's motion to dismiss the burglary charge.

[3] We now turn to the charge of second-degree kidnapping. The elements of kidnapping are: (1) confinement, restraint, or removal from one place to another; (2) of a person; (3) without the person's con-

sent; (4) for the purpose of facilitating the commission of a felony. N.C.G.S. § 14-39(a) (1999). If the victim was released in a safe place and neither sexually assaulted nor seriously injured, the kidnapping is of the second degree. N.C.G.S. § 14-39(b). In the case at bar, the trial court instructed the jury on defendant's removal of Morrison for the purpose of facilitating the felony of sexual assault. Because defendant was convicted under a theory of aiding and abetting, we apply the same tests as we did above to determine whether there was sufficient evidence for a trier of fact to find that defendant was at the scene of the kidnapping, that defendant intended to aid Lawrence in the kidnapping, and that he communicated this intent to Lawrence.

Although defendant argues that there was insufficient evidence that he possessed the specific intent to aid Lawrence in removing Morrison for the purpose of facilitating a sexual assault and that there was insufficient evidence that he communicated any such intent to Lawrence, he again erroneously relies on his own testimony. *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360. Considered in the light most favorable to the State, the evidence shows that defendant left a cookout with Lawrence to travel to McLean's home while aware that Lawrence intended to get a hotel room with a female. Once at McLean's home, defendant watched Lawrence point a pistol at Morrison and demand that she leave with him. After Morrison refused, Lawrence and defendant followed her into McLean's home where Lawrence shot McLean. Lawrence then forced the barely clad Morrison, who was screaming and crying, to leave with him. As defendant drove from the scene of the murder to Lawrence's father's home, he stated to Lawrence, "[Y]ou should have killed her too because she's going to tell it." At one point, Lawrence instructed defendant to "[s]low down. We don't want to make it look like we're doing something wrong." When Lawrence went inside his father's home, defendant hovered behind the vehicle in which Morrison sat until they swapped vehicles. Defendant then drove Lawrence and Morrison to the Comfort Inn where he remained in the vehicle with Morrison while Lawrence registered. Defendant's loaded shotgun subsequently was brought into the rented room. After being paged by Lawrence, defendant later returned to the room to give Lawrence clothing for Morrison. This substantial evidence supports the conclusion that defendant had the requisite criminal intent to aid Lawrence in removing Morrison for the purpose of committing the felony of sexual assault and that his intent was communicated to Lawrence.

Although defendant argues that this evidence at most shows that he assisted Lawrence in escorting Morrison to the hotel for a consensual sexual encounter with Lawrence, a reasonable juror readily could have inferred that defendant knew a sexual assault was in the offing. Testimony established that Morrison, barely dressed and in obvious distress, was removed at gunpoint from her home immediately after she saw her boyfriend murdered and was then kept in the vehicle while Lawrence checked in at the Comfort Inn. Soon thereafter, Morrison noticed that a loaded shotgun had been brought into the hotel room. Defendant's behavior both encouraged and protected Lawrence and also ensured that others would not witness or hinder the commission of the rape. Defendant's claim that he was unaware a sexual assault would take place is not plausible, and the trial court properly denied defendant's motion to dismiss the kidnapping charge. This assignment of error is overruled.

[4] Defendant next contends that he is entitled to a new trial on the kidnapping charge because the trial court instructed the jury on a theory not alleged in the indictment. Defendant did not make a contemporaneous objection; therefore, we review the instructions for plain error. N.C. R. App. P. 10(b)(2), (c)(4). Under this standard, defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. N.C.G.S. § 15A-1443(a) (1999); *State v. White*, 321 N.C. 52, 361 S.E.2d 724 (1987). The error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). We have observed that " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

As a general rule, "an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998). Although defendant was convicted of aiding and abetting second-degree kidnapping, he was indicted for first-degree kidnapping. In order properly to indict a defendant for first-degree kidnapping, the State must allege both the essential elements of kidnapping as provided in N.C.G.S. § 14-39(a) and at least one of the elements of first-degree kidnapping listed in

N.C.G.S. § 14-39(b). *State v. Bell*, 311 N.C. 131, 316 S.E.2d 611 (1984). Section 14-39 of the North Carolina General Statutes provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39(a), (b).

The indictment in defendant's case provided:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap Gwen Morrison, a person who had attained the age of 16 years, by unlawfully *confining* her without her consent, and for the purpose of facilitating the commission of a felony, to wit: murder, sexual assault and for terrorizing the victim. Ms. Morrison was released in a safe place, and was sexually assaulted.

(Emphasis added.) However, the trial court gave the following instruction to the jury:

> As to first-degree kidnapping—he is also accused of first-degree kidnapping on two theories: One as the principal and the other as an aider and abettor. As to first-degree kidnapping for you to find the Defendant guilty of first-degree kidnapping the State must prove five elements beyond a reasonable doubt: First, that the Defendant unlawfully *removed* a person from one place to another. Second, that the person did not consent to this *removal*. A consent obtained by fear is not consent. Third, that the Defendant *remove* that person for the purpose of commission of a felony sexual assault. . . . Fourth, that this *removal* was a separate, complete act independent of and apart from a sexual assault. And fifth, that the person had been sexually assaulted. So I charge if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant unlawfully, that is, the Defendant himself unlawfully *removed* Gwen Morrison from one place to another and that she did not consent to this *removal* and that this *removal* was done for the purpose of commission of a felonious sexual assault and that this *removal* was a separate complete act independent of and apart from sexual assault and that Gwen Morrison had been sexually assaulted, your duty would be to return a verdict of guilty of first-degree kidnapping as principal. . . . Second-degree kidnapping differs from first-degree kidnapping only in that it is unnecessary for the State to prove that the person kidnapped had been sexually assaulted. So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant unlawfully *removed* Gwen Morrison from one place to another and she did not consent to this *removal* and that this *removal* was done for the purpose of commission of a sexual assault and that this *removal* was a separate complete act independent and apart from the intended sexual assault, your duty would be to return a verdict of guilty of second-degree kidnapping as a principal.

(Emphases added.)

We have long held that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). For instance, in *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977), the defendant was indicted for

kidnapping on a theory of removal for purposes of terrorizing and feloniously assaulting the victim. However, the trial court instructed the jury that it could find the defendant guilty if he confined, restrained or removed the victim for the purposes of holding the victim for ransom, holding the victim hostage, sexually assaulting the victim, or facilitating flight. We noted that "[t]hese theories of the crime were neither supported by the evidence nor charged in the bill of indictment" and held that the instructions constituted prejudicial error. *Id.* at 272, 237 S.E.2d at 841. Subsequently, in *State v. Taylor*, the defendant was indicted on a theory of removal for the purposes of facilitating defendant's commission of the felony of rape and subsequent flight. The trial court, however, charged the jury on theories of confinement, removal or restraint for the purposes of facilitating the defendant's flight from apprehension for another crime or to obtain the use of the victim's vehicle. The Court in the *Taylor* opinion did not state whether the defendant lodged an objection to the trial court's instructions or what standard of review was applied. We noted that the indictment charged "removing" while the instruction erroneously cited "confined" and "restrained" and observed that while confinement and restraint might be supported by the evidence, those theories were not charged in the indictment. However, our extended analysis focused on the purpose for which the kidnapping was committed. We held:

> It was prejudicial error, therefore, for the trial court to instruct with respect to "another crime" and to refer to "[obtaining] the use of her vehicle," the latter not being charged in the bill of indictment. . . . Its failure to instruct on the theory charged in the bill of indictment, in addition to its instructions on theories not charged, constitutes prejudicial error entitling defendant to a new trial on the charge of kidnapping.

State v. Taylor, 301 N.C. at 171, 270 S.E.2d at 413-14. Likewise, in *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984), the defendant was indicted on theories of confinement, removal and restraint for the purpose of facilitating the commission of the felony of attempted rape. The indictment also alleged that the defendant did not release the victim in a safe place. However, the trial court charged the jury on theories of confinement, removal and restraint for the purpose of terrorizing the victim. In addition, the trial court instructed that to convict defendant of first-degree kidnapping, the jury must find that the defendant sexually assaulted the victim rather than that he failed to release her in a safe place, as alleged in the indictment. Noting that

we were "especially concerned by the 'terrorism' instruction, for the State presented absolutely no evidence directed to proof of the theory that defendant kidnapped Ms. Noles for the purpose of terrorizing her," we concluded that

> the judge's instructions permitted the jury in this case to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial. We therefore hold that under the factual circumstances of this case, there was "plain error" in the jury instructions as that concept was defined in *Odom* and defendant must therefore receive a new trial on the first-degree kidnapping charge.

Id. at 249, 321 S.E.2d at 863. Finally, in *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), the defendant was indicted on a theory of removal for purposes of facilitating the commission of the felonies of first-degree rape and first-degree sexual offense, but the trial court instructed the jury on a theory of restraint. We held that under a plain error analysis, "[i]n light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have . . . ' "tilted the scales" and caused the jury to reach its verdict convicting the defendant." ' *Id.* at 540, 346 S.E.2d at 422 (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

Because the indictment here charged confinement, the instructions given by the trial court based on the theory of removal were erroneous. However, we find that the error was not prejudicial. The cases cited above are distinguishable from the case at bar. In *Dammons*, *Brown* and *Taylor*, the trial court instructed the jury on the defendant's underlying intent or purpose in committing the kidnapping, which in each case differed from that alleged in the indictment. In the instant case, however, defendant was indicted for kidnapping for the purposes of facilitating the commission of "murder, sexual assault and for terrorizing the victim," and the trial court instructed the jury that defendant's purpose in the kidnapping was to commit sexual assault, either as a principal or as an aider and abettor. Thus, unlike *Dammons*, *Brown* and *Taylor*, this purpose did not differ from that listed in the indictment. In addition, while the evidence in *Tucker* was highly conflicting, the evidence of confinement, restraint and removal was compelling in the case at bar. After examining the instructions and the record in its entirety, we cannot say that any defect in the instructions was " 'a "fundamental error, some-

thing so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), *quoted in State v. Robinson*, 346 N.C. 586, 603, 488 S.E.2d 174, 185 (1997); *see also State v. Clinding*, 92 N.C. App. 555, 562-63, 374 S.E.2d 891, 895 (1989) (defendant argued that the trial court committed plain error in instructing the jury on restraint when the indictment alleged only removal and confinement as theories of kidnapping, and the court held that "[b]ecause the evidence of defendant's guilt in this case is overwhelming," including "the testimonies of five eyewitnesses, and a confession by the defendant explaining his involvement in the crimes, suffice it to say that we do not believe that a different result would likely have been reached had this instruction not been given"). Accordingly, we conclude that a different result would not have been reached had the trial court instructed on confinement rather than removal and hold that the erroneous instructions do not constitute prejudicial error.

Although our holding in *Tucker* was intended to encourage trial courts to exercise care in instructing juries in kidnapping cases, we note that issues relating to such instructions continue to arise. In *State v. Raynor*, 128 N.C. App. 244, 495 S.E.2d 176 (1998), the indictment alleged restraint, but the instructions allowed a conviction upon either restraint or removal. No objection was raised, and the Court of Appeals found no plain error, holding that the evidence supported conviction on either theory. In *State v. Dominie*, 134 N.C. App. 445, 518 S.E.2d 32 (1999), the indictment alleged removal, and the trial court instructed that the jury could convict upon a finding of removal, restraint or confinement. The State confessed error on the issue, and the Court of Appeals reversed, citing *Tucker*. The Court of Appeals in *Dominie* did not state whether an objection was raised at trial. Most recently, in *State v. Lancaster*, 137 N.C. App. 37, 527 S.E.2d 61, *disc. rev. denied in part and allowed in part*, 352 N.C. 680, —— S.E.2d —— (2000), the indictment charged kidnapping by confining, restraining *and* removing. The court instructed on kidnapping by confinement, restraint *or* removal. In the absence of an objection, the Court of Appeals applied plain error analysis and found no error, holding that the evidence allowed a conviction under any of the theories.

Because kidnapping is an ongoing offense that often begins as a restraint or confinement and segues into a removal, *State v. White*,

127 N.C. App. 565, 492 S.E.2d 48 (1997), a prosecutor may encounter problems in drafting an indictment that properly describes the offense and gives adequate notice to the defendant. The trial court may face similar difficulties in preparing instructions for the jury. Although we acknowledge these concerns, we reaffirm our holding in *Tucker*, and we again adjure the trial courts to take particular care to ensure that the jury instructions are consistent with the theory presented in the indictment and with the evidence presented at trial.

This assignment of error is overruled.

[5] Defendant also argues that he is entitled to a new trial on the burglary and kidnapping charges because the trial court failed to instruct the jury on defendant's "mere presence." As above, because defendant did not object to the instructions at trial, we review the instructions for plain error. N.C. R. App. P. 10(b)(2), (c)(4).

The trial court gave the following instructions during its charge to the jury:

> Now, as to aiding and abetting in the charge of burglary and first- or second-degree kidnapping, a person may be guilty of a crime although he personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of the crime just as if he had personally done all the acts necessary to constitute the crime. For you to find the Defendant guilty of another crime because of aiding and abetting the State must prove generally three elements beyond a reasonable doubt: First, that the crime was committed by some other person, in this case Jimmy Wayne Lawrence. Second, that the Defendant knowingly encouraged or aided the other person to commit that crime. And third, that the Defendant's actions or statements caused or contributed to the commission of the crime by Jimmy Wayne Lawrence.

These instructions reflect almost verbatim the pattern jury instructions for aiding and abetting. N.C.P.I.—Crim. 202.20 (1998). However, defendant contends that the court also should have included parenthetical language provided in the pattern instructions as follows:

> (A person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission. To be guilty he must

> aid or actively encourage the person committing the crime, or in some way communicate to this person his intention to assist in its commission.)

Id.

There is no question that a defendant's mere presence at the scene of a crime will not support a finding of guilt of the crime charged. *State v. Walden*, 306 N.C. 466, 476, 293 S.E.2d 780, 786-87 (1982) ("It remains the law that one may not be found to be an aider and abettor, and thus guilty as a principal, solely because he is present when a crime is committed.").[1]

> "To render one who does not *actually participate* in the commission of the crime guilty of the offense committed, there must be some evidence to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to render assistance when and if it should become necessary."

State v. Johnson, 310 N.C. 574, 579, 313 S.E.2d 560, 564 (1984) (quoting *State v. Ham*, 238 N.C. 94, 97, 76 S.E.2d 346, 348 (1953)) (alteration in original). There is no obligation, however, to give an instruction on mere presence where the evidence is undisputed that the defendant participated in the crime and was not just a bystander. *State v. Cheek*, 351 N.C. 48, 520 S.E.2d 545 (1999) (defendant was not entitled to an instruction on mere presence where there was undisputed evidence that he actively participated in the kidnapping and robbery of the victim), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000); *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (trial court correctly did not instruct jury on mere presence where evidence overwhelmingly showed defendant was not merely present at the murder scene but that defendant agreed to the robbery and murder, supplied the murder weapon, and actively participated in stealing the money box); *State v. Harvell*, 334 N.C. 356, 432 S.E.2d 125 (1993) (trial court did not err in giving pattern instruction that did not include a provision on mere presence where defendant followed codefendant into group with a steel pipe and made it known to codefendant that he was willing to lend any assistance necessary as codefendant shot the victim).

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1. As discussed previously, the "mere presence" rule is subject to an exception where a friend's presence provides encouragement and protection to the perpetrator. *State v. Lemons*, 348 N.C. 335, 501 S.E.2d 309.

As in the cases cited above, there is undisputed evidence that defendant was more than merely present at the scene of the offenses. That evidence, detailed previously, showed that defendant armed himself to accompany his friend Lawrence, stood by with his loaded weapon ready for use while Lawrence abducted Morrison after shooting her boyfriend numerous times, commented on Lawrence's failure to kill Morrison, drove the getaway car, guarded Morrison, brought clothes to Lawrence for Morrison to wear, and hid Lawrence's murder weapon. Defendant did not deny any of this evidence, and his contention that it amounts to "mere presence" is unpersuasive.

Moreover, when read as a whole, the instructions adequately convey the principle that defendant's presence alone is not sufficient to support a conviction for burglary or kidnapping as an aider and abettor. Given these instructions, a reasonable juror could not have found that defendant's mere presence at the scene of the crimes was sufficient for a conviction. *State v. Hammonds*, 301 N.C. 713, 272 S.E.2d 856 (1981) (trial court's instructions emphasizing that an aider and abettor has to knowingly advise, encourage, instigate or aid another in committing a crime were sufficient to illustrate that defendant's presence alone was not sufficient to convict). This assignment of error is overruled.

DEFENDANT'S MOTION FOR APPROPRIATE RELIEF

[6] Defendant contends in his motion for appropriate relief that the court-imposed enhancements of his burglary and kidnapping sentences must be vacated because North Carolina's firearm enhancement statute, N.C.G.S. § 15A-1340.16A (1999), is unconstitutional on its face and as applied to him. Specifically, defendant argues that the statute unconstitutionally authorizes imposition of an enhanced sentence without requiring submission of the enhancing factors to a jury and without requiring proof of those factors beyond a reasonable doubt. In addition, defendant asserts that the trial court lacked jurisdiction to impose the sentencing enhancements because none of the indictments alleged any elements set out in the applicable statute.

Section 15A-1340.16A, North Carolina's firearm enhancement statute, provides:

> (a) If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony,

the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. The court shall not suspend the 60-month minimum term of imprisonment imposed as an enhanced sentence under this section and shall not place any person sentenced under this section on probation for the enhanced sentence.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) The person is not sentenced to an active term of imprisonment.

(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B1, B2, C, D, or E felony.

(3) The person did not actually possess a firearm about his or her person.

N.C.G.S. § 15A-1340.16A.

At defendant's trial, the jury returned verdicts finding defendant guilty of both first-degree burglary and second-degree kidnapping. First-degree burglary is punishable as a class D felony, N.C.G.S. § 14-52 (1999), and second-degree kidnapping is punishable as a class E felony, N.C.G.S. § 14-39. At sentencing, the trial court found defendant to have a prior record level of I. Pursuant to section 15A-1340.17, which provides in pertinent part the punishment limits for each class of offense and prior record level, N.C.G.S. § 15A-1340.17(c), (e) (1999), the trial court sentenced defendant to 64 to 86 months' imprisonment for first-degree burglary and 25 to 39 months' imprisonment for second-degree kidnapping. The trial court then added 60 months to each sentence pursuant to the firearm enhancement statute, which resulted in the imposition of 124 to 146 months' imprisonment for the burglary and 85 to 99 months' imprisonment for the kidnapping.

Our review of the legality of these sentences is both guided and bound by two recent opinions of the United States Supreme Court. In *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), the defendant was indicted, in part, for carjacking or aiding and abetting that offense in violation of 18 U.S.C. § 2119. That statute authorizes a maximum penalty of fifteen years' imprisonment upon conviction; however, higher penalties may be imposed when the offense results in serious bodily injury or death. The defendant's indictment made no

reference to the numbered subsections of the statute that specify the offense level, nor did it allege any of the factors set out in those subsections that authorize the sentencing court to impose an enhanced sentence. However, because a preponderance of the evidence established that one of the victims had suffered serious bodily injury, the district court sentenced defendant under a twenty-five-year enhancement provision of the statute. The United States Court of Appeals for the Ninth Circuit affirmed the defendant's sentence, but the United States Supreme Court reversed.

Focusing on the role of the jury and the distinction between an "element" of an offense and a "sentencing consideration," the Supreme Court expressed concern "whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.* at 244, 143 L. Ed. 2d at 326. The Court determined that the "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range" would raise serious constitutional questions under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees under the Sixth Amendment. *Id.* at 248, 143 L. Ed. 2d at 329. Accordingly, the Court construed 18 U.S.C. § 2119 "as establishing three separate offenses by the specification of distinct elements" and held that each element "must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Id.* at 252, 143 L. Ed. 2d at 331.

Subsequently, the Supreme Court extended this holding to the states in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the defendant fired several bullets into the home of an African-American family. The defendant was indicted, in part, for second-degree possession of a firearm for an unlawful purpose in violation of N.J. Stat. Ann. § 2C:39-4a. Under New Jersey state law, a second-degree offense is punishable by imprisonment between five and ten years. However, New Jersey has enacted a hate crime law, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), which authorizes an extended imprisonment term between ten and twenty years for second-degree offenses committed for the purpose of intimidating individuals on the basis of their race, color, gender, handicap, religion, sexual orientation or ethnicity. The trial court applied this enhancement in the defendant's case after finding by a preponderance of the evidence that the defendant's actions were undertaken for

the purpose of intimidation. Although the Appellate Division of the Superior Court of New Jersey and the New Jersey Supreme Court affirmed, the United States Supreme Court reversed.

As in *Jones*, the Court analyzed the difference between an "element" of an offense and a "sentencing factor" and concluded that the key inquiry is, "[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494, 147 L. Ed. 2d at 457. The Court answered this question in the affirmative, stating that "the effect of New Jersey's sentencing 'enhancement' here is unquestionably to turn a second-degree offense into a first-degree offense, under the State's own criminal code." *Id.*

> "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, 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." The Fourteenth Amendment commands the same answer in this case involving a state statute.

Id. at 476, 147 L. Ed. 2d at 446 (quoting *Jones v. United States*, 526 U.S. at 243 n.6, 143 L. Ed. 2d at 326 n.6). Accordingly, the Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455.

Jones and *Apprendi* apply to the case at bar only if the statute in question "increases the penalty for a crime beyond the prescribed statutory maximum." *Id.* The North Carolina sentencing scheme is structurally unlike that of either New Jersey or the United States. With only a few exceptions, such as N.C.G.S. § 14-17, North Carolina criminal statutes setting out the elements of offenses do not specify a punishment. Instead, the statutes define the class of felony. Reference must then be made to article 81B of section 15A of the General Statutes, which contains the sentencing charts. The range of possible minimum sentences becomes known only when the sentencing court determines the defendant's prior record level and whether the offense was mitigated or aggravated, then cross-checks the sentencing grid found in N.C.G.S. § 15A-1340.17(c) to determine the available range of minimum sentences. Once the minimum sentence is selected from that range, the sentencing court refers to

another chart found in N.C.G.S. § 15A-1340.17(e) to determine the maximum sentence corresponding to the minimum sentence that has been imposed. *See* Stevens H. Clarke, *Law of Sentencing, Probation and Parole in North Carolina* (Institute of Gov't 2d ed. 1997).

Because many of the factors that are considered in determining a defendant's sentencing range are uncertain or unknown in the early stages of a criminal prosecution, most trial courts routinely have followed a cautious course and advised defendants at arraignment that the maximum sentence is that which could be imposed if the defendant were in the highest criminal history category and the offense were aggravated. Such prudence is entirely sensible, and we endorse it. Any estimate of a sentence based on preliminary and incomplete information will be wrong if, as frequently happens, additional facts surface that have an impact on sentencing detrimental to the defendant. Similarly, most trial courts follow a comparable procedure when a negotiated plea is entered. Although the parties may have agreed to the sentence that will actually be imposed, the court must nevertheless again advise the defendant of the maximum possible sentence. N.C.G.S. § 15A-1022(a)(6) (1999). Warning a defendant of the harshest possible outcome ensures that the defendant is fully advised of the implications of the charge against him or her and, if pleading, is aware of the possible consequences of the plea. We believe this approach, focusing on the theoretical maximum sentence any defendant could receive rather than the actual maximum sentence a particular defendant is facing, is also proper for determining the statutory maximum sentence for an offense. Accordingly, we hold that, unless the statute describing the offense explicitly sets out a maximum sentence, the statutory maximum sentence for a criminal offense in North Carolina is that which results from: (1) findings that the defendant falls into the highest criminal history category for the applicable class offense and that the offense was aggravated, followed by (2) a decision by the sentencing court to impose the highest possible corresponding minimum sentence from the ranges presented in the chart found in N.C.G.S. § 15A-1340.17(c). The statutory maximum sentence is then found by reference to the chart set out in N.C.G.S. § 15A-1340.17(e).

In the present case, defendant was convicted of first-degree burglary, a class D felony. N.C.G.S. § 14-52. Although defendant's prior record level was I and his actual sentencing range was toward the low end of the sentencing tables, we determine the statutory maximum sentence, as opposed to defendant's maximum sen-

tence, by assuming that the offense was aggravated and that defendant had a criminal history level of VI. Accordingly, the highest possible minimum sentence for defendant is 183 months. N.C.G.S. § 15A-1340.17(c). Reference to N.C.G.S. § 15A-1340.17(e) reveals that the corresponding statutory maximum sentence is 229 months. However, application of the firearm enhancement yields an enhanced minimum sentence of 243 months (183 months plus the 60-month enhancement), and N.C.G.S. § 15A-1340.17(e) then provides an enhanced maximum sentence of 301 months, which exceeds the statutory maximum of 229 months. A similar analysis of defendant's second-degree kidnapping offense shows that, despite defendant's prior record level of I, application of the firearm enhancement results in an enhanced maximum sentence that exceeds the statutory maximum.

Under this analysis, it is apparent that the enhancement provision of N.C.G.S. § 15A-1340.16A "increases the penalty for [defendant's] crime[s] beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455. According to our analysis of the process used to determine the statutory maximum sentence for any given offense, the addition of sixty months to the longest minimum sentence results in the addition of at least sixty months to the corresponding statutory maximum sentence, a process which results in an enhanced maximum exceeding that set out in the sentencing charts for a defendant in the highest criminal history category convicted of an aggravated offense.[2] This result is forbidden by *Jones* and *Apprendi* unless the use of a firearm under the statute is charged in the indictment, proven beyond a reasonable doubt, and submitted to the jury. Accordingly, we hold that in every instance where the State

2. To illustrate, consider a defendant convicted of a class E felony. Assuming an aggravated offense and a criminal history category of VI, the defendant's longest minimum sentence is 74 months according to N.C.G.S. § 15A-1340.17(c). Cross-reference to the table in N.C.G.S. § 15A-1340.17(e) then yields a corresponding statutory maximum of 98 months. If the firearm enhancement is applied, the longest minimum sentence becomes 134 months (74 months plus 60 months), and the corresponding maximum becomes 170 months, which exceeds the 98-month statutory maximum sentence. Another example is a defendant convicted of an aggravated class B1 offense who falls into criminal history category IV, the highest category for any class offense that does not automatically receive a life sentence upon conviction. A judge following our analysis would determine that the statutory maximum sentence is the sum of 480 months, 20% of 480 months, and 9 months, or 585 months. N.C.G.S. § 15A-1340.17(c), (e1). This sentence appears to be the highest maximum nonlife sentence contemplated by the sentencing tables. However, if the firearm enhancement is added, the enhanced maximum sentence would be the sum of 540 months (480 months plus the 60-month enhancement), 20% of 540 months, and 9 months, or 657 months, a sentence exceeding any found in the sentencing tables.

seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. If the jury returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence.

We must acknowledge that our analysis does not encompass the most serious offenses. Regardless of the firearm enhancement, life without parole and death are the only sentences available for defendants convicted of a class A offense, and life without parole is the only sentence available for a defendant convicted of a class B1 offense whose prior record level is V or VI. Nevertheless, should a prosecutor wish to have an enhancement on the record for a judge conducting a review pursuant to N.C.G.S. § 15A-1380.5 or for other purposes, the enhancement must be pleaded by indictment and proven as set out in the body of this opinion.

Because defendant was not charged in an indictment with the statutory factors supporting an enhancement, nor were those factors submitted to the jury, the trial court improperly imposed an enhanced sentence. We remand to the trial court for imposition of an unenhanced sentence in accordance with this opinion.

We note that, as in *Apprendi*, this holding does not declare N.C.G.S. § 15A-1340.16A unconstitutional, but instead requires that the State meet the requirements set out in *Jones* and *Apprendi* in order to apply the enhancement provisions of the statute. We further hold that this ruling applies to cases in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final. *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000); *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649 (1987).

To prevent future confusion, we also take this opportunity to address an issue raised by the State that might otherwise come before this Court in future cases. Defendant was convicted of first-degree burglary, a class D felony. The offense was neither mitigated nor aggravated, and defendant's criminal history category was at level I. The trial court properly determined a sentence of a minimum of 64 months' imprisonment and a maximum of 86 months' imprisonment. However, when the trial court enhanced the sentence, it added 60 months to both the minimum and maximum sentence, yielding 124

to 146 months' imprisonment. The trial court followed the same procedure with defendant's kidnapping sentence. However, N.C.G.S. § 15A-1340.16A provides only that the 60 months are added to the *minimum* sentence. Accordingly, we believe that the General Assembly intended that the trial court add 60 months to the minimum sentence, then refer to the sentencing charts to determine the corresponding maximum sentence. In the case at bar for example, an enhanced minimum sentence of 124 months for kidnapping would yield an enhanced maximum sentence of 158 months, rather than 146 months.

Based upon the foregoing, we reverse the decision of the Court of Appeals as to the issue raised by the State on appeal and hold that the trial court properly instructed as to defendant's specific intent to commit first-degree kidnapping and second-degree burglary. As to defendant's additional issues raised in his petition for discretionary review, we find no error. As to defendant's motion for appropriate relief seeking review of his enhanced sentences for first-degree kidnapping and second-degree burglary, we vacate the sentences imposed and remand to the trial court for further proceedings consistent with this opinion.

REVERSED IN PART; NO ERROR IN PART; SENTENCES VACATED IN PART AND REMANDED FOR NEW SENTENCING HEARING IN PART.

STATE OF NORTH CAROLINA v. ELRICO DARNELL FOWLER

No. 164A00

(Filed 20 July 2001)

1. Evidence— hearsay—unavailable declarant

The trial court did not err in a capital trial by admitting an unavailable victim's hearsay statements to two officers under N.C.G.S. § 8C-1, Rule 804(b)(5), because: (1) the State could not procure the declarant's presence by process or other reasonable means since the victim moved to India and indicated he would not return to the United States based on his injuries and the fact that he feared for his life in America; (2) the State provided timely written notice of its intent to offer the statements at trial;

(3) the State's failure to supply an address for the victim was acceptable under the circumstances; (4) the trial court concluded the victim's statements had sufficient guarantees of trustworthiness; (5) the proffered statement was offered as evidence of a material fact; (6) the trial court concluded the statements were more probative on the point for which they were offered than any other available evidence; and (7) the trial court concluded the admission of the statements would serve the interests of justice.

2. Constitutional Law— right to confront witnesses—unavailable declarant

The trial court did not violate defendant's confrontation rights in a capital trial by admitting an unavailable victim's hearsay statements to two officers, because: (1) the factors considered in reviewing the admissibility of the statements under N.C.G.S. § 8C-1, Rule 804(b)(5) equally demonstrate the admissibility of the statements under the Confrontation Clause since they show the statements are both necessary and reliable; and (2) an independent review of the record reveals that the statements contain numerous guarantees of trustworthiness including that the victim was an eyewitness to the shooting and spoke from personal knowledge, the victim was motivated to aid in the quick capture of the perpetrator when he was extremely frightened and feared further violence, the victim never recanted his version of the attack, and the victim did not make his statements to receive any benefit from the State or to avoid prosecution.

3. Identification of Defendant— in-court—suggestiveness of identification procedure

A witness's in-court identification of defendant in a capital trial did not deprive him of his due process rights even though defendant contends the identification was the result of an impermissibly suggestive procedure based on the cumulative effect of viewing photographic arrays and meeting with prosecutors, because: (1) the trial court found the witness's identification was based on his independent recollection of defendant from the night of the crimes; (2) the record reveals that prosecutors told the witness when they met with him before the pretrial hearing that he should tell the truth if he did not recognize defendant; (3) nothing suggests that the prosecutors encouraged the witness to make a false identification; (4) although prosecutors should avoid instructing the witness as to defendant's location in the

courtroom, there is insufficient evidence to support defendant's contention that prosecutors rigged the identification; and (5) the in-court identification was not the only evidence pointing to defendant's guilt.

4. Evidence— potentially exculpatory statement—defendant did not commit the crimes

The trial court did not abuse its discretion in a capital trial by excluding a potentially exculpatory statement defendant made to another witness in jail concerning whether defendant said that he did not commit the crimes at issue after the witness testified that he told defendant the gun he had purchased from defendant had been destroyed, and defendant said he was glad and for the witness not to tell anyone about the gun, because: (1) defendant's self-serving statement of innocence was unnecessary for an understanding of the testimony about the gun; and (2) it is unclear whether defendant's statements about the gun and his assertion of innocence were part of the same verbal transaction.

5. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge for one of the victims even though defendant concedes the evidence was sufficient to prove he stole the motel's money, because the State's evidence showed that: (1) the victim habitually carried cash in his wallet; (2) the victim's wallet, business cards, and birth certificate were lying by his side at the crime scene; and (3) the wallet contained no money.

6. Robbery— dangerous weapon—jury instruction

The trial court did not commit plain error in its jury instructions concerning the robbery with a dangerous weapon of one of the victims even though defendant contends the instruction allowed the jury to convict him of this charge based solely on the taking of the motel's money, because: (1) the instructions read as a whole adequately explain the different requirements for each robbery charge; and (2) the trial court made clear that defendant had to take the motel's property to be guilty of the first robbery count and had to take the victim's property to be guilty of the second robbery count.

7. Sentencing— capital—aggravating circumstance—murder commited to avoid lawful arrest

The trial court did not err in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody, because: (1) no evidence exists to show that the victim either posed a threat to defendant or tried to resist during the robbery; (2) defendant shot the victim from behind at close range with a .44-caliber handgun; and (3) the victim was on the ground at the time of the shooting.

8. Sentencing— capital—death penalty—proportionate

The trial court did not err by sentencing defendant to the death penalty for a first-degree murder, because: (1) defendant was convicted on the basis of malice and premeditation and deliberation and under the felony murder rule; (2) defendant shot a helpless man who was lying on the floor and who was in no way resisting defendant's robbery; and (3) the jury found the N.C.G.S. §§ 15A-2000(e)(5) and (e)(11) aggravating circumstances, either of which standing alone have been held sufficient to support the death penalty.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Bridges, J., on 14 November 1997 in Superior Court, Mecklenburg County, upon a jury verdict finding defendant guilty of first-degree murder. On 31 January 2001 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 13 February 2001.

Roy A. Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

James R. Glover for defendant-appellant.

MARTIN, Justice.

On 29 January 1996 the state indicted defendant Elrico Darnell Fowler (defendant) for the first-degree murder of Bobby Richmond. The state also indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury and two counts of robbery with a dangerous weapon. Defendant was tried capitally at the 13

October 1997 Criminal Session of Superior Court, Mecklenburg County. 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 both counts of robbery with a dangerous weapon and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. The trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to terms of imprisonment for his remaining convictions.

The evidence at trial is summarized as follows: On 31 December 1995 at approximately 10:45 p.m., Bobby Richmond (Richmond), an employee at a Howard Johnson's Motel in Charlotte, North Carolina, entered the motel lobby looking for ice. Bharat Shah (Shah) was working as the motel night clerk. About five minutes later, two black males entered the motel and approached the check-in counter. One of the men pulled out a gun and ordered Richmond to get on the ground. The other man ordered Shah to "open the register and give [him] the money." While Shah was handing over the money, the man with the gun shot both Richmond and Shah. He then ordered Shah to open the office safe. When Shah stated he did not have the combination, the man shot Shah again. Both assailants then fled the motel.

The Charlotte-Mecklenburg Police arrived at the scene at 11:04 p.m. and found Richmond and Shah lying near the counter. Richmond was unresponsive. Shah was struggling to speak with police. He told the police they had been robbed by two black males, one wearing a green jacket.

When paramedics arrived, they found a large wound in the middle of Richmond's back. Richmond had no carotid pulse. The paramedics determined Shah's life was in danger. A hospital surgeon later found two wounds in Shah's left thigh, two more wounds in Shah's back, and a wound in Shah's right forearm.

A high-velocity weapon caused Shah's thigh injury. Doctors removed two .44-caliber bullet jacket fragments from his forearm during surgery. A .44-caliber bullet jacket was also found in Richmond's left lung. Police located a .44-caliber bullet core in the motel carpet beneath Richmond's chest wound. Police also found a .44-caliber bullet jacket and a large fragment from a .44-caliber bullet jacket at the scene. Both had been fired from the same weapon used

to shoot Richmond. Other pieces of metal found at the scene were also consistent with .44- caliber ammunition.

Richmond had an entrance wound in his back and an exit wound in his chest. His chest was against a hard surface when he was shot. The evidence showed Richmond was likely shot from a distance of no more than three feet.

Officers found Richmond's wallet at the scene next to his body. The wallet contained no money. The cash register drawer and a plastic change drawer next to the register also contained no money. Approximately $300.00 was stolen from the motel during the robbery.

Jimmy Guzman (Guzman), the owner of a restaurant in the motel lobby, heard gunshots around 11:00 p.m. Guzman looked through the glass door of his restaurant and saw an individual standing behind the check-in counter, looking down. Guzman said the man was black, in his late twenties, and approximately six feet tall. The man was wearing a green toboggan and a camouflage army jacket. The man had a pointed nose and hair on his face but not a full beard. Shortly after the robbery, police showed Guzman a man in a green jacket, but he was unable to say whether this was the man from the motel.

On 8 January 1996 police showed Guzman a photo array which included a 1995 photo of defendant with a full beard. Guzman said none of the men looked like the one he saw in the motel. On 11 January 1996 police showed Guzman a second photo array with a picture of another suspect. Guzman said the picture of the other suspect resembled the man he had seen at the crime scene.

On 14 January 1996 police showed Guzman another photo array produced by a computer. It included a picture taken two days earlier of defendant with a slightly unshaven face. Guzman picked out defendant's picture as the one most closely resembling the man at the motel. He was unable to state for sure, however, that defendant was the man he had seen. On 3 April 1996 police showed Guzman another photo array, without a picture of defendant. Guzman selected two photos resembling the man he had seen.

Before the pretrial hearing on 14 October 1997, the prosecutor told Guzman that at any proceeding where he was called to testify, defendant would be seated between his attorneys at the defense table. At the pretrial hearing, Guzman identified defendant as the man he had seen. Guzman said this identification was based on his mem-

ory of seeing defendant at the crime scene. At trial, Guzman again identified defendant as the man he had seen.

On 1 January 1996 at approximately 4:00 p.m., Sergeant Diego Anselmo visited Shah in the hospital. Shah provided an account of the robbery and shootings. Shah said Richmond entered the lobby looking for ice around 10:45 p.m. Shah described the two men who entered the motel and robbed and shot him as black males around twenty-five or twenty-six years old, thinly built, and approximately 5'7" tall. He said both individuals wore red ski caps with black stripes. One man, wearing a gray and black flannel shirt, asked for a room. The other man, wearing a red flannel shirt, removed a revolver from his waistband and ordered Richmond onto the ground. The man with no gun ordered Shah to open the register and give him the money. As Shah complied, the man in the red shirt shot Richmond and Shah. The man with the gun ordered Shah to open the safe. When Shah stated that he did not have the combination, the man shot Shah again. Both individuals then fled.

On 8 January 1996 Investigator Christopher Fish (Investigator Fish) interviewed Shah. During this interview Shah provided additional details about the robbery. Shah stated he gave one of the men approximately $300.00 out of the register. The man to whom he handed the money was a black male with small eyes and a goatee, and was approximately the same height as Shah, about 5'4". This man was wearing a black checked flannel shirt and dark toboggan. Shah stated that the man at the end of the counter with the gun was also black and looked similar to his accomplice although he was a little taller. This man had unshaven hair on his face but not a full beard. The man was wearing a red checked flannel shirt and dark toboggan. Shah thought the gun was black and about six inches long. The man shot Richmond first and then shot Shah in the leg. Investigator Fish showed photographs to Shah at the interview, and one of the photographs depicted defendant with a full beard. Shah said during the interview that he did not get a good look at the shooter because he was primarily focused on the man taking the money. Shah said he probably could not recognize the suspects.

Shah was released from the hospital on 14 January 1996 and eventually moved to India. The state made repeated attempts to locate Shah. Investigator Sam L. Price (Investigator Price), an investigator with the Charlotte-Mecklenburg Police Department, spoke to Shah's brother in California as early as September 1996. Investigator Price obtained Shah's telephone number in India and spoke to Shah

by phone in October 1996. Investigator Price told Shah that the state would provide him with air transportation, lodging, meals, and whatever was necessary to care for his injuries if he would return to North Carolina to testify. Investigator Price further promised that Shah would be picked up in California and provided police protection while in Charlotte. Despite the state's offer to pay for his air transportation, accommodations, and meals, as well as to provide police protection, Shah refused to return to the United States to testify at trial.

The state provided defendant with written notice of its intent to offer Shah's hearsay testimony at defendant's trial. In the state's initial notice, the state recited that Shah was living at an unknown address in India. The state later served defendant with an amended notice that included Shah's telephone number in India.

Several people testified concerning defendant's statements and actions before and after the events at the motel. Jermale Jones (Jones) said defendant told him on Thanksgiving 1995 about a potential plot to rob a Howard Johnson's Motel. Further, while incarcerated with Jones in the Mecklenburg County jail in March 1996, defendant told Jones that he entered the Howard Johnson's with a handgun to attempt a robbery and that when the people working at the motel made him ask twice for the money, defendant shot them. Defendant said the gun he used was "a big old .44."

Edward Adams (Adams) testified that he saw defendant at an apartment around 8:00 p.m. on 31 December 1995. Defendant left between 9:00 and 10:00 p.m. with two other men and returned between midnight and 1:00 a.m. Defendant stated he was going to the Sugar Shack, a local nightclub, and left with some other people. On the evening of 1 January 1996, Adams purchased a .44-caliber revolver from defendant. The gun was destroyed the next day. In April 1996 defendant spoke with Adams while they were both incarcerated. Defendant asked Adams where the gun was located, and Adams told him the gun had been destroyed. Defendant responded, "I'm glad," and asked Adams not to tell people about the gun. Defendant also told Adams that the district attorney did not know the identity of the person who purchased the gun.

Leo McIntyre, Jr. (McIntyre) testified that he went to the Sugar Shack on 31 December 1995 and spoke with defendant. Defendant was dressed in army fatigues. Defendant told McIntyre that he shot two people during a robbery at a Howard Johnson's. Defendant also

stated that he only got two or three hundred dollars and was now broke because he had paid for his friends to get into the club. Later on that week, McIntyre saw defendant at a car wash. Defendant told him then that, although he thought he had killed both people at the robbery, one of them had lived.

Waymon Fleming (Fleming) lived with defendant in December 1995. Defendant told Fleming that he robbed the motel, obtained money from the cash register, and then shot people who would not open the safe. Several days later, defendant informed Fleming of his plan to flee the state. Fleming relayed this information to law enforcement officers, and defendant was eventually apprehended.

Charlotte-Mecklenburg Police Officer James Saunders and Federal Bureau of Investigation Special Agent David Martinez met with Shenitra Johnson (Johnson) on 11 January 1996. Johnson told them defendant arrived at her house shortly after 11:30 p.m. on 31 December 1995 and left between 12:30 and 1:00 a.m. She also stated that when defendant came over to Johnson's residence, he had a .44-caliber gun, which he later sold. However, at trial Johnson testified that defendant arrived at her home around 10:30 p.m. and did not leave until sometime between 1:15 and 1:30 a.m. She further testified that she never saw defendant selling or trying to sell a handgun at her apartment.

Additional facts will be provided below as necessary.

GUILT-INNOCENCE PHASE

[1] Defendant first contends the trial court erred by admitting Shah's hearsay statements to Sergeant Anselmo on 1 January 1996 and Investigator Fish on 8 January 1996. Defendant argues these statements were improperly admitted in violation of North Carolina Rule of Evidence 804(b)(5) and his right to confrontation under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. Defendant also contends the admission of the challenged statements violated his constitutional due process rights and his constitutional protections from cruel and unusual punishment.

At the outset we note that defendant has waived appellate review of his cruel and unusual punishment claims. Defendant raises these constitutional claims in his assignments of error and questions presented. Nonetheless, he has not argued these claims in his brief or otherwise provided any authority supporting these contentions.

Accordingly, defendant has waived review of these claims. *See* N.C. R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief[] are deemed abandoned."); N.C. R. App. P. 28(b)(5) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); *State v. Kilpatrick*, 343 N.C. 466, 475, 471 S.E.2d 624, 630 (1996).

Defendant contends that the trial court erred in admitting Shah's out-of-court statements under N.C. R. Evid. 804(b)(5) and that their admission violated his Sixth Amendment right to confront the witnesses against him. We disagree.

Rule 804 provides in pertinent part:

> (b) **Hearsay exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) *Other Exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rule 804(b)(5) (1999).

In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), this Court enunciated the guidelines for admission of hearsay testimony under Rule 804(b)(5). First, the trial court must find that the declarant is

unavailable. Second, the trial court must conduct a six-prong inquiry to determine admissibility. *Id.* at 9, 340 S.E.2d at 741. The trial court must consider the following:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (quoting N.C.G.S. § 8C-1, Rule 804(b)(5)); *see also Triplett*, 316 N.C. at 9, 340 S.E.2d at 741.

At a pretrial evidentiary hearing on 15-16 October 1997, the trial court heard evidence relevant to the admissibility of Shah's statements to Sergeant Anselmo and Investigator Fish. Following this hearing the trial court determined that Shah was unavailable and made conclusions of law concerning each of the six *Triplett* prongs. On the basis of these conclusions, the trial court ruled that Shah's statements were admissible. Defendant argues that Shah's statements were insufficiently reliable to meet the evidentiary and constitutional requirements for admission at trial. Defendant further contends that the trial court's conclusion concerning Shah's unavailability was not supported by the evidence.

Rule 804 provides in pertinent part:

> (a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:
>
> . . . .

> (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

N.C.G.S. § 8C-1, Rule 804(a)(5).

The trial court concluded that Shah was unavailable based on the following findings of fact. After the shooting Shah went to California and lived with his brother, visited India, returned to the United States, and then moved back to India on a permanent basis. State officials attempted to locate Shah in preparation for trial and learned he was living in India. Shah informed the officials that there was nothing they could do to make him return to the United States and testify. Shah also stated that he would not testify because of (1) continual pain and disability from his gunshot injuries which made it difficult for him to travel, and (2) his fear for his life in America.

In *State v. Bowie*, 340 N.C. 199, 207, 456 S.E.2d 771, 775, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 435 (1995), the declarant made a statement to police and then moved to Philadelphia. Prior to trial, the state obtained an order from the trial court compelling the declarant to "be taken into custody and delivered to a North Carolina officer to assure her attendance at the trial." *Id.* When officers attempted to take the declarant into custody, she was not at her stated address. *Id.* The declarant's mother told the officers that the declarant had moved and that she did not know the declarant's new address or telephone number. *Id.* The Court held that the evidence of record was sufficient to support the trial court's finding that the state could not procure the declarant's presence by process or other reasonable means. *Id.*

In the present case, as in *Bowie*, the state was unable to determine the declarant's exact address. Further, Shah refused to attend the proceedings because of his injuries and fear for his safety. The trial court's detailed findings of fact are sufficient to support its conclusion that Shah was unavailable.

After establishing unavailability, the trial court considered the six-prong *Triplett* inquiry to determine admissibility. *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741; *State v. Smith*, 315 N.C. 76, 92-97, 337 S.E.2d 833, 844-47 (1985).

Under the first prong, the trial court must determine whether the proponent of the hearsay testimony provided proper notice to the adverse party of its intent to offer the testimony and the particulars

of the evidence. *Smith*, 315 N.C. at 92, 337 S.E.2d at 844. The state must provide defendant with written notice of its intent to offer the statements in adequate time for defendant to have a fair opportunity to meet the statements. *Triplett*, 316 N.C. at 12, 340 S.E.2d at 743. The notice requirement should be construed "somewhat flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence." *Id.* at 12-13, 340 S.E.2d at 743.

Based on the following findings of fact, the trial court concluded that the state provided timely written notice of its intent to offer Shah's statements at trial: (1) the state filed written notice of its intent to offer the statements approximately one month prior to the pretrial hearing; (2) the state attached to that notice a copy of one of Shah's statements as well as an officer's notes concerning the other statement, *see State v. Nichols*, 321 N.C. 616, 623, 365 S.E.2d 561, 565 (1988) (finding relevancy in defendant's receipt of the declarant's statement well in advance of trial); and (3) the state filed an amended notice on 2 October 1997 providing defendant with a telephone number for Shah and indicating that Shah was living at an unknown address in India. These findings were sufficient to support the trial court's conclusion that the state provided adequate notice of its intent to offer Shah's statements into evidence at trial.

We believe the state's failure to supply an address for Shah was acceptable under the present circumstances. Investigator Price spoke with Shah's brother in California, obtained Shah's telephone number in India, and telephoned Shah at this number. Having confirmed the accuracy of the telephone number provided by Shah's brother, the state provided defendant with this contact information. Obviously, the state could not provide what it did not have but nonetheless provided defendant with a reliable means to contact Shah. Accordingly, the state's failure to produce Shah's address in India did not deny defendant a fair opportunity to meet the evidence at trial.

The trial court next considered, under the second prong, whether the statements made by Shah in the hospital to Sergeant Anselmo and Investigator Fish were covered by any of the other hearsay exceptions listed in Rule 804(b)(1)-(4). *See State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). Although the trial court found that Shah's statements to police at the crime scene could be admitted under other hearsay exceptions, it determined that the statements made at the

hospital did not fall under any other exception. Defendant has not shown that the trial court's analysis and conclusion on this issue were improper.

Next, the trial court considered whether, under the third prong, the challenged statements possessed " 'guarantees of trustworthiness' that are equivalent to the other exceptions contained in Rule 804(b)." *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E.2d 102, 104 (1986). This Court has directed the trial court to consider the following factors when analyzing this question: (1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth, (3) whether the declarant recanted, and (4) the practical availability of the declarant at trial for meaningful cross-examination. *State v. Tyler*, 346 N.C. 187, 195, 485 S.E.2d 599, 603 (citing *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997).

In the present case, the trial court concluded that Shah's statements had sufficient guarantees of trustworthiness. This conclusion was premised on the trial court's detailed findings of fact that: (1) Shah had personal knowledge of the robbery and shooting as an eyewitness to the entire event, *compare Tyler*, 346 N.C. at 199, 485 S.E.2d at 605 (holding declarant's hearsay testimony that defendant set her on fire was properly admitted pursuant to Rule 804(b)(5) when the deceased declarant made statements to police in the hospital from her personal knowledge and had no reason to lie and never recanted the statement), *with State v. Swindler*, 339 N.C. 469, 450 S.E.2d 907 (1994) (holding hearsay statements were improperly admitted where the declarant had no personal knowledge of the events described in the letter the proponent sought to admit, the declarant refused to acknowledge writing the letter, the declarant refused to testify, the letter incriminated the defendant, and the declarant was motivated to talk to obtain a deal with police); (2) Shah was motivated to speak truthfully to law enforcement officers to facilitate defendant's immediate capture, *see Triplett*, 316 N.C. at 10-12, 340 S.E.2d at 742; *State v. Brown*, 339 N.C. 426, 437-38, 451 S.E.2d 181, 188 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995); (3) Shah never recanted his account or description of the events in any way, *see Tyler*, 346 N.C. at 199, 485 S.E.2d at 605; (4) Shah had no specific relationship with defendant or police that would encourage him to provide anything other than a truthful statement, *see Triplett*, 316 N.C. at 11, 340 S.E.2d at 742; *Brown*, 339 N.C. at 437, 451 S.E.2d at 188; and (5) in consideration of Shah's availability for cross-examination, com-

pelling Shah's attendance at trial provided huge and insurmountable obstacles, *see State v. Chapman*, 342 N.C. 330, 341-42, 464 S.E.2d 661, 667-68 (1995) (holding the trial court properly considered the state's unsuccessful attempts to find the declarant), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996); *see also Triplett*, 316 N.C. at 11, 340 S.E.2d at 742. These findings are sufficient to support the trial court's conclusion that Shah's statements possessed sufficient guarantees of trustworthiness for admission at defendant's trial. We further note that the principal reasons for Shah's unavailability appear to be the difficulty of the long journey and his fear for his life. Such reasons do not suggest any improper motivation to avoid testifying, and they support the trial court's conclusion that Shah's statements were trustworthy.

Next, under the fourth *Triplett* prong, the trial court determined that the proffered statement was offered as evidence of a material fact. *See Smith*, 315 N.C. at 94-95, 337 S.E.2d at 845. The trial court concluded that Shah's statements were material because the statements described the assailants and the details of the crime. Accordingly, this prong of the inquiry is fully satisfied.

The trial court next considered whether, under the fifth prong, Shah's statements were more probative on the point for which they were offered than other available evidence. "Th[is] requirement imposes the obligation of a dual inquiry: were the proponent's efforts to procure more probative evidence diligent, and is the statement more probative on the point than other evidence that the proponent could reasonably procure?" *Smith*, 315 N.C. at 95, 337 S.E.2d at 846. The trial court first concluded that Shah's hearsay statements were more probative than any other evidence because Shah was the only surviving victim of the crimes, Shah was the only eyewitness to the entire event, and Shah was the closest person to the assailants and therefore had the best opportunity to observe them. The trial court also found that the state was diligent in its efforts to produce Shah's presence at defendant's trial and concluded that it was practically impossible to return Shah to this country to testify.

Defendant argues, however, that the trial court failed to adequately consider the first prong of the two-part probativeness inquiry outlined in *Smith*, which requires a showing that the proponent's efforts to procure more probative evidence were diligent. *Id.* Defendant further contends that the state's lack of diligence denied defendant the opportunity to cross-examine Shah.

Contrary to defendant's contention, the trial court's findings support a conclusion that the state acted diligently in trying to produce Shah to testify. Although the live testimony of the hearsay declarant will ordinarily be more probative than his prior statement, *see id.*, the trial court specifically found that it was practically impossible to return Shah to this country to testify. The trial court made the following findings of fact to support its conclusion: (1) state officials contacted Shah in India, and Shah informed them there was no way he would return to the United States to testify; (2) Shah was not willing to return to this country because his painful injuries made travel difficult and he feared for his safety; (3) the state spoke numerous times with Shah's brother in California in attempts to locate Shah; (4) the state offered to provide Shah with police protection during his stay; and (5) the state offered to pay for Shah's airfare, lodging, meals, and care for his injuries during his stay. These facts are sufficient to support the trial court's conclusion that the state's efforts to produce Shah were diligent.

The final inquiry under the six-prong *Triplett* analysis is whether the admission of the hearsay statements serves the interests of justice and the general purpose of the rules of evidence. *Smith*, 315 N.C. at 96, 337 S.E.2d at 846-47. The trial court concluded that admission of Shah's statements would serve the interests of justice. It considered numerous factors, including that Shah's prior inability to identify defendant could be raised during cross-examination of the witnesses through whom Shah's statements would be introduced. The trial court thus determined that Shah's statements would not be unduly prejudicial to defendant. Defendant has not shown error in the trial court's analysis.

Accordingly, the witness has been properly deemed to be unavailable, and the trial court satisfied all six prongs of the *Triplett* analysis. We find no error in the admission of the victim's hearsay statements under Rule 804(b)(5).

[2] We also reject defendant's contention that the admission of Shah's hearsay statements violated his right to confrontation. Under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The North Carolina Constitution provides a similar right. N.C. Const. art. I, § 23; *see also State v. Chandler*, 324 N.C. 172, 178-79, 376 S.E.2d 728, 733 (1989). This Court has generally construed the right to confrontation under our state constitution consistent with the federal

provision. *See, e.g., State v. Jackson*, 348 N.C. 644, 653-54, 503 S.E.2d 101, 107 (1998); *Deanes*, 323 N.C. at 514-25, 374 S.E.2d at 254-61.

This Court uses a two-part test to determine whether statements admissible under a hearsay exception violate the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 607 (1980); *Deanes*, 323 N.C. at 525, 374 S.E.2d at 260. First, the prosecution must "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use." *Roberts*, 448 U.S. at 65, 65 L. Ed. 2d at 607. This prong of the *Roberts* inquiry is called the "Rule of Necessity." *Id.* In analyzing this prong, " '[a] witness is not "unavailable" for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.' " *Id.* at 74, 65 L. Ed. 2d at 613 (quoting *Barber v. Page*, 390 U.S. 719, 724-25, 20 L. Ed. 2d 255, 260 (1968)) (alterations in original).

The second prong of the *Roberts* analysis requires the prosecutor to show that the statements at issue have sufficient "indicia of reliability." *Id.* at 66, 65 L. Ed. 2d at 607. Assuming testimony falls within a "firmly rooted" hearsay exception, this reliability is presumed without more. *Id.* at 66, 65 L. Ed. 2d at 608. Testimony that does not fall within a "firmly rooted" exception, however, will be excluded absent a showing of particularized guarantees of trustworthiness drawn from the totality of the circumstances surrounding the statements. *Idaho v. Wright*, 497 U.S. 805, 818-19, 111 L. Ed. 2d 638, 654-55 (1990); *see also Tyler*, 346 N.C. at 200, 485 S.E.2d at 606. The United States Supreme Court has stated that residual hearsay exceptions such as Rule 804(b)(5) are not firmly rooted. *Wright*, 497 U.S. at 817, 111 L. Ed. 2d at 653; *Tyler*, 346 N.C. at 200, 485 S.E.2d at 606; *State v. Felton*, 330 N.C. 619, 643, 412 S.E.2d 344, 359 (1992).

This Court recently stated that the two-part *Roberts* test is incorporated within the trustworthiness and probativeness prongs of the six-part inquiry from *Smith* and *Triplett*. *Brown*, 339 N.C. at 439, 451 S.E.2d at 189; *Deanes*, 323 N.C. at 525, 374 S.E.2d at 260. In the present case, the factors considered in reviewing the admissibility of Shah's statements under Rule 804(b)(5) equally demonstrate the admissibility of the statements under the Confrontation Clause because they show Shah's statements are both necessary and reliable. *Brown*, 339 N.C. at 439, 451 S.E.2d at 189.

The United States Supreme Court recently stated, however, that in analyzing "whether the admission of a declarant's out-of-court

statements violate the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause." *Lilly v. Virginia*, 527 U.S. 116, 137, 144 L. Ed. 2d 117, 134 (1999). Accordingly, we have conducted a full and independent review to determine whether Shah's statements contained sufficient "particularized guarantees of trustworthiness" for admission consistent with the Confrontation Clause. *Id.* at 125, 144 L. Ed. 2d at 127.

Upon careful review of the record, we have determined that Shah's statements contain numerous guarantees of trustworthiness. As indicated above, Shah was an eyewitness to the shooting and thus spoke from personal knowledge. Further, Shah was apparently extremely frightened that he might be the victim of further violence and was thus motivated to speak truthfully to law enforcement officers to aid in the quick capture of the perpetrator. Shah never recanted his version of the attack. Moreover, Shah did not make his statements to receive any benefit from the state or to avoid prosecution. Accordingly, based on our independent review of the record, we conclude that Shah's statements contained "particularized guarantees of trustworthiness." We thus reject defendant's contention that admission of Shah's hearsay statements violated the Sixth Amendment Confrontation Clause.

[3] Defendant next argues that Guzman's in-court identification deprived defendant of his rights to due process and freedom from cruel and unusual punishment. Before trial, defendant moved to suppress any in-court identification by Guzman. The trial court denied this motion and permitted Guzman to identify defendant at a pretrial hearing and at trial.

As noted earlier in this opinion, defendant advances no argument concerning cruel and unusual punishment in his brief. Accordingly, this argument is deemed abandoned. *See* N.C. R. App. P. 28(a), (b)(5).

As to due process, defendant argues that Guzman's in-court identification was influenced by viewing several photographic lineups and receiving instruction from prosecutors before court on how to identify defendant. Defendant notes that Guzman was never able to identify him confidently in photographic lineups prior to trial and in fact sometimes picked other people out of the lineups. Further, prior to the pretrial hearing, prosecutors met with Guzman, told him defendant's name, and instructed him that defendant would be seated

at the defense table between his attorneys. Thus, defendant contends the in-court identification violated his due process rights.

Defendant assigns special significance to the trial court's finding that:

> Mr. Guzman indicated his identification of the Defendant in open Court [was] based upon his recollection of the appearance of the Defendant as being the person behind the counter at Howard Johnson's Motel on December 31st, 1995 and not based upon any suggestion or inference in conferences with the police officers or with prosecuting attorneys.

Defendant contends that the last portion of this finding is not supported by the evidence because Guzman never stated whether his in-court identification was influenced by conferences with police or prosecutors. Indeed, defendant argues the trial court never adequately considered whether the state's instructions to Guzman were overly suggestive.

In analyzing defendant's arguments, we must consider whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. *United States v. Marson*, 408 F.2d 644, 650 (4th Cir. 1968), *cert. denied*, 393 U.S. 1056, 21 L. Ed. 2d 698 (1969); *State v. Simpson*, 327 N.C. 178, 186, 393 S.E.2d 771, 776 (1990); *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). If so, the identification should be suppressed on due process grounds. *Simpson*, 327 N.C. at 186, 393 S.E.2d at 776. This due process analysis requires a two-part inquiry. First, the Court must determine whether the identification procedures were impermissibly suggestive. *State v. Powell*, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988); *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978). Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification. *Powell*, 321 N.C. at 369, 364 S.E.2d at 335; *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *Headen*, 295 N.C. at 439, 245 S.E.2d at 708.

The test under the first inquiry is "whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151. "[T]he viewing of a defendant in the courtroom dur-

ing the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so 'unnecessarily suggestive and conducive to irreparable mistaken identification' as would deprive defendant of his due process rights." *State v. Covington*, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976) (quoting *Hannah*, 312 N.C. at 292, 322 S.E.2d at 152).

In the present case, the trial court made extensive findings concerning the photographic arrays shown to Guzman and concluded that Guzman's in-court identification was based on his independent recollection of defendant from the night of the crimes. The trial court's findings of fact are binding on appeal when supported by competent evidence. *Hannah*, 312 N.C. at 291, 322 S.E.2d at 151-52. There is ample evidence in the present record to support the trial court's findings. Guzman testified he was confident that defendant was the man he saw in the motel lobby on 31 December 1995. Guzman stated that his identification was based on his memory of seeing defendant in person in the motel lobby on the night of the shootings and not on seeing photographs of defendant. Moreover, the record reveals prosecutors told Guzman when they met with him before the pretrial hearing that he should tell the truth if he did not recognize defendant.

This evidence is sufficient to support the trial court's findings, which in turn support its ultimate legal conclusion that Guzman's identification was not the result of an impermissibly suggestive procedure. Nothing in the trial court's findings or in the evidence suggests that the prosecutors encouraged Guzman to make a false identification. The meeting between prosecutors and Guzman appears to have been nothing more than an opportunity to go over what would happen in court. The prosecutors did not provide Guzman with any information that would not have been readily apparent to him during the proceedings. Thus, although prosecutors should avoid instructing the witness as to defendant's location in the courtroom, there is nonetheless insufficient evidence to support defendant's contention that prosecutors rigged Guzman's identification. Accordingly, although Guzman never explicitly testified that his meeting with prosecutors did not affect his in-court identification, the evidence in the record supports the trial court's conclusion that Guzman's identification was not a result of prosecutorial suggestion.

Nor do we agree with defendant's suggestion that the cumulative effect of viewing photographic arrays and meeting with prosecutors caused Guzman's in-court identification to be a violation of defendant's due process rights. The sequence of events leading to Guzman's in-court identification was not unnecessarily suggestive. When, as here, the first prong of the analysis "is answered in the negative, we need proceed no further." *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151.

Assuming *arguendo* that the identification procedures used here were impermissibly suggestive, we nonetheless conclude, under the second prong of the analysis, that such procedures did not create a substantial likelihood of irreparable misidentification. *See Powell*, 321 N.C. at 369, 364 S.E.2d at 335; *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *Headen*, 295 N.C. at 439, 245 S.E.2d at 708.

Finally, we note that Guzman's in-court identification was by no means the only evidence pointing to defendant's guilt. At trial, three witnesses testified that defendant admitted entering the Howard Johnson's to attempt a robbery and that he shot two people. One witness testified that defendant told him he had only gotten two or three hundred dollars from the robbery and that he was broke because he had paid for his friends to get into the Sugar Shack. Another person testified that defendant sold him a .44-caliber revolver on the evening of 1 January 1996, the day after the murders.

Accordingly, Guzman's in-court identification did not violate defendant's due process rights. Alternatively, assuming error *arguendo*, any due process violation was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1999). This assignment of error fails.

[4] Defendant next argues that the trial court erred in excluding a potentially exculpatory statement defendant made to Edward Adams (Adams).

As indicated above, Adams and defendant spoke while in jail. Adams said the gun he had purchased from defendant had been destroyed. Defendant said, "I'm glad," and told Adams not to tell people about the gun. On cross-examination, defendant asked Adams if defendant had also said that defendant did not commit the crimes at issue.

The state objected to this question, and the trial court conducted *voir dire* outside the jury's presence. The trial court then considered

the proposed testimony under North Carolina Rule of Evidence 403 and, by analogy, Rule of Evidence 106. The trial court concluded that defendant's self-serving statement of innocence was not necessary for an understanding of the testimony about the gun. Accordingly, the trial court sustained the state's objection to the proposed testimony.

First, defendant assigns error to the exclusion of the testimony as a violation of his right to freedom from cruel and unusual punishment. We note, however, that defendant advances no argument in his brief concerning cruel and unusual punishment. Accordingly, this argument is deemed abandoned. *See* N.C. R. App. P. 28(a), (b)(5).

Second, defendant argues that exclusion of his statement of innocence was a violation of his right to due process. It is widely accepted that if the state submits a defendant's confession, the defendant may then introduce other statements made by him if they involve a specific issue related to the inculpatory statements put forth by the state. *State v. Vick*, 341 N.C. 569, 578-79, 461 S.E.2d 655, 660 (1995); *see also State v. Lovin*, 339 N.C. 695, 709-10, 454 S.E.2d 229, 237 (1995); 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 212, at 67 (5th ed. 1998). However, statements may be admitted under this rule only if they were made during the same "verbal transaction" as the confession. *Vick*, 341 N.C. at 579, 461 S.E.2d at 660 (holding admission of earlier statements by defendant did not mean later statements by defendant in a different room were admissible); *State v. Jackson*, 340 N.C. 301, 319, 457 S.E.2d 862, 873 (1995) (holding a statement was inadmissible where it was made the same day but at a different time as a confession).

We further note that whether evidence should be excluded under Rule 403 or under the common law rule of completeness codified in Rule 106 is within the trial court's discretion. *State v. Thompson*, 332 N.C. 204, 219-20, 420 S.E.2d 395, 403 (1992); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Here, it is unclear whether defendant's statements about the gun and his assertion of innocence were part of the same verbal transaction. According to Adams, defendant stated that he did not commit the crimes at issue during the "same period of time that he was talk-

ing about the gun." In his testimony, however, Adams indicated that defendant's statement of innocence was made on a different day than at least some gun-related comments. While defendant stated his innocence on only one occasion, defendant and Adams apparently discussed the gun at numerous different times. Thus, we cannot conclude that the trial court abused its discretion in excluding defendant's alleged statements of innocence. Defendant's argument, therefore, must fail.

[5] Defendant next argues that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that he robbed Richmond with a dangerous weapon. Defendant claims this conviction violated his rights to due process and freedom from cruel and unusual punishment. Again, defendant advances no argument concerning cruel and unusual punishment in his brief. Accordingly, this argument is deemed abandoned. *See* N.C. R. App. P. 28(a), (b)(5).

Defendant was indicted for armed robbery of both the Howard Johnson's Motel and Richmond. The trial court denied defendant's motion to dismiss the charge of the Richmond count, and the jury found defendant guilty of both counts.

Defendant concedes that the evidence was sufficient to prove he stole the motel's money. Defendant argues, however, that the evidence is insufficient to show he stole money belonging to Richmond. Therefore, this Court must decide whether the trial court properly concluded that sufficient evidence existed to submit the Richmond count to the jury.

In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator. *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 636 (2000). The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. *Id.* at 216, 539 S.E.2d at 637; *State v. Grooms*, 353 N.C. 50, 78, 540 S.E.2d 713, 731 (2000). The defendant's evidence should be considered only if it is favorable to the state. *Israel*, 353 N.C. at 216, 539 S.E.2d at 637; *Grooms*, 353 N.C. at 79, 540 S.E.2d at 731. If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt. *Grooms*, 353 N.C. at 79, 540 S.E.2d at 731.

In the instant case, the state's evidence showed that Richmond habitually carried cash in his wallet. Evidence of a habit can be used

to prove an element of a criminal offense. *See State v. Howell*, 335 N.C. 457, 473, 439 S.E.2d 116, 125 (1994). The state's evidence also showed that Richmond's wallet, business cards, and birth certificate were lying by his side at the scene of the crime. The wallet contained no money.

In *State v. Palmer*, 334 N.C. 104, 112, 431 S.E.2d 172, 176 (1993), this Court considered whether sufficient evidence of armed robbery existed. We held the jury's finding that money was taken at the time of the killing was supported by evidence that the victim always had money, that the victim's purse had been emptied, and that the purse contained no money. *Id.* at 112-13, 431 S.E.2d at 176.

Similarly, in *State v. Quick*, 329 N.C. 1, 8, 405 S.E.2d 179, 184 (1991), the victim's billfold was found on the floor next to his body. The billfold contained personal papers but no cash. *Id.* We held the conclusion that an armed robbery occurred during the killing was supported in part by evidence that the victim carried money on his person and that the victim's empty wallet was found at the scene. *Id.* at 20, 405 S.E.2d at 191.

Viewing the evidence in the light most favorable to the state, we hold the trial court in the present case properly denied defendant's motion to dismiss the Richmond count of robbery with a dangerous weapon. The evidence was sufficient to permit a reasonable jury to find defendant guilty of this charge beyond a reasonable doubt.

[6] Next, defendant assigns error to the trial court's instructions to the jury concerning the Richmond count of robbery with a dangerous weapon. Defendant contends the instructions allowed the jury to convict him of robbing Richmond even if it did not find that any of Richmond's personal property had been taken. Defendant thus claims violations of his rights to due process, freedom from double jeopardy, and freedom from cruel and unusual punishment. Defendant advances no argument in his brief concerning double jeopardy or cruel and unusual punishment, and these arguments are accordingly deemed abandoned. *See* N.C. R. App. P. 28(a), (b)(5). Because defendant failed to object at trial, defendant limits his attack on the instructions to plain error.

The relevant instructions provide:

> Now, the Defendant has been charged with robbery with a firearm on two counts, one of which being by taking property of UDP, Incorporated, doing business as Howard Johnsons; the

other count being an allegation of taking property of Bobby Richmond with a firearm.

So then I charge that if you find from the evidence in this case, beyond a reasonable doubt, that on or about the alleged date, the Defendant had in his possession a firearm, and that he took and carried away property of UDP, Incorporated, which operated under the business name Howard Johnsons from the person or presence of a person without the voluntary consent of that person by endangering or threatening the life of that person with the use or threatened use of a firearm, the Defendant knowing he was not entitled to take the property, and intending to deprive that person of its use permanently, then it would be your duty to return a verdict of guilty of robbery with a firearm as to that particular charge.

However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Now, so as to the [sic] distinguish between those two cases on the verdict sheet under the possible verdict guilty of robbery with a dangerous weapon, it says in parenthesis, of UDP, Incorporated, doing business as Howard Johnsons.

Your possible verdicts on that verdict sheet, and that is case number 96-CRS-2910, your possible verdicts are guilty of robbery with a dangerous weapon, or not guilty. You simply choose one of those verdicts according to your unanimous decision.

In the other case, I instruct you, likewise, that if you find from the evidence, beyond a reasonable doubt, that on or about the alleged date, the Defendant had in his possession a firearm, and that he took and carried away property from the person or presence of Bobby Richmond without his voluntary consent, by endangering or threatening his or another person's life with the use or threatened use of a firearm, the Defendant knowing at the time that he was not entitled to take the property, and intending to deprive that person of its use permanently, then it would be your duty to return a verdict of guilty of robbery with a dangerous weapon, or robbery with a firearm.

However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

> And again, in case number 96-CRS-2909, your verdict sheets [sic] specifies guilty of robbery with a dangerous weapon of Bobby Richmond, or not guilty.

Defendant contends this instruction allowed the jury to find defendant guilty of robbing Richmond if the state proved defendant stole *any property* from Richmond's presence. According to defendant, this instruction impermissibly allowed the jury to find defendant guilty of both robberies based solely on the taking of the motel's money.

When analyzing jury instructions, we must read the trial court's charge as a whole. *State v. Hardy*, 353 N.C. 122, 131-32, 540 S.E.2d 334, 342 (2000). We construe the jury charge contextually and will not hold a portion of the charge prejudicial if the charge as a whole is correct. *Id.* at 132, 540 S.E.2d at 342. " 'If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.' " *State v. Rich*, 351 N.C. 386, 394, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)). Furthermore, to constitute plain error, the challenged instruction must result in a miscarriage of justice or the probability of a different verdict than the jury would otherwise have reached. *State v. Wallace*, 351 N.C. 481, 527, 528 S.E.2d 326, 355, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 498 (2000).

In the present case, when the trial court's instructions are read as a whole, they adequately explain the different requirements for each robbery charge. In the first paragraph, the trial court explained that defendant was charged with two counts of robbery with a firearm, one charge for taking the motel's property, and one charge for taking Richmond's property. Moreover, in the specific instruction concerning Richmond's robbery, the trial court stated that defendant must have intended "to deprive *that person* of its use permanently." (Emphasis added). Thus, the trial court made clear that defendant had to take the motel's property to be guilty of the first robbery count and had to take Richmond's property to be guilty of the second robbery count.

When read in its entirety, the jury charge fairly presented the law to the jury. Because the trial court stated that property belonging to Richmond must have been taken for defendant to be guilty of robbing him, it is unlikely a different verdict would have been

reached had the instructions been more explicit or repetitive. Thus, the instructions did not amount to plain error. Defendant's argument is without merit.

CAPITAL SENTENCING PROCEEDING

[7] Defendant assigns error to the trial court's submission of the (e)(4) aggravating circumstance during his capital sentencing proceeding. This circumstance exists when a murder is committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody. *See* N.C.G.S. § 15A-2000(e)(4) (1999). Defendant argues that the evidence introduced at trial did not support submission of this aggravating circumstance and that its submission violated defendant's rights to due process and freedom from cruel and unusual punishment. Defendant advances no argument concerning cruel and unusual punishment in his brief. This argument is thus deemed abandoned. *See* N.C. R. App. P. 28(a), (b)(5).

To submit the (e)(4) aggravating circumstance, the trial court "must find substantial, competent evidence in the record from which the jury can infer that at least one of defendant's purposes for the killing was the desire to avoid subsequent detection and apprehension for a crime." *Hardy*, 353 N.C. at 135, 540 S.E.2d at 344. The trial court must analyze the evidence in the light most favorable to the state. *State v. Gregory*, 340 N.C. 365, 410-11, 459 S.E.2d 638, 664 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). The state should be granted every reasonable inference from the evidence, and all discrepancies and contradictions in the evidence should be resolved in the state's favor. *Id.* at 411, 459 S.E.2d at 664. If substantial evidence of the aggravating circumstance exists, the circumstance must be submitted to the jury. *Id.*

In *State v. Green*, the defendant shot a man who had been drinking heavily and was dozing off in a bar. 321 N.C. 594, 608-09, 365 S.E.2d 587, 595-96, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). The victim was shot from behind while either asleep or paralyzed with fear. *Id.* at 609, 365 S.E.2d at 596. The evidence showed that the victim was defenseless and did not resist or struggle prior to his death. *Id.* The state argued that the fact that the victim was killed while in a defenseless position was sufficient indication he was killed to eliminate him as a witness. The court held this evidence was sufficient to justify submission of the (e)(4) aggravating circumstance. *Id.* at 608, 365 S.E.2d at 595.

Similarly, in the present case, no evidence exists to show that Richmond either posed a threat to defendant or tried to resist during the robbery. Defendant shot Richmond from behind from close range with a .44-caliber handgun. Richmond was on the ground at the time of the shooting. Such a shooting cannot be construed as merely facilitating the robbery. It is thus reasonable for the jury to infer from these facts that defendant shot Richmond to avoid being apprehended. Accordingly, defendant's assignment of error is without merit.

PRESERVATION

Defendant raises five additional issues to permit this Court to reexamine its prior holdings and also to preserve these issues for any further judicial review: (1) the indictment's failure to allege all the elements of first degree capital murder; (2) the unconstitutionality of North Carolina's capital sentencing scheme; (3) the trial court's error in instructing the jury in the penalty phase that it had a duty to impose a death sentence if it found the mitigating circumstances failed to outweigh the aggravating circumstances and the aggravating circumstances were sufficiently substantial to call for the death penalty when considered with the mitigating circumstances; (4) the trial court's error in its definition of mitigating circumstances in the jury charge; and (5) the unconstitutionality of the Court's standards for proportionality review.

Defendant presents no compelling reason for this Court to depart from our prior holdings. Accordingly, these assignments of error are without merit.

PROPORTIONALITY REVIEW

Having concluded defendant's trial and capital sentencing proceeding were free from error, we must review and determine (1) whether the record supports the jury's finding of any aggravating circumstances upon which the death sentence was based; (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 all three aggravating circum-

stances submitted: (1) defendant committed the murder to avoid or prevent a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (2) defendant committed the murder while engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); and (3) defendant committed the murder as part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person, N.C.G.S. § 15A-2000(e)(11).

Of the thirteen mitigating circumstances submitted, one or more jurors found four nonstatutory mitigators: (1) defendant was twenty years old at the time of the murder; (2) defendant had no stable father figure in his life; (3) defendant had an unstable home environment; and (4) defendant's mother abused alcohol.

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 evidence that defendant's death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor.

[8] Finally, we turn to our statutory duty of proportionality review. In conducting our proportionality review, we 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). In conducting our review, we must " 'eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v. Atkins*, 349 N.C. 62, 114, 505 S.E.2d 97, 129 (1998) (quoting *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988)), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). 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); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

The present case is not substantially similar to any case where this Court found a death sentence disproportionate. Defendant in the

present case was convicted of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. "[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 facts in this case indicate that defendant shot a helpless man, who was lying on the floor and who was in no way resisting defendant's robbery.

We have also compared the instant case with cases where we found the death penalty proportionate. *See McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we consider all the cases in the pool of similar cases during proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out the duty." *Id.*

There are four statutory aggravating circumstances which, standing alone, are sufficient to sustain a death sentence. *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). The jury found two of these circumstances, (e)(5) and (e)(11), in the present case. Thus, we conclude the present case is more similar to cases in which we have found a death sentence proportionate than to those where we found a death sentence disproportionate.

Whether a death sentence is "disproportionate in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Based on the characteristics of this defendant and the crime he committed, we conclude the death sentence is not disproportionate.

Accordingly, defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. CERRON THOMAS HOOKS

No. 89A00

(Filed 20 July 2001)

1. Criminal Law— reasonable doubt—instructions—academic doubt—ingenuity of counsel

There was no plain error in a first-degree murder prosecution where the trial court's definition of reasonable doubt included the statements "it's not an academic doubt" and "nor . . . doubt suggested by the ingenuity of counsel." Although defendant argued that the "academic doubt" phrase effectively instructed the jury to forego intellectual analysis, the phrase in context would be interpreted by an ordinary jury to mean that a mere theoretical or speculative doubt is insufficient to constitute reasonable doubt. The "ingenuity of counsel phrasing, contended by defense counsel to be an instruction to ignore his closing argument, in context refers to a doubt created by the ingenuity of counsel that is not supported by the evidence.

2. Sentencing— capital—aggravating circumstances—especially heinous, atrocious or cruel—sufficiency of the evidence

There was sufficient evidence in a capital sentencing proceeding to submit the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where a jury could infer from the evidence that the victim was aware of his impending death but was helpless to prevent it, and defendant's decision to kick, pistol-whip and taunt his felled and dying victim showed an unusual depravity of mind and a physically agonizing and unnecessarily torturous death. N.C.G.S. § 15A-2000(e)(9).

3. Sentencing— capital—mitigating circumstances—mental or emotional disturbance—substance abuse

The trial court did not err in a capital sentencing proceeding by not submitting as a mitigating circumstance that defendant committed the murder under the influence of mental or emotional disturbance where defendant's expert testified that defendant had primitively developed skills for emotional expression, social connection, and adult functioning as a result of the early onset of chronic substance dependence and that both marijuana abuse and alcohol dependence are mental disorders. Notwithstanding the American Psychiatric Association's listing of alcohol

and drug abuse as mental disorders, voluntary intoxication is not a mental disturbance for the (f)(2) mitigating circumstance and the trial court did not err by submitting instead the (f)(6) circumstance of impaired capacity.

4. Sentencing— capital—victim impact statement

The trial court did not err in a capital sentencing proceeding by allowing the victim's older brother to state in a victim impact statement that the victim was easygoing; gave everything 110 percent; wanted to make something of himself; was loving, kind, and respectful; had accepted Jesus Christ after a neighbor had died of a heart attack; and left a favorable impression on everyone he met. The testimony as a whole showed that the victim was a living human being with aspirations, fears, a family, and friends; the fleeting comment regarding acceptance of Jesus Christ briefly addressed the religious facet of the victim's life and did not inflame the jury.

5. Sentencing— capital—death sentence—not arbitrary

The record fully supports the aggravating circumstances found by the jury in a capital sentencing proceeding and the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary consideration.

6. Sentencing— capital—death sentence—proportionate

A death sentence was not disproportionate considering all the circumstances, including the senseless nature of the crime and defendant's shocking behavior as the victim lay dying, and that this case was more similar to cases in which a death sentence was found proportionate than to those in which a death sentence was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., on 9 February 2000 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 16 May 2001.

Roy A. Cooper, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, and Ellen B. Scouten, Special Deputy Attorney General, for the State.

J. Clark Fischer for defendant-appellant.

PARKER, Justice.

Defendant Cerron Thomas Hooks was indicted on 19 October 1998 for the first-degree murder of Michael Miller. Defendant was tried capitally and found guilty of first-degree murder on the basis of premeditation and deliberation. Following a capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment accordingly.

The State's evidence tended to show that on 5 September 1998 the victim invited friends to a pool party at the apartment complex where the victim resided. Shortly after the party started, defendant went to the pool area and joined the gathering. Defendant was drinking beer at the pool, although witnesses testified that he did not appear to be intoxicated. Around 9:30 that night, the victim invited the guests at the pool back to his apartment to continue the party.

Later that night, the victim's roommate saw defendant playing outside the apartment with a .45-caliber "automatic" pistol equipped with a laser scope. A short time later defendant returned to the apartment and began looking for a shirt that he had taken off in the apartment earlier in the evening. The victim told defendant that he had not seen the shirt and that he would return it to a mutual friend should he find it later. Defendant then "got loud" and began searching the apartment for his shirt, eventually entering the victim's closed bedroom. The victim told defendant that defendant "can't disrespect his house" and asked defendant to leave. While defendant was walking towards the door to leave, he and the victim "had words" back and forth, culminating in defendant telling the victim just outside the front door, "you ain't going to disrespect me in front of them bitches."

As defendant was walking down the stairs outside the apartment, the victim followed defendant down to the ground level to make sure that he left. Defendant and the victim continued arguing face to face at the bottom of the stairs. Defendant stated that he was going to "f—k [the victim] up." The victim began backing away, and defendant pulled a .38-caliber handgun from his pocket and pointed

it at the victim's face. The victim said, "Oh, you're going to shoot me now"; and after a "silent moment," defendant shot the victim four times.

The victim fell to the ground; and defendant began kicking him in the face and chest, pistol-whipping him, and taunting him by saying, "you thought I was playing, you thought I was playing." Defendant then fled the scene. The victim remained conscious and in obvious extreme pain for at least fifteen minutes after the shooting while a neighbor administered aid. Officers with the Winston-Salem Police Department apprehended defendant on 8 September 1998. At the time, defendant, with a fully loaded nine-millimeter Luger in his hand, was crouching behind a retainer wall at the top of a stairwell.

The medical examiner who autopsied the victim's body found four gunshot entry wounds: one in the face, which broke the victim's jaw and went through his tongue; one in the abdomen, which traveled through the victim's liver; one in the victim's left arm, which traveled completely through the arm; and one in the upper back, fragments of which lodged in the victim's neck and cheek. The victim died approximately twelve hours after the shooting as a result of the gunshot wounds.

GUILT-INNOCENCE PHASE

[1] In his only assignment of error relating to the guilt-innocence phase of the trial, defendant contends that the trial court committed plain error while instructing the jury by defining reasonable doubt in a manner that was legally incorrect and that lowered the State's burden of proof. We disagree.

The trial court gave the following instruction defining reasonable doubt:

> Now, a reasonable doubt, members of the jury, means exactly what it says. It's not a mere possible, it's not an academic and it's not a forced doubt. There are few things in human experience which are beyond all doubt or which are beyond a shadow of a doubt, nor is it a doubt suggested by the ingenuity of counsel for either side or even by your own ingenuity of mind, not legitimate or warranted by the evidence and the testimony you've heard in this case. Of course, your reason and your common sense would tell you that a doubt wouldn't be reasonable if it was founded upon or suggested by any of these type [sic] of considerations.

> A reasonable doubt is a doubt based on reason and common sense arising out of all or some of the evidence—excuse me, out of some or all of the evidence that has been presented or the lack of or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

We initially note that "[a]bsent a specific request, the trial court is not required to define reasonable doubt, but if the trial court undertakes to do so, the definition must be substantially correct." *State v. Miller*, 344 N.C. 658, 671, 477 S.E.2d 915, 923 (1996). Furthermore,

> so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, *see Jackson v. Virginia*, 443 U.S. 307, 320, n.14[, 61 L. Ed. 2d 560, 574, n.14] (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. *Cf. Taylor v. Kentucky*, 436 U.S. 478, 485-86[, 56 L. Ed. 2d 468, 475] (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *Holland v. United States*, 348 U.S. 121, 140[, 99 L. Ed. 150, 167] (1954).

Victor v. Nebraska, 511 U.S. 1, 5, 127 L. Ed. 2d 583, 590 (1994). Upon appeal "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Id.* at 6, 127 L. Ed. 2d at 591.

The trial court gave defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time defendant indicated his satisfaction with the trial court's instructions. Having failed to object to this instruction at trial, defendant did not properly preserve this issue for review; therefore, we review the record to determine whether the instruction constituted plain error. N.C. R. App. P. 10(b)(2); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000).

Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has

been made in the trial court.' " *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). Furthermore, in reviewing jury instructions this Court has stated:

> " 'The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it. . . .' *State v. Wilson*, 176 N.C. 751, [754-55,] 97 S.E. 496[, 497] (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal."

State v. Rich, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (citations omitted)) (alterations in original).

Defendant acknowledges that various versions of the above instruction have been upheld in other cases. *See State v. Lambert*, 341 N.C. 36, 52, 460 S.E.2d 123, 132-33 (1995); *State v. Adams*, 335 N.C. 401, 420, 439 S.E.2d 760, 770 (1994). However, defendant argues that those cases upheld the instructions on other grounds and did not explicitly approve the language defendant finds objectionable here. Assuming *arguendo* that defendant's interpretation of the bases underlying the holdings in *Lambert* and *Adams* is correct, we decline to find plain error in the language about which defendant complains.

Defendant first contends that the phrase "it's not an academic doubt" lessens the State's burden of proof. Defendant cites a definition from the 1995 edition *Microsoft Bookshelf*, a computer reference source, as evidence that the word "academic" normally relates to school, higher education, learning, and scholarship.[1] Thus, defendant argues, this phrase effectively instructs the jury to forgo intellectual analysis in reviewing the evidence. However, defendant's own cited authority also defines "academic" as "scholarly to the point of being unaware of the outside world" and "theoretical or speculative without a practical purpose or intention." *American Heritage Dictionary*

1. Our research discloses that *Microsoft Bookshelf* (1995 ed.) utilized *American Heritage Dictionary* (3d ed.) as its source. We have verified the definition using *American Heritage Dictionary* (3d ed.).

9 (3d ed. 1992). Furthermore, the cited definition suggests the words "pedantic" and "theoretical" as possible synonyms. *Id.*

The phrase in question, when read in context, would, in our judgment, be interpreted by an ordinary juror to mean that a mere theoretical or speculative doubt is insufficient to constitute reasonable doubt. Immediately before the phrase in question—"it's not an academic"—the trial judge stated, "[i]t's not a mere possible." Immediately afterwards the trial judge stated, "its not a forced doubt." Thus, we conclude that no reasonable likelihood exists that the jury, considering this instruction as a whole, would have applied the instruction in an unconstitutional manner. *See Victor*, 511 U.S. at 6, 127 L. Ed. 2d at 591.

Defendant also contends that the phrase "nor is it a doubt suggested by the ingenuity of counsel" directs the jury to ignore the closing arguments of defendant's counsel. We have previously held that this phrase is not erroneous. *State v. Bishop*, 346 N.C. 365, 399-400, 488 S.E.2d 769, 787-88 (1997). In this case the sentence containing the objectionable phrase ends with the following qualifying language not present in the instruction in *Bishop*: "not legitimate or warranted by the evidence and the testimony you've heard in this case." When read in context, this phrase instructs the jury that a doubt created by the ingenuity of counsel that is not supported by the evidence is not a reasonable doubt. Therefore, as this phrase is the same as in *Bishop*, except for a limiting qualification, we decline to find error. For these reasons, we find this assignment of error to be without merit.

SENTENCING PROCEEDING

[2] By another assignment of error, defendant contends that the trial court committed prejudicial error by submitting as the sole aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1999), in that the evidence was insufficient to warrant submission of this aggravating circumstance. We disagree.

"Whether the trial court properly submitted the (e)(9) aggravating circumstance depends upon the particular facts and circumstances of this case." *State v. Holman*, 353 N.C. 174, 181, 540 S.E.2d 18, 23 (2000). Furthermore, "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. Fleming*, 350 N.C. 109, 119, 512 S.E.2d 720, 729, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). Contradictions in the evidence pertaining to the aggravat-

ing circumstance are for the jury to resolve. *State v. Stanley*, 310 N.C. 332, 339, 312 S.E.2d 393, 397 (1984).

This Court has categorized several types of murders which meet the especially heinous, atrocious, or cruel criteria:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328[, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18] (1988). A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985)[, *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)], including those which leave the victim in her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

State v. Gibbs, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). In this case the evidence, when viewed in the light most favorable to the State, reveals that this murder falls within the scope of each of the above categories.

First, the evidence permits the inference that the killing was physically agonizing to the victim. After shooting the victim four times, defendant repeatedly kicked and pistol-whipped the helpless victim. The victim was conscious and in extreme pain for at least fifteen minutes after the shooting and assault, attempting to talk despite his broken jaw and wounded tongue. *See Brown*, 315 N.C. at 67, 337 S.E.2d at 828 (holding that evidence that the victim was conscious for fifteen minutes after being shot six times supports a finding that the victim suffered great physical pain prior to death).

Further, the evidence permits the inference that the murder was conscienceless and pitiless, leaving the victim in his last moments aware of but helpless to prevent impending death. Defendant's kicking, pistol-whipping, and taunting his felled victim showed a complete lack of conscience and pity. Moreover, a juror could reasonably infer that the victim knew that death was imminent and that he was

helpless to prevent it during the "silent moment" between defendant's pointing the gun at the victim's face and the first shot. The length of time during which the victim fears for his life may qualify despite any brevity. *See State v. Sexton*, 336 N.C. 321, 374, 444 S.E.2d 879, 909 (holding that a reasonable juror could infer that the victim feared for her life in the ten seconds it took her to lose consciousness), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). Additionally, the evidence shows that the victim was conscious and in great pain for at least fifteen minutes after the shooting, thereby permitting the inference that he was also aware of, but helpless to prevent, impending death after the shooting. *See Brown*, 315 N.C. at 67, 337 S.E.2d at 828 (holding that where the dying victim remained conscious for fifteen minutes the evidence was sufficient to show that the victim knew that he was dying but was helpless to prevent it).

Finally, the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. Defendant demonstrated unusual depravity of mind as he told the victim he was going to "f—k him up," pointed the gun in his face as the victim was backing away, waited a "silent moment," and then shot him four times over such trivial matters as a missing shirt and perceived disrespect. After shooting the victim, defendant scoffed at him by saying, "you thought I was playing" while kicking the victim about the face and upper body. This decision by defendant to taunt and continue assaulting the victim as he lay helplessly bleeding to death on the ground at defendant's feet further evinces defendant's lack of remorse and unusual depravity of mind. *See State v. Robinson*, 342 N.C. 74, 86-87, 463 S.E.2d 218, 225-26 (1995) (holding that evidence that defendant robbed the victim after killing him showed a lack of remorse), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996).

Defendant cites numerous cases where this Court has held that the evidence was insufficient to submit the (e)(9) aggravator. However, upon reviewing those cases and remaining mindful that "[w]hether the trial court properly submitted the (e)(9) aggravating circumstance depends upon the particular facts and circumstances of this case," *Holman*, 353 N.C. at 181, 540 S.E.2d at 23, we find that the cases cited are factually distinguishable and, thus, not controlling in this case.

Defendant first cites *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981). In *Hamlette* the defendant, after drinking beer for most of

the evening, shot the victim in the back of the head three times for no apparent reason as the victim was using a payphone, then fled the scene. *Id.* at 504, 492, 276 S.E.2d at 347, 340. The victim, who did not know he was about to be attacked, lingered for twelve days before dying. *Id.* at 504, 276 S.E.2d at 347. The Court ruled that submission of the (e)(9) aggravator to the jury on these facts was error. *Id.*

Next, defendant cites *Stanley*, 310 N.C. 332, 312 S.E.2d 393. In *Stanley*, the Court found submission of the (e)(9) circumstance improper where the defendant shot his wife nine times from a passing car while she was walking along a sidewalk. *Id.* at 340, 312 S.E.2d at 398. Defendant then drove to a police station and surrendered. *Id.* at 341, 312 S.E.2d at 398. The medical evidence was that the victim was unconscious within minutes, though death was not instantaneous. *Id.* at 340, 312 S.E.2d at 398. The Court deemed this evidence to be insufficient to show prolonged suffering for purposes of (e)(9). Furthermore, the Court held that the evidence was insufficient to support a reasonable inference that the victim knew she was about to be shot. *Id.*

Defendant next relies upon *Hamlet*, 312 N.C. 162, 321 S.E.2d 837. In *Hamlet* the defendant ambushed the victim, shot him numerous times, and fled the scene. *Id.* at 165-66, 321 S.E.2d at 840-41. The Court held that the evidence was insufficient to submit the (e)(9) aggravating circumstance, as no evidence suggested that the victim knew he was about to be shot or that he remained conscious after the first shot. *Id.* at 175-76, 321 S.E.2d at 846.

Defendant also contends that *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), is substantially similar to the present case. In *Oliver* the Court held that where the defendant fatally shot a clerk while robbing a convenience store, then shot a bystander as the defendant was running from the store, the (e)(9) aggravating circumstance was improperly submitted as to the bystander, who had pulled up to the gas pump and died instantaneously. *Id.* at 61, 274 S.E.2d at 204.

Finally, defendant argues that the case of *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984), is similar to the case at bar. In *Moose*, the defendant followed the victim's car, honking his horn and bumping the other car. *Id.* at 485, 313 S.E.2d at 510. When the victim stopped his car, he stated, "Oh, God, what are they going to do." *Id.* at 495, 313 S.E.2d at 516. The defendant then shot the victim from inside his own car. *Id.* The Court held the victim's statement showed merely general

apprehension rather than a fear of death. *Id.* at 495-96, 313 S.E.2d at 516.

Defendant argues that the present case is similar to *Moose*, as the shooting was the result of a sudden escalation in the argument. However, this contention ignores the evidence that defendant told the victim he was going to "f—k [him] up" and the evidence of the "silent moment" when the gun was pointed at the victim's face before he was shot. Thus, assuming *arguendo* that the victim's statement in this case, "Oh, you're going to shoot me now," is properly interpreted as incredulity rather than fear, other evidence would permit a jury reasonably to infer that the victim feared for his life. Therefore, we do not find *Moose* persuasive or controlling on the issue in this case.

Based on the evidence in the instant case, a jury could reasonably infer that the victim was aware of impending death but was helpless to prevent it. Furthermore, defendant's behavior, namely, his decision to kick, pistol-whip, and taunt his felled and dying victim, shows an unusual depravity of mind and a physically agonizing and unnecessarily torturous death that was not present in the cases cited by defendant. When taken in the light most favorable to the State, the evidence supports a finding that the murder was especially heinous, atrocious, or cruel as previously defined by this Court. *See Gibbs*, 335 N.C. at 61-62, 436 S.E.2d at 356. Accordingly, we hold that the trial court properly submitted the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance to the jury. Therefore, this assignment of error is overruled.

[3] In another assignment of error, defendant contends that the trial court erred in failing to submit the (f)(2) mitigating circumstance, that defendant committed the murder under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2).

A trial court must submit all mitigating circumstances supported by substantial evidence. *State v. Strickland*, 346 N.C. 443, 463, 488 S.E.2d 194, 206 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). A trial court must do so regardless of whether submission is requested by the defendant. *State v. Holden*, 338 N.C. 394, 407, 450 S.E.2d 878, 885 (1994). The burden is on the defendant to provide this substantial evidence. *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).

As to the mitigating circumstance that the defendant was under the influence of a mental or emotional disturbance at the time of the offense, N.C.G.S. § 15A-2000(f)(2), this Court has stated:

> Defendant's mental and emotional state *at the time of the crime* is the central question presented by the (f)(2) circumstance. *State v. McKoy*, 323 N.C. 1, 28-29, 372 S.E.2d 12, 27 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The use of the word "disturbance" in the (f)(2) circumstance "shows the General Assembly intended something more . . . than mental impairment which is found in another mitigating circumstance [N.C.G.S. § 15A-2000(f)(6)]." *State v. Spruill*, 320 N.C. 688, 696, 360 S.E.2d 667, 671 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988).

State v. Geddie, 345 N.C. 73, 102-03, 478 S.E.2d 146, 161 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997).

In this case defendant's expert witness, Dr. Tyson, testified that defendant "didn't suffer from an impairing mental disorder such as psychosis or mental retardation, any condition that would have grossly impaired his ability to function on a day to day basis." However, Dr. Tyson further opined that defendant had primitively developed skills for emotional expression, social connection, and adult functioning as a result of the early onset of chronic substance dependence. Dr. Tyson concluded that "the combination of substance dependence and the impoverished skills for adult functioning combined such that his ability to think through his behavior, to consider the consequences of his actions, to reasonably plan or to understand and appreciate the connection between his actions and consequent events would have been impaired at the time of the offense." Dr. Tyson opined that defendant's impoverished skills for functioning in adult life were in large part the result of "the early onset of substance dependence and the ongoing substance dependence into his adult life."

After considering the above testimony, the trial court refused to submit the (f)(2) mitigating circumstance, that defendant was under the influence of mental or emotional disturbance at the time of the offense, choosing instead to submit the (f)(6) mitigating circumstance, that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Defendant urges this Court to hold that the testimony

was sufficient to warrant submission of the (f)(2) mitigating circumstance. We decline to do so.

Defendant contends that this case is similar to *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991), in which the Court found the evidence to be sufficient to submit the (f)(2) mitigator where the evidence showed that the defendant's "organic brain damage" had left him with little foresight and poor impulse control and that these deficiencies were exacerbated by alcohol consumption. *Id.* at 775, 408 S.E.2d at 186-87. According to an expert witness, the defendant was likely to lose control and act violently when aroused by anger or frustration. *Id.* at 775, 408 S.E.2d at 187. After consuming alcohol, the defendant killed his father out of anger over the possibility of being disinherited. *Id.* at 775, 408 S.E.2d at 186.

We do not find *Greene* to be controlling in this case. The evidence in *Greene* showed that the defendant may have been under an emotional disturbance at the time of the crime, rather than just having general emotional or mental impairments. There, the defendant's mental problems, when coupled with his drinking and anger at his father, led to an overwhelming emotional disturbance at the time of the crime. By contrast, nothing in the evidence in the present case suggests that defendant suffered any emotional or mental disturbance at the time of the offense beyond his general mental deficiencies.

In our view this case is analogous to *Geddie*, 345 N.C. 73, 478 S.E.2d 146. In *Geddie* the defendant relied upon expert testimony that he lacked coping skills, was a substance abuser, and was a victim of child abuse in contending that the (f)(2) mitigator should have been submitted. *Id.* at 102, 478 S.E.2d at 161. Finding the evidence insufficient, this Court held that the evidence presented in support of the (f)(2) mitigator did not show that the defendant was under the influence of a mental or emotional disorder or disturbance at the time of the crime. *Id.* at 103, 478 S.E.2d at 161. The Court further approved the trial court's submission of the (f)(6) mitigator rather than the (f)(2) mitigator based on this evidence. *Id.* at 102, 478 S.E.2d at 161.

The evidence presented in this case tended to show that defendant's impoverished skills, which resulted from chronic substance abuse, led to poor impulse control and a failure to understand the consequences of his actions. Thus, as we held in *Geddie*, we hold that

this evidence showed diminished capacity rather than any mental disturbance at the time of the killing.

Defendant emphasizes that, when asked whether this murder was committed while defendant was under the influence of a mental or emotional disturbance at the time, Dr. Tyson responded, "Yes. . . . Both marijuana abuse and alcohol dependence are considered mental disorders. He also would have been seen as suffering from a personality disorder, a failure to develop adult functioning skills at the time of the offense." Dr. Tyson later explained that "[a]lcohol dependence and marijuana or cannabis abuse are both listed as mental disorders in the Diagnostic and Statistical Manual of the American Psychiatric Association."

Notwithstanding the American Psychiatric Association's listing alcohol and drug abuse as mental disorders, this Court has consistently held that voluntary intoxication is not a mental disturbance for purposes of the (f)(2) mitigating circumstance. *See, e.g., Geddie*, 345 N.C. at 103, 478 S.E.2d at 161-62. As discussed above the evidence in this case did not establish a mental or emotional disturbance supporting submission of the (f)(2) mitigator. On this record the trial court did not err by failing to submit the (f)(2) mitigating circumstance and submitting instead the (f)(6) mitigating circumstance for the jury's consideration. *See State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43 (holding that (f)(6) applies where there is evidence of "some mental disorder . . . to the degree that it affected the defendant's ability to understand and control his actions."), *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Accordingly, we find this assignment of error to be without merit.

[4] Defendant next argues that the trial court erred in allowing the prosecutor to offer a victim-impact statement that exceeded the allowable scope of such statements. Defendant objected to the testimony of the victim's older brother, who testified that the victim was easygoing; gave everything "110 percent"; wanted to make something of himself; and was loving, kind, and respectful. The witness further testified that the victim had accepted Jesus Christ after a neighbor died of a heart attack and that the victim left a favorable impression on everyone he met.

Victim-impact evidence is admissible in a capital sentencing proceeding unless the evidence "is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991). The victim-impact statement may

"flesh[] out the humanity of the victim so long as it does not go too far." *State v. Reeves*, 337 N.C. 700, 723, 448 S.E.2d 802, 812 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995). The prosecutor cannot ask the jury to impose the death penalty because the victim was a good person. *Id.* Defendant argues that the testimony in this case went too far as it implied that anyone who kills a well-mannered young man who has accepted Jesus Christ is more deserving of the death penalty than someone whose victim has not made such a religious choice. We disagree.

The testimony in question constituted a small portion of the State's overall case and did no more than " 'remind[] the sentencer that . . . the victim is an individual whose death represents a unique loss to society and in particular to his family.' " *Payne*, 501 U.S. at 825, 115 L. Ed. 2d at 735 (quoting *Booth v. Maryland*, 482 U.S. 496, 517, 96 L. Ed. 2d 440, 457 (1987) (White, J., dissenting), *overruled by Payne*, 501 U.S. 800, 115 L. Ed. 2d 720). The fleeting comment regarding the victim's acceptance of Jesus Christ briefly addressed the religious facet of the victim's life and did not inflame the jury to sentence defendant to death because the victim was a Christian. The testimony as a whole showed that the victim was a living human being with aspirations, fears, a family, and friends. This testimony did not go beyond the bounds of proper victim-impact evidence. *See State v. Bowman*, 349 N.C. 459, 478, 509 S.E.2d 428, 439-40 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). This assignment of error is overruled.

PRESERVATION ISSUE

Defendant raises one additional issue that he concedes has previously been decided contrary to his position by this Court: whether the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), is unconstitutionally vague and overbroad.

Defendant raises this issue for purposes of urging this Court to reexamine its prior holdings. We have considered defendant's arguments on this issue and conclude that defendant has demonstrated no compelling reason to depart from our prior holdings. This assignment of error is overruled.

PROPORTIONALITY

[5] Finally, defendant argues that the death sentence imposed in this case is disproportionate to the sentences imposed in similar cases,

considering both the crime and the defendant. 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, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Likewise, 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.

[6] Defendant was found guilty of first-degree murder based on premeditation and deliberation. At the conclusion of defendant's sentencing proceeding, the jury found the only aggravating circumstance submitted: that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9).

The jury found two statutory mitigating circumstances: that defendant has no significant prior criminal history, N.C.G.S. § 15A-2000(f)(1), and that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). Two additional statutory mitigating circumstances were submitted to but not found by the jury: the age of defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7), and the catchall statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). Of the eleven nonstatutory mitigating circumstances submitted, the jury found that three had mitigating value: (i) that defendant has no prior history of violence or violent acts, (ii) that defendant has behaved well while in confinement, and (iii) that defendant has shown remorse.

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 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).

Of the seven cases in which we have held the death sentence to be disproportionate, only *Stokes* and *Bondurant* involved the especially heinous, atrocious, or cruel aggravating circumstance. *See State v. Spruill*, 338 N.C. 612, 664, 452 S.E.2d 279, 307 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). The case at hand is distinguishable from *Stokes* in that the Court in *Stokes* emphasized that the record was devoid of evidence suggesting that the defendant was the ringleader. *Stokes*, 319 N.C. at 21, 352 S.E.2d at 664. In this case defendant acted on his own and is solely responsible for his crime. Furthermore, the defendant in *Stokes* was only seventeen years old at the time of the crime, *id.*; whereas, defendant in this case was twenty years old at the time of the crime. We have previously distinguished *Stokes* on this basis. *Robinson*, 342 N.C. at 89, 463 S.E.2d at 227 (holding *Stokes* distinguishable where the defendant was twenty-one years old).

This case also differs substantially from *Bondurant*, where the defendant immediately exhibited remorse and concern for the victim by seeking medical treatment. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. Significantly, in the case at hand defendant exhibited no such remorse, deciding instead to further assault and taunt his dying victim after the shooting.

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). Defendant was convicted of first-degree murder on the basis of premeditation and deliberation. We have noted that " '[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.' " *State v. Mitchell*, 353 N.C. 309, 331, 543 S.E.2d 830, 834 (2001) (quoting *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). Furthermore, this Court has held that the (e)(9) aggravating circumstance, standing alone, is sufficient to support a sentence of death. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Although the presence of the (e)(9) aggravating circumstance is not determinative in itself, it is an indication that the death sentence was neither exces-

sive nor arbitrary. *State v. Moseley*, 338 N.C. 1, 64, 449 S.E.2d 412, 450 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995).

Defendant cites numerous cases in which either a jury returned a sentence of life imprisonment or a judge imposed a life sentence when the jury could not reach a unanimous sentencing recommendation. Defendant claims these cases are factually similar to or substantially more heinous, atrocious, or cruel than the case at bar. Such factual similarity, however, is only one part of our proportionality review.

> [T]he fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review. . . . [S]imilarity of cases, no matter how many factors are compared, will not be allowed to "become the last word on the subject of proportionality rather than serving as an initial point of inquiry." [*State v. Williams*, 308 N.C. 47, 80-81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983).] . . . [T]he constitutional requirement of "individualized consideration" as to proportionality [can] only be served if the issue of whether the death penalty [is] disproportionate in a particular case ultimately rest[s] upon the "experienced judgments" of the members of this Court, rather than upon mere numerical comparisons of aggravators, mitigators and other circumstances. Further, the fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have "consistently" returned life sentences in factually similar cases.

State v. Green, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). While the cases cited by defendant give us a point of initial inquiry, our statutory task of proportionality review requires us to make our ultimate determination on the totality of circumstances, not solely on similarities to isolated cases where a jury returned a life sentence.

We conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Accordingly, after considering all the circumstances including the senseless nature of this murder and defend-

ant's shocking behavior as the victim lay dying, the experienced judgment of this Court is that the death sentence is not disproportionate in this case.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error; and the death sentence in this case is not disproportionate. Accordingly, the judgment of the trial court is left undisturbed.

NO ERROR.

ROBERT EARL DALTON D/B/A B. DALTON & COMPANY v. DAVID CAMP, NANCY J. MENIUS, AND MILLENNIUM COMMUNICATION CONCEPTS, INC.

No. 495PA99-2

(Filed 20 July 2001)

1. **Employer and Employee— breach of fiduciary duty—forming rival company**

The trial court properly granted summary judgment in favor of defendant Camp on a claim for breach of fiduciary duty arising from defendant leaving plaintiff's employment and starting a rival company, because plaintiff employer failed to establish facts supporting a breach of fiduciary duty when no evidence suggests that defendant's position in the workplace resulted in domination and influence over plaintiff.

2. **Employer and Employee— breach of loyalty—forming rival company**

The trial court properly granted summary judgment in favor of defendant Camp on a claim for breach of duty of loyalty arising from defendant leaving plaintiff's employment and starting a rival company, because plaintiff failed to establish that any independent tort for breach of duty of loyalty exists under our state law.

3. **Wrongful Interference— interference with prospective advantage—employee founding rival business**

The trial court properly granted summary judgment in favor of defendants Camp and MCC on a claim for tortious interference with prospective advantage arising from defendant Camp leaving

plaintiff's employment and starting a rival business publishing employment newsletters, because: (1) there is no evidence that defendant Camp induced KFI into entering a contract; and (2) plaintiff employer offers no evidence showing that but for defendant Camp's alleged interference, a contract with KFI would have ensued.

4. **Unfair Trade Practices— employee founding rival business—no fiduciary relationship—no egregious or aggravating conduct**

The trial court properly granted summary judgment in favor of defendants Camp and MCC on a claim for unfair and deceptive trade practices under N.C.G.S. § 75-1.1 arising from defendant Camp leaving plaintiff's employment and starting a rival business, because: (1) defendant Camp did not have a fiduciary relationship with plaintiff employer when defendant's duties as a production manager for plaintiff were limited to those commonly associated with any employee; (2) defendant Camp did not serve his employer in the capacity of either a buyer or a seller, nor did he serve in any alternative capacity suggesting that his employment was such that it otherwise qualified as "in or affecting commerce"; and (3) there is no evidence of attendant circumstances to indicate that defendant Camp's conduct was especially egregious or aggravating.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 138 N.C. App. 201, 531 S.E.2d 258 (2000), affirming in part, reversing in part, and remanding for a new trial an order for summary judgment entered 13 July 1998 by Zimmerman, J., in Superior Court, Randolph County. This case was previously remanded by order of the Supreme Court of North Carolina for the Court of Appeals' reconsideration in light of *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999). *Dalton v. Camp*, 135 N.C. App. 32, 519 S.E.2d 82 (1999). Heard in the Supreme Court 12 March 2001.

Moser Schmidly Mason & Roose, by Stephen S. Schmidly; and Murchison, Taylor & Gibson, by Andrew K. McVey, for plaintiff-appellee.

Wyatt Early Harris & Wheeler, L.L.P., by William E. Wheeler, for defendant-appellants David Camp and Millennium Communication Concepts, Inc.

Moore & Van Allen, P.L.L.C., by George M. Teague, on behalf of North Carolina Citizens for Business and Industry, amicus curiae.

ORR, Justice.

This case arises out of an employer's allegations of unfair competitive activity by former employees and a new corporation formed by them. Plaintiff Robert Earl Dalton d/b/a B. Dalton & Company ("Dalton") produced, under a thirty-six month contract, an employee newspaper for Klaussner Furniture Industries ("KFI"). Dalton hired defendant David Camp ("Camp") to produce the publication and subsequently hired Nancy Menius ("Menius") to assist in the production of the employee newspaper. Near the conclusion of the contract period, Dalton began negotiations with KFI to continue publication. After the contract had expired, Dalton continued to publish the employee newspaper without benefit of a contract while talks between the parties continued. During this period, Camp, who was contemplating leaving Dalton's employ, established a competing publications entity, Millennium Communication Concepts, Inc. ("MCC"), and discussed with KFI officials the possibility of replacing Dalton as publisher of KFI's employee newspaper. Soon thereafter, Camp entered into a contract with KFI to produce the newspaper. He resigned from Dalton's employment approximately two weeks later.

In the wake of Camp's resignation, Dalton sued Camp, Menius, and MCC for breach of the fiduciary duty of loyalty, conspiracy to appropriate customers, tortious interference with contract, interference with prospective advantage, and unfair and deceptive acts or practices under chapter 75 of the North Carolina General Statutes. The trial court first dismissed Dalton's claim for tortious interference with contract and subsequently granted Camp's motion for summary judgment against Dalton for the remaining claims. In its initial review of the case, the Court of Appeals held that the trial court had properly granted summary judgment for all defendants as to the claim for unfair and deceptive trade practices. As for the claim for breach of duty of loyalty, the Court of Appeals held that summary judgment was proper for defendant Menius and improper for defendant Camp. As for Dalton's claim of tortious interference with prospective advantage, the Court of Appeals again held that summary judgment was properly granted for defendant Menius and improperly granted for defendant Camp. *Dalton v. Camp*, 135 N.C. App. 32, 519 S.E.2d 82

(1999). After this Court remanded the case to the Court of Appeals for further review in light of, *inter alia*, our holding in *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), the Court of Appeals ultimately concluded that summary judgment was properly granted for: (1) all claims against Menius, and (2) the conspiracy to appropriate customers claim against Camp and MCC. The court also held that summary judgment was improperly granted for: (1) the breach of duty of loyalty claim against Camp, (2) the interference with prospective advantage claim against Camp and MCC, and (3) the unfair and deceptive trade practices claim against Camp and MCC.

For the reasons set forth below, we hold that the trial court properly granted summary judgment for all applicable claims, and we reverse those portions of the Court of Appeals opinion that hold otherwise. Thus, in sum, none of plaintiff Dalton's claims survive.

I.

We begin our analysis with an examination of Dalton's first claim against Camp which, as described in Dalton's complaint, constituted a breach of fiduciary duty, including a duty of loyalty. From the outset, we note that Dalton argues this claim from two distinct vantage points. First, he alleges that Camp breached his fiduciary duty by being disloyal. *See Long v. Vertical Techs., Inc.*, 113 N.C. App. 598, 604, 439 S.E.2d 797, 802 (1994) (defining fiduciary duty as one requiring good faith, fair dealing, and loyalty). Second, he argues that a separate and distinct action for breach of duty of loyalty exists and that Camp's conduct constituted a breach of that duty. We disagree with both contentions, holding that Dalton has failed to establish: (1) facts supporting a breach of fiduciary duty, and (2) that any independent tort for breach of duty of loyalty exists under state law.

Prior to trial, the trial court granted defendants' motion for summary judgment as to all pending claims. Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56(c); *accord Fordham v. Eason*, 351 N.C. 151, 159, 521 S.E.2d 701, 706 (1999). The rule is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980).

When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. *Coats v. Jones*, 63 N.C. App. 151, 303 S.E.2d 655, *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

Thus, the question before us is whether the Court of Appeals properly concluded that genuine issues of material fact existed as to Dalton's claims against Camp for breach of fiduciary duty and/or breach of duty of loyalty. We address the specifics of Dalton's arguments supporting the Court of Appeals decision in successive order.

[1] For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971). Such a relationship has been broadly defined by this Court as one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*.' " *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)) (emphasis added), *quoted in Patterson v. Strickland*, 133 N.C. App. 510, 516, 515 S.E.2d 915, 919 (1999). However, the broad parameters accorded the term have been specifically limited in the context of employment situations. Under the general rule, "the relation of employer and employee is not one of those regarded as confidential." *King v. Atlantic Coast Line R.R. Co.*, 157 N.C. 44, 72 S.E. 801 (1911); *see also Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 529, 286 S.E.2d 566, 569, *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 365 (1982).

In applying this Court's definition of fiduciary relationship to the facts and circumstances of the instant case—in which employee Camp served as production manager for a division of employer Dalton's publishing business—we note the following: (1) the managerial duties of Camp were such that a certain level of confidence was reposed in him by Dalton; and (2) as a confidant of his employer, Camp was therefore bound to act in good faith and with due regard

to the interests of Dalton. In our view, such circumstances, as shown here, merely serve to define the nature of virtually all employer-employee relationships; without more, they are inadequate to establish Camp's obligations as fiduciary in nature. No evidence suggests that his position in the workplace resulted in "domination and influence on the other [Dalton]," an essential component of any fiduciary relationship. *See Abbitt*, 201 N.C. at 598, 160 S.E. at 906. Camp was hired as an at-will employee to manage the production of a publication. His duties were those delegated to him by his employer, such as overseeing the business's day-to-day operations by ordering parts and supplies, operating within budgetary constraints, and meeting production deadlines. In sum, his responsibilities were not unlike those of employees in other businesses and can hardly be construed as uniquely positioning him to exercise dominion over Dalton. Thus, absent a finding that the employer in the instant case was somehow subjugated to the improper influences or domination of his employee—an unlikely scenario as a general proposition and one not evidenced by these facts in particular—we cannot conclude that a fiduciary relationship existed between the two. As a result, we hold that the trial court properly granted defendant Camp's motion for summary judgment as to Dalton's claim alleging a breach of fiduciary duty and reverse the Court of Appeals on this issue.

[2] As for any claim asserted by Dalton for breach of a duty of loyalty (in an employment-related circumstance) outside the purview of a fiduciary relationship, we note from the outset that: (1) no case cited by plaintiff recognizes or supports the existence of such an independent claim, and (2) no pattern jury instruction exists for any such separate action. We additionally note that Dalton relies on cases he views as defining an independent duty of loyalty, *see McKnight v. Simpson's Beauty Supply*, 86 N.C. App. 451, 358 S.E.2d 107 (1987); *In re Discharge of Burris*, 263 N.C. 793, 140 S.E.2d 408 (1965) (per curiam), even though those cases were devoid of claims or counterclaims alleging a breach of such duty. In *McKnight*, the Court of Appeals held that every employee was obliged to "serve his employer faithfully and discharge his duties with reasonable diligence, care and attention." 86 N.C. App. at 453, 358 S.E.2d at 109. However, the rule's role in deciding the case was limited; it was but a factor in determining whether an employer was justified in terminating an employee. The circumstance and conclusion reached in *Burris* are strikingly similar. At issue in that case was whether a civil service employee was properly discharged after he "knowingly . . . brought about a con-

flict of interest between himself and his employer." *Burris*, 263 N.C. at 795, 140 S.E.2d at 410. In deciding the case, this Court wrote "[w]here an employee deliberately acquires an interest adverse to his employer, he is disloyal, *and his discharge is justified.*" *Id.* (emphasis added). Conspicuously absent from the *Burris* Court's consideration was any claim or counterclaim seeking damages resulting from an alleged breach of a duty of loyalty.

In our view, if *McKnight* and *Burris* indeed serve to define an employee's duty of loyalty to his employer, the net effect of their respective holdings is limited to providing an employer with a defense to a claim of wrongful termination. No such circumstance is at issue in the instant case, in which Camp resigned from Dalton's employ. Thus, we hold that: (1) there is no basis for recognizing an independent tort claim for a breach of duty of loyalty; and (2) since there was no genuine issue as to any material fact surrounding the claim as stated in the complaint (breach of fiduciary duty, including a duty of loyalty), the trial court properly concluded as a matter of law that summary judgment was appropriate for Camp.

To the extent that the holding in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1224 (M.D.N.C. 1996), can be read to sanction an independent action for breach of duty of loyalty, *see id.* at 1229 ("There is a cause of action for violation of the duty of loyalty."), we conclude that the federal district court incorrectly interpreted our state case law by assuming that: (1) "[s]ince the [state's] courts recognize the existence of the duty of loyalty, it follows that they *would* recognize a claim for breach of that duty," *id.* (emphasis added); and (2) the "North Carolina . . . Supreme Court[] *likely would* recognize a broader claim" for a breach of fiduciary duty, *id.* (emphasis added). As previously explained, although our state courts recognize the existence of an employee's duty of loyalty, we do not recognize its breach as an independent claim. Evidence of such a breach serves only as a justification for a defendant-employer in a wrongful termination action by an employee. Moreover, an examination of our state's case law fails to reveal support for the federal district court's contention that this Court would broaden the scope of fiduciary duty to include food-counter clerks employed by a grocery store chain.

As for the holding in *Long*, we note that the corporate employer in that case was awarded damages for "a material breach of . . . fiduciary duty of good faith, fair dealing and loyalty" by its employees.

113 N.C. App. at 604, 439 S.E.2d at 802. Essentially, the *Long* court determined that the employees, who originally founded the company in question and served respectively as its president and senior vice president, owed a fiduciary duty to the parent firm and that they breached that duty by taking actions contrary to the parent firm's best interests. Thus, the claim and damages awarded in *Long* resulted from: (1) a showing of a fiduciary relationship, (2) thereby establishing a fiduciary duty, and (3) a breach of that duty. No such fiduciary relationship or duty is evidenced by the circumstances of the instant case.

II.

[3] As for Dalton's claim against Camp and MCC for tortious interference with prospective advantage, this Court has held that "interfere[nce] with a man's business, trade or occupation by maliciously inducing a person not to enter a contract with a third person, which he would have entered into but for the interference, is actionable if damage proximately ensues." *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965); *see also Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (affirming view that plaintiff must show that contract would have ensued but for defendant's interference), *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982).

In applying the law to the circumstances of the instant case, we note the following: (1) under contract, Dalton had published a newsletter to the expressed satisfaction of KFI for thirty-six months; (2) at or about the time that the original contract expired, Dalton and KFI discussed renewing the deal; (3) such negotiations reached an impasse over two key terms (duration of the new contract and price); (4) in the aftermath of the expired original contract, the parties agreed that Dalton would continue to publish the newsletter on a month-to-month basis; (5) during this negotiating period, Camp formed a rival publishing company (MCC); and (6) while still in the employ of Dalton, Camp (representing MCC) entered into a contract with KFI to publish its newsletter. Approximately two weeks after signing the KFI deal, Camp resigned his position with Dalton, presumably in order to run MCC with his partner, Menius.

Although the facts confirm that Camp joined the negotiating fray at a time when Dalton and KFI were still considering a contract between themselves, thereby establishing a proper time frame for

tortious interference, two other obstacles undermine Dalton's claim. First, there is no evidence suggesting that Camp induced, no less maliciously induced, KFI into entering a contract. According to testimony from the deposition of Mark Walker, KFI's human resources director, it was he who approached Camp about assuming the newsletter contract, not vice versa. Moreover, Dalton admitted in his own deposition that he had no personal knowledge as to the specifics of who offered what amid conversations between Camp and Walker. Thus, nothing in the record reflects an improper inducement on the part of Camp.

Second, while Dalton may have had an expectation of a continuing business relationship with KFI, at least in the short term, he offers no evidence showing that but for Camp's alleged interference a contract would have ensued. After Dalton's original contract expired, he met with KFI to discuss terms for a possible renewal. During the negotiation period, the parties agreed that Dalton would continue publishing the newsletter on an interim basis. However, with regard to a new contract, KFI said it wanted a discount from the original contract price. In response, Dalton said he could not reduce the price as he was not making any profit on the publication. KFI, through Walker, then urged Dalton to consider the matter further and get back to the company, which, by his own admission, Dalton never did. In our view, such circumstances fail to demonstrate that a Dalton-KFI contract would have ensued.

The absence of evidence supporting two essential elements of a party's allegation of interference with prospective advantage—intervenor's inducement of a third party and a showing that a contract would have ensued—exposes a fatal weakness in that claim. As a result, we hold that the trial court properly granted summary judgment for both Camp and his company, MCC, *see Econo-Travel*, 301 N.C. at 203, 271 S.E.2d at 57, and thus reverse the Court of Appeals on this issue.

III.

[4] Dalton additionally argues that he has presented a genuine question of material fact as to alleged unfair and deceptive trade practices of Camp and MCC. Again, we disagree.

The extent of trade practices deemed as unfair and deceptive is summarized in N.C.G.S. § 75-1.1(a) ("the Act"), which provides: "Unfair methods of competition in or affecting commerce, and unfair

or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a) (1999). The Act was intended to benefit consumers, *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986), but its protections extend to businesses in appropriate situations. *See, e.g., United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) ("After all, unfair trade practices involving only businesses affect the consumer as well.").

Although this Court has held that the Act does not normally extend to run-of-the-mill employment disputes, *see HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991) (citing *Buie v. Daniel Inter'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118 (holding that employment disputes involving workers' compensation and wrongful termination issues fall within the purview of other statutes and that such disputes do not fall within the intended scope of N.C.G.S. § 75-1.1), *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982)), we note that the mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade or practice claim. For example, employers have successfully sought damages under the Act when an employee's conduct: (1) involved egregious activities outside the scope of his assigned employment duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce. *See Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (holding that a defendant cannot use his status as an employee to shield himself from liability if his conduct constitutes unfair and deceptive trade practices as defined by the Act).

In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991). A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987) (citing *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)). The determination as to whether an act is unfair or deceptive is a question of law for the court. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). As for whether a particular act was one "in or affecting commerce," we note that N.C.G.S. § 75-1.1(b) defines "commerce" inclusively as "business activity, how-

ever denominated." We also note that while the statutory definition of commerce crosses expansive parameters, it is not intended to apply to all wrongs in a business setting. Examples of business activity beyond the scope of the statutory definition include: professional services, *see* N.C.G.S. § 75-1.1(b); most employer-employee disputes, *see HAJMM*, 328 N.C. at 593, 403 S.E.2d at 492; and securities transactions, *see Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985). Moreover, "[s]ome type of *egregious* or *aggravating* circumstances must be alleged and proved before the [Act's] provisions may [take effect]." *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993) (emphasis added); *see also Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992).

Application of the aforementioned law to the circumstances underlying the dispute between Dalton and Camp serves a two-fold purpose. By helping to illustrate the distinguishing characteristics between the instant case and *Sara Lee*—a case in which an employer successfully pursued an unfair and deceptive trade practices claim against an employee—the analysis simultaneously demonstrates why Camp's actions did not amount to unfair or deceptive trade practices.

In *Sara Lee*, this Court concluded that "defendant's relationship to plaintiff as an employee, *under these facts*, does not preclude applicability of N.C.G.S. § 75-1.1." 351 N.C. at 34, 519 S.E.2d at 312 (emphasis added). In the Court's view, the defendant: (1) had fiduciary duties, and (2) was entrenched in buyer-seller transactions that fell squarely within the Act's intended reach. *Id.* While serving as a purchasing agent for Sara Lee, defendant was simultaneously selling parts to his employer at inflated prices, a scheme characterized by the Court as self-dealing conduct "in or affecting commerce." *Id.* at 33, 519 S.E.2d at 311. As a consequence, the Court held that it would not permit the defendant to use his employment status as a *de facto* defense against his employer's unfair and deceptive trade practices claim.

In contrast, as evidenced in part I of this opinion, *supra*, the two parties in the instant case were not in a fiduciary relationship. Thus, employee Camp was unencumbered by fiduciary duties, a significant distinction between him and the employee-defendant in *Sara Lee*. Camp's duties as a production manager for Dalton were limited to those commonly associated with any employee. He simply produced a magazine—designing layouts, editing content, printing copies, etc.

Unlike the *Sara Lee* defendant, who worked as a purchasing agent, Camp did not serve his employer in the capacity of either a buyer or a seller. Nor did he serve in any alternative capacity suggesting that his employment was such that it otherwise qualified as "in or affecting commerce."

We also find no evidence of attendant circumstances to indicate that Camp's conduct was especially egregious or aggravating. *See Branch Banking*, 107 N.C. App. at 62, 418 S.E.2d at 700. Camp met with a KFI representative and raised the possibility of forming his own publishing company. He and the KFI representative later discussed having Camp's new company publish KFI's magazine, talks that ultimately culminated in an exclusive publishing agreement between Camp and KFI. However, during this period, we note that Camp also continued his best efforts to publish Dalton's final issue. That he failed to inform his employer of the ongoing negotiations and resigned after signing the KFI deal may be an unfortunate circumstance; however, in our view, such business-related conduct, without more, is neither unlawful in itself, see parts I and II of this opinion, *supra*, nor aggravating or egregious enough to overcome the long-standing presumption against unfair and deceptive practices claims as between employers and employees.

As a consequence of concluding that employee Camp was without fiduciary duty, that his position was not one "in or affecting commerce," and that his business actions were neither aggravating nor egregious, we conclude that the trial court properly granted summary judgment as to employer Dalton's claim under N.C.G.S. § 75-1.1. Therefore, with regard to both appellants Camp and MCC, we reverse the Court of Appeals on this issue.

In sum, the decision of the Court of Appeals is hereby reversed as to appellee Dalton's claims for: (1) breach of fiduciary duty of loyalty against Camp; (2) interference with prospective advantage against Camp and his company, MCC; and (3) unfair and deceptive acts or practices against Camp and MCC. Accordingly, that court is instructed to reinstate the judgment of the trial court.

REVERSED.

LENOX, INCORPORATED v. E. NORRIS TOLSON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 17A01

(Filed 20 July 2001)

Taxation— liquidation of out-of-state subsidiary—nonbusiness income

The Court of Appeals correctly remanded a tax refund action for summary judgment in favor of plaintiff where plaintiff was a New Jersey corporation which decided to dispose of a subsidiary, ArtCarved, by selling all of its assets; the sale of ArtCarved completed plaintiff's involvement in the jewelry business and plaintiff has not reentered that business; plaintiff did not retain any of the liquidation proceeds for use in its ongoing operations but distributed all of those proceeds to its sole shareholder within 24 hours of receipt; and defendant classified the gain resulting from the sale as business income and assessed corporate income tax. The net income of a multistate corporation is divided into two classes, business income, which is taxable, and nonbusiness income, which is allocated solely to the state most closely associated with the income-generating asset. "Business income" is determined by the transactional and the functional tests, which are separate and independent tests. Under the functional test, business income includes income from property if the acquisition, management, and disposition of the property constitute integral parts of the corporation's regular course of business. When a transaction involves a complete or partial liquidation and cessation of a company's particular line of business and the proceeds are distributed to shareholders rather than reinvested in the company, any gain or loss generated from that transaction is nonbusiness income under the functional test; specific language in *Polaroid Corp. v. Offerman*, 349 N.C. 290, is disavowed. In this case, nonbusiness income would be allocated solely to New Jersey, the parties agree that the income from the sale does not satisfy the transactional test, the disposition of ArtCarved did not generate business income based on the functional test because liquidation of this asset was not a regular part of Lenox's trade or business, and Lenox is due a refund.

Justice PARKER dissenting.

Justice MARTIN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 140 N.C. App. 662, 538 S.E.2d 203 (2000), reversing an order for summary judgment for defendant[1] entered 14 June 1999 by Hight, J., in Superior Court, Granville County, and remanding for entry of summary judgment for plaintiff. Heard in the Supreme Court 14 May 2001.

Wilson & Iseman, L.L.P., by G. Gray Wilson; James M. Iseman, Jr.; and Kevin B. Cartledge, for plaintiff-appellee.

Roy A. Cooper, Attorney General, by Kay Linn Miller Hobart, Assistant Attorney General, for defendant-appellant.

WAINWRIGHT, Justice.

Lenox, a New Jersey-based corporation, operates as a conglomerate corporation with multistate operating divisions, including North Carolina. Since 1983, Lenox has been a wholly owned subsidiary of the Brown Forman Corporation. At all relevant times, Lenox has been engaged in the business of manufacturing and selling numerous consumer products, including fine china, fine crystal, dinnerware, silverware, collectibles, candles, luggage and fine jewelry. In 1970, Lenox established its ArtCarved subsidiary division to manufacture and sell fine jewelry. ArtCarved was a functionally and financially distinct entity from Lenox. ArtCarved, which had its principal place of business in New York, maintained its own centralized management and financial systems apart from those of Lenox and had its own president, chief financial officer, controller and accounting and human resources staff. In addition, ArtCarved had its own operating and reserve accounts and administered its own payables, receivables and payroll.

By 1988, the ArtCarved subsidiary of Lenox had not been profitable. Pursuant to a corporate restructuring plan, Lenox decided to dispose of ArtCarved and all associated assets. Lenox liquidated ArtCarved by selling all of its assets. The sale of ArtCarved for $118,341,000 completed the cessation of Lenox's involvement in the sale and manufacture of fine jewelry. Lenox did not retain any of the ArtCarved liquidation proceeds for use in its ongoing business operation and, instead distributed all proceeds by wire transfer within twenty-four hours of their receipt to Lenox's sole shareholder,

1. Pursuant to N.C. R. App. P. 38, E. Norris Tolson has been substituted as Secretary of Revenue, replacing Muriel Offerman.

Brown Foreman Corporation. Lenox has not reentered the jewelry business.

For tax purposes, the sale produced a $46,700,194 gain on which Lenox paid taxes in New Jersey. Lenox classified the gain as "nonbusiness income" on its North Carolina tax return for the fiscal year ending 1988, pursuant to N.C.G.S. § 105-130.4(a)(1) and (a)(5) of the North Carolina Corporate Income Tax Act, and therefore did not pay taxes on this gain. The North Carolina Department of Revenue (DOR), however, reclassified the gain as business income and assessed corporate income tax in the amount of $469,540, which Lenox paid under protest. Lenox then filed this tax refund action to recover on its claim of erroneous taxation.

In order to achieve uniform taxation among states, North Carolina modeled its Corporate Income Tax Act, N.C.G.S. ch. 105, art. 4, pt. 1 (1999), after the income classification scheme in the Uniform Division of Income for Tax Purposes Act (UDITPA). *Polaroid Corp. v. Offerman*, 349 N.C. 290, 294, 507 S.E.2d 284, 288 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999). Under this uniform statute, the net income of a multistate corporation, such as Lenox, is divided into two classes for taxation purposes: (1) "business income," which is apportioned among all states in which the corporation transacts business, N.C.G.S. § 105-130.4(i); and (2) "nonbusiness income," which is allocated solely to the state most closely associated with the income-generating asset, N.C.G.S. § 105-130.4(h), which in the present case would be New Jersey. *See Polaroid*, 349 N.C. at 294, 507 S.E.2d at 288. The Act defines "business income" as follows:

> (1) "Business income" means income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations.
>
> . . . .
>
> (5) "Nonbusiness income" means all income other than business income.

N.C.G.S. § 105-130.4(a)(1), (5).

Recently, in a case of first impression, this Court attempted to clarify the scope of the statutory definition of business income. *Polaroid*, 349 N.C. 290, 507 S.E.2d 284. In *Polaroid*, this Court held that the plain language of the statute contains two separate and independent tests for determining taxable business income, namely the "transactional" test and the "functional" test. *Id.* at 301, 507 S.E.2d at 293. The "transactional" test, which is the first part of the statutory definition, focuses on "income arising from transactions and activity in the regular course of the corporation's trade or business." N.C.G.S. § 105-130.4(a)(1); *accord Polaroid*, 349 N.C. at 295, 507 S.E.2d at 289. The "functional" test, which is the second part of the statutory definition, alternatively focuses on "income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations." N.C.G.S. § 105-130.4(a)(1); *accord Polaroid*, 349 N.C. at 296, 507 S.E.2d at 289. If either test is satisfied, the income in question constitutes taxable business income. *See Polaroid*, 349 N.C. at 300, 507 S.E.2d at 292.

The transactional test looks to the particular transaction generating the income to determine whether that transaction was done in the ordinary and regular course of business. *Id.* at 295, 507 S.E.2d at 289. The frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income are all central to this inquiry. *Id.* In the present case, both parties agree that the income from the sale of ArtCarved does not satisfy the transactional test.

The functional test, on the other hand, focuses on income generated by the corporation's acquisition, management and/or disposition of property that is essential to the corporation's business operations. *Id.* at 301, 507 S.E.2d at 292-93. In this regard, defendant contends that ArtCarved was an integral part of Lenox's regular manufacturing business and that its sales proceeds therefore satisfy the functional test. As such, defendant argues the income from the sale of ArtCarved is "business income" for which Lenox must be taxed in North Carolina. Plaintiff Lenox, however, responds that the sale and liquidation of ArtCarved marked the end of Lenox's involvement in the manufacture and sale of fine jewelry and that the sales proceeds are more properly classified as "nonbusiness income."

Therefore, the sole issue before this Court is whether the liquidation and cessation of a separate and distinct operating division of Lenox constitute "business income" under the functional test of the

statutory definition set forth by the North Carolina Corporate Income Tax Act, N.C.G.S. ch. 105, art. 4, pt. 1. We conclude that the income produced by the sale of ArtCarved should be classified as nonbusiness income.

In the instant case, ArtCarved manufactured and sold fine jewelry as a division of Lenox. The transaction in question divested the whole subsidiary of ArtCarved from Lenox and was a complete liquidation as to ArtCarved and a partial liquidation as to Lenox. Following its disposition of ArtCarved, Lenox did not return to this particular line of business. Additionally, the proceeds of the sale were distributed to the sole shareholder and were not reinvested in the Lenox corporation. The sale of the assets and property that generated this income was not an ordinary event but was one of an extraordinary and infrequent nature.

In *Polaroid*, this Court stated that the extraordinary nature or infrequency of the transaction is irrelevant. *Polaroid*, 349 N.C. at 296, 507 S.E.2d at 289 (citing *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 269, 695 N.E.2d 481, 485 (1998)). We further stated that if the asset or property was integral to the corporation's regular trade or business, "income resulting from the acquisition, management, and/or disposition of [that asset] constitutes business income regardless of how that income is received." *Id.* at 306, 507 S.E.2d at 296. Based on this specific language from *Polaroid*, defendant contends that this Court must determine that the assets associated with ArtCarved were integral to Lenox's regular trade or business operations and must thereby conclude that the income generated from the sale of those assets must necessarily be classified as business income without further analysis. Defendant is correct that an application of the above language from *Polaroid* would result in such a determination, regardless of how that income is received and regardless of how extraordinary or infrequent the transaction.

The wording of these two sentences in *Polaroid* is a cause of confusion, and we hereby disavow these statements. The statements in *Polaroid* are in direct contravention of the functional test of our statute which requires that the "property constitute [an] integral part[] of the corporation's *regular* trade or business operations." N.C.G.S. § 105-130.4(a)(1) (emphasis added). The source of corporate income cannot be disregarded, as extraordinary or infrequent transactions may well fall outside a corporation's regular trade or business. Again, the focus must be on the asset or property that generated the income and its relationship to the corporation's regular trade or

business. To use such overly broad language as we have just disavowed would render the statutory definition of "nonbusiness income" meaningless.

Resolution of the issue in this case therefore depends upon our statutory interpretation of business income, as defined by the functional test. N.C.G.S. § 105-130.4(a)(1). The principal goal of statutory construction is to accomplish the legislative intent. *Polaroid*, 349 N.C. at 297, 507 S.E.2d at 290. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, " 'the spirit of the act and what the act seeks to accomplish.' " *Id.* (quoting *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)). If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so. *Id.* When the statute under consideration is one concerning taxation, special canons of statutory construction apply. *In re Denial of Refund of N.C. Inheritance Taxes*, 303 N.C. 102, 106, 277 S.E.2d 403, 407 (1981). If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of the taxpayer. *Polaroid*, 349 N.C. at 297, 507 S.E.2d at 290; *Regional Acceptance Corp. v. Powers*, 327 N.C. 274, 277, 394 S.E.2d 147, 149 (1990).

As previously stated, under the "functional test," business income "includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute *integral* parts of the corporation's *regular trade or business operations*." N.C.G.S. § 105-130.4(a)(1) (emphasis added). In *Polaroid*, we defined "integral" as "essential to completeness." *Polaroid*, 349 N.C. at 301, 507 S.E.2d at 292. However, when an asset is sold pursuant to a complete or partial liquidation, the court must focus on more than the question of whether the asset was integral to the corporation's business. *See Laurel Pipe Line Co. v. Pennsylvania*, 537 Pa. 205, 642 A.2d 472 (1994). "Moreover, the phrase 'regular trade or business operations' refers to business operations done in a recurring manner, or at fixed or uniform intervals." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315-16, 526 S.E.2d 167, 171 (2000); *see also Black's Law Dictionary* 356 (7th ed. 1999) (regular "course of business" is defined as "[t]he normal routine in managing a trade or business"). Partial or complete liquidations are extraordinary events and are not recurring transactions. *See Kemppel v. Zaino*, 91 Ohio St. 3d 420, 423, 746 N.E.2d 1073, 1076-77 (2001) (The income in question resulted from "a

one-time event that terminated the business"; therefore, it was not considered a "sale in the regular course of a trade or business.").

Furthermore, this Court has specifically noted that liquidation cases are in a separate category because the transaction at issue is a means of ceasing business operations rather than in furtherance thereof. In *Polaroid*, we stated the following in a footnote:

> We do note, however, that cases involving liquidation are in a category by themselves. Indeed, true liquidation cases are inapplicable to these situations because the asset and transaction at issue are not in furtherance of the unitary business, but rather a means of cessation.

Polaroid, 349 N.C. at 306 n.6, 507 S.E.2d at 296 n.6.

Therefore, when the transaction involves a complete or partial liquidation and cessation of a company's particular line of business, and the proceeds are distributed to shareholders rather than reinvested in the company, any gain or loss generated from that transaction is nonbusiness income under the functional test. *See generally Laurel Pipe Line*, 537 Pa. at 214, 642 A.2d at 477.

An examination of case law from other UDITPA states that have adopted the functional test is instructive. In *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue*, 88 N.M. 521, 543 P.2d 489 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975), the taxpayer was engaged in the business of laying small diameter pipelines and laying large diameter pipelines. *Id.* at 522, 543 P.2d at 490. After liquidating its five-year-old large-diameter business pursuant to a major reorganization, the taxpayer continued operating its twenty-five-year-old small-diameter business. *Id.* The *McVean* court held that the

> taxpayer was not in the business of buying and selling pipeline equipment and, in fact, *the transaction in question was a partial liquidation of taxpayer's business and total liquidation of taxpayer's [large-diameter] business*. The sale of equipment did not constitute an *integral* part of the *regular* trade or business operations of taxpayer. This sale contemplated a cessation of taxpayer's [large-diameter] business.

Id. at 524, 543 P.2d at 492 (emphases added). Accordingly, the *McVean* court concluded that liquidation of the large-diameter operations produced nonbusiness income. *Id.* We note for the record that fifteen years after the decision in *McVean*, New Mexico amended its

definition of "business income" to explicitly include "income from the disposition or liquidation of a business or segment of business." *See* N.M. Stat. Ann. § 7-4-2 (Michie Supp. 2000). New Mexico's current version of UDITPA specifically classifies liquidation proceeds as business income, unlike its predecessor statute and North Carolina's current definition of business income.

More recently, the Pennsylvania Supreme Court classified the proceeds of a liquidation as nonbusiness income under the functional test. *Laurel Pipe Line*, 537 Pa. at 214, 642 A.2d at 477. In that case, the taxpayer, a petroleum pipeline transporter, sold one of its two pipelines while continuing to operate the other. *Id.* at 207, 642 A.2d at 473. The taxpayer distributed the entire after-tax net proceeds to its shareholders, and none of the proceeds were used to generate income or acquire assets for use in future business operations. *Id.* The Pennsylvania Supreme Court disagreed with the contention that "a singular disposition of an unprofitable pipeline is an integral part of the company's regular business because, if not sold, the company's other business would suffer financially." *Id.* at 211, 642 A.2d at 475. Instead, the court held that

> [t]he [disposed] pipeline had been idle for over three years prior to the time that it was sold. In our view, the pipeline was not disposed of as an integral part of [the taxpayer's] regular trade or business. Rather, the effect of the sale was that the company liquidated a portion of its assets. This is evidenced by the fact that the proceeds of the sale were not reinvested back into the operations of the business, but were distributed entirely to the stockholders of the corporation. Although [the taxpayer] continued to operate a second, independent pipeline, the sale of the [other] pipeline constituted a liquidation of a separate and distinct aspect of its business.

Id.; *see also Blessing/White, Inc. v. Zehnder*, No. 99L51087, slip op. at 6 (Cook County Ill. Cir. Ct., Jan. 24, 2001) (Lanigan, J.) (When a business was completely liquidated and the proceeds distributed to its shareholder, the income produced was not business income, in that "BWI did not use the proceeds of the liquidation to continue its business because it had no business to continue.").

In *Laurel Pipe Line*, the Pennsylvania Supreme Court factually distinguished an earlier liquidation case in which the taxpayer sold its idle and unprofitable Philadelphia plant. 537 Pa. at 210-12, 642 A.2d at 475-76; *see Welded Tube Co. of Am. v. Pennsylvania*, 101 Pa.

Commw. 32, 515 A.2d 988 (1986). In *Welded Tube*, the taxpayer used the sales proceeds in ongoing operations by expanding its Chicago plant and retiring corporate debt. *Welded Tube*, 101 Pa. Commw. at 38, 515 A.2d at 991. There was "no suggestion on the record that the closing of the facility contemplated the cessation of operations" and the court held that this sale generated business income. *Id.* at 45-46, 515 A.2d at 994-95.

The Illinois Supreme Court's decision in *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 695 N.E.2d 481 (1998), to consider the taxpayer's liquidated assets business income is easily distinguishable from the case at hand. In *Texaco-Cities*, the taxpayer, a pipeline petroleum transporter, sold major segments of its pipeline assets and related realty, but continued to transport petroleum by pipeline and reinvested the sales proceeds therein. *Id.* at 265, 273, 695 N.E.2d at 483, 487. The taxpayer classified the gain as nonbusiness income, contending that the "sale was an extraordinary event and more in the nature of a cessation than a furtherance of business." *Id.* at 266, 695 N.E.2d at 483. The Illinois Supreme Court disagreed and classified the gain as business income under the functional test. *Id.* at 273, 695 N.E.2d at 486. The court in that case distinguished *Laurel Pipe Line* by stating:

> The court in *Laurel Pipe Line* found that the sale was a liquidation of a "separate and distinct aspect" of Laurel's business, namely, all of its pipeline operations in a specific geographical region. *Laurel Pipe Line*, 537 Pa. at 213, 642 A.2d at 476, citing *McVean & Barlow*, 88 N.M. 521, 543 P.2d 489. In reaching this conclusion, the court considered the "totality of the circumstances surrounding the sale," including the fact that the sales proceeds were distributed to the shareholders rather than being used to acquire business assets or generate income for use in future business operations. *Laurel Pipe Line*, 537 Pa. at 213-14, 642 A.2d at 476-77. In the case at bar, by contrast, it was undisputed that following the sale, [the taxpayer] Texaco-Cities remained primarily in the business of providing transportation by pipeline, and that the sales proceeds were invested right back into that business rather than being disseminated to its shareholders. Unlike the cases upon which Texaco-Cities relies, there was no evidence that this sale was a cessation of a separate and distinct portion of Texaco-Cities' business. Thus, the gain from the [Texaco-Cities'] sale was properly classified as business income.

Texaco-Cities, 182 Ill. 2d at 273-74, 695 N.E.2d at 486-87 (citations omitted). The same language can be similarly used to distinguish *Texaco-Cities* from the instant case.

In the instant case, as in *McVean* and *Laurel Pipe Line*, the transaction is a liquidation in cessation of business, distinguishing it from the *Welded Tube* and *Texaco-Cities* dispositions, which were in furtherance of the unitary businesses. Lenox did not use any of the liquidation proceeds in its remaining, ongoing business operations. Instead, Lenox distributed all of the ArtCarved proceeds to its sole shareholder less than twenty-four hours after their receipt. None of Lenox's remaining businesses involve fine jewelry or similar products. ArtCarved maintained its own management, personnel structure, accounting staff and operations, controller, operating and reserve accounts, payroll, payables and receivables accounts. The ArtCarved sale was a one-time complete liquidation of a separate operating division by Lenox, marking Lenox's complete departure from the fine jewelry business with immediate distribution of the sales proceeds to its sole shareholder.

Accordingly, the disposition of ArtCarved did not generate business income because the liquidation of this asset was not an integral part of Lenox's regular trade or business. Therefore, based on the functional test, Lenox's gain from the ArtCarved liquidation is properly classified as nonbusiness income. As nonbusiness income, the gain was not taxable by North Carolina, and Lenox is due a refund for overpayment of corporate income tax. We hereby affirm the Court of Appeals' reversal of the trial court's grant of summary judgment in favor of defendant and its remand for summary judgment in favor of plaintiff herein.

AFFIRMED.

Justices PARKER and MARTIN dissenting.

Justice PARKER dissenting.

Less than three years ago in *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998), this Court in an exhaustive opinion interpreted Section 105-130.4(a)(1) of the North Carolina Corporate Income Tax Act which defines business income. In that opinion, the Court concluded that under the plain language of the statute the definition of business income for corporate income tax purposes

included both a transactional test and a functional test. *Id.* at 301, 507 S.E.2d at 293. In *Polaroid* the Court stated that under the functional test, "once a corporation's assets are found to constitute integral parts of the corporation's regular trade or business, income resulting from the acquisition, management, and/or disposition of those assets constitutes business income regardless of how that income is received." *Id.* at 306, 507 S.E.2d at 296. The Court further stated that under the functional test, "the extraordinary nature or infrequency of the event is irrelevant." *Id.* at 296, 507 S.E.2d at 289.

The majority acknowledges that applying the above language, defendant is correct in its determination that the income generated from the sale of ArtCarved's assets would necessarily be classified as business income inasmuch as the assets associated with ArtCarved were integral to plaintiff's regular trade or business operations. The majority then disavows this language from *Polaroid* on the basis that the language "is a cause of confusion" and is "in direct contravention of the functional test of our statute." The majority then states that "[t]he source of corporate income cannot be disregarded, as extraordinary or infrequent transactions may well fall outside a corporation's regular trade or business. Again, the focus must be on the asset or property that generated the income and its relationship to the corporation's regular trade or business."

The majority then purports to apply the functional test to the facts of this case. The majority emphasizes that (i) a liquidation is an extraordinary, not a recurring transaction, and is thus not a sale in the regular course of trade or business; and (ii) the proceeds of the sale were distributed to the sole stockholder and were not reinvested in plaintiff's business. The majority finds support for this analysis in footnote 6 in the *Polaroid* opinion, which suggested that liquidations are not within the purview of the functional test. *Id.* at 306, n.6, 507 S.E.2d at 296, n.6.

In my view the majority has misread the functional test as set forth in the statute and interpreted in *Polaroid*. The functional test focuses on whether the asset is found to be an integral part of the corporation's regular business, not whether the transaction is found to be a part of the regular business. The critical question is whether the property or asset produced business income while it was owned by the taxpayer.

In *Polaroid*, this Court noted the administrative rule in effect since 1976 which provides

> "(2) A gain or loss from the sale, exchange or other disposition of real or personal property constitutes business income if the property while owned by the taxpayer was used to produce business income."

Id. at 302, 507 S.E.2d at 293 (quoting 17 NCAC 5C .0703(2) (June 1998)).

Further, in my view the footnote to *Polaroid* is *obiter dictum* and is not a basis for disavowing the language in *Polaroid.* Even if the footnote were pertinent, a partial liquidation of a business division is not a "true liquidation." Moreover, in this case the sole shareholder to whom the proceeds were distributed was the parent corporation of plaintiff. Hence, the question remains as to whether the proceeds were used in furtherance of the unitary business.

Finally, the interpretation of our tax laws has widespread ramifications, and under the principle of *stare decisis* this Court should not lightly abandon or modify its interpretation of a tax statute. Both the Secretary of Revenue and the taxpayer are entitled to a measure of stability and constancy in the interpretation and application of our tax statutes.

Applying the functional test as set forth in *Polaroid*, I am of the opinion that ArtCarved as an asset of plaintiff was an integral part of plaintiff's regular trade or business, namely, manufacturing and selling various consumer goods, and that the sale of ArtCarved produced business income pursuant to N.C.G.S. § 105-130.4(a)(1).

For the foregoing reasons, I respectfully dissent and vote to reverse the opinion of the Court of Appeals.

Justice MARTIN joins in this dissenting opinion.

DEPARTMENT OF TRANSPORTATION v. JOE C. ROWE AND WIFE, SHARON B. ROWE; HOWARD L. PRUITT, JR. AND WIFE, GEORGIA PRUITT; ROBERT W. ADAMS, TRUSTEE; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY AND HUSBAND, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL AND HUSBAND, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (FORMERLY APPALACHIAN POSTER ADVERTISING COMPANY, INC.), LESSEE; AND FLORENCE BOWMAN BOLICK

No. 506A98-2

(Filed 20 July 2001)

1. **Appeal and Error— preservation of issues—violation of Law of the Land Clause—not argued at trial—no assignment of error—no Court of Appeals argument**

The Court of Appeals erred by considering whether N.C.G.S. § 136-112(1) violates the Law of the Land Clause in the North Carolina Constitution in an action arising from the taking of a part of defendants' land where defendants did not argue to the trial court that the Law of the Land Clause was an independent reason to strike down the statute, did not assign error on those grounds in the Court of Appeals, and did not make that argument before the Court of Appeals.

2. **Eminent Domain— condemnation of part of tract for highway—measure of damages—equal protection—strict scrutiny**

The statute which concerns the measure of damages for condemnation of a part of a tract for a highway, N.C.G.S. § 136-112(1), neither infringes defendants' right to just compensation nor classifies persons on the basis of a suspect characteristic and does not trigger strict scrutiny under the Equal Protection Clauses of the North Carolina or United States Constitution. Although defendant contends that the statute infringes upon the fundamental right to just compensation by allowing consideration of general benefits on the market value of the remaining land, allowing the jury to consider those benefits is in accord with persuasive federal precedent, the consistent practice of the North Carolina Supreme Court, and the purposes underlying the requirement of just compensation.

3. Eminent Domain— condemnation of part of tract for highway—measure of damages—Law of the Land Clause—general benefit to remaining property

The Law of the Land Clause of the North Carolina Constitution requires only that a condemnee be indemnified and permits a factfinder to consider "general benefits" accruing to a condemnee's remaining property; a benefit is no less real when shared by a condemnee's neighbor.

4. Eminent Domain— condemnation of part of tract for highway—measure of damages—equal protection—rational basis

The statute which concerns the measure of damages for condemnation of a part of a tract, N.C.G.S. § 136-112(1), does not violate the Equal Protection Clause of the United States or the North Carolina Constitution on a rational-basis review even though N.C.G.S. § 40A-64(b) provides property owners in other cases a choice of compensation measures which is not available under N.C.G.S. § 136-112(1). The General Assembly could have rationally believed that condemnors under Chapter 40A should pay damages using either of the two measures in N.C.G.S. § 40A-64 because public and private condemnors can offset some of their costs through user fees; furthermore, Chapter 40A governs a huge range of use types, condemning authorities, and circumstances, a drastically different situation from the uniform practice of DOT.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 138 N.C. App. 329, 531 S.E.2d 836 (2000), on remand from this Court, 351 N.C. 172, 521 S.E.2d 707 (1999), finding error in orders entered 8 May 1997 and 16 May 1997 by Baker, J., and in a judgment entered 17 June 1997 by Hyatt, J., in Superior Court, Catawba County, and ordering a new trial. Heard in the Supreme Court 12 February 2001.

Roy A. Cooper, Attorney General, by J. Bruce McKinney, Assistant Attorney General, and T. Lane Mallonee and W. Richard Moore, Special Deputy Attorneys General, for plaintiff-appellant.

Lewis & Daggett, Attorneys at Law, P.A., by Michael J. Lewis; and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for defendant-appellees.

ORR, Justice.

This dispute arose from the North Carolina Department of Transportation's ("DOT") decision to build a road connecting U.S. Highway 70-321 to an interchange on Interstate 40 in Catawba County. To acquire land for this project, the DOT exercised its authority under N.C.G.S. § 136-18 to condemn 11.411 acres of defendants' 18.123-acre tract. As required by statute, the DOT acquired defendants' property by filing a declaration of taking and asking for a determination of just compensation. At trial, the presiding judge instructed the jury as to the requirements of N.C.G.S. § 136-112(1), which provides that just compensation is

> the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1) (1999). The jury rendered a verdict that defendants were not entitled to any financial compensation for the taking. The verdict reflected that the jury agreed with DOT's argument that the "general benefits" to defendants' remaining property from the project exceeded the cost of the loss of acreage. The trial court entered judgment consistent with this verdict, and the defendants appealed.

After reviewing the errors alleged by defendants, the Court of Appeals, *inter alia*, ordered a new trial on two grounds. First, the Court of Appeals held that N.C.G.S. § 136-112(1) violated the Law of the Land Clause of the North Carolina Constitution. *Department of Transp. v. Rowe*, 138 N.C. App. 329, 342-43, 531 S.E.2d 836, 845 (2000). The Court of Appeals stated that "by allowing general benefits to [set off] the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee." *Id.* at 342, 531 S.E.2d at 845. Second, the Court of Appeals held that the statute denied defendants equal protection of the law under the North Carolina Constitution. The Court of Appeals decision was based upon the different standards for compensation for condemnees set out in two different statutes. Defendants' compensation was determined under N.C.G.S. § 136-112(1) because the DOT condemned the property. However, owners of property condemned under N.C.G.S. § 40A would be entitled to compensation under N.C.G.S. § 40A-64(b), which provides for a compensation system more favorable to condemnees

than the system provided for in N.C.G.S. § 136-112(1). The Court of Appeals reasoned that "[b]ecause there is no compelling governmental interest to support [the classes created by N.C.G.S. § 136-112(1) and N.C.G.S. § 40A-64(b)] . . . a property owner's equal protection rights are violated by allowing such a classification." *Id.* at 344, 531 S.E.2d at 846.

Judge Horton dissented on two grounds. He first contended that the Court of Appeals lacked jurisdiction to consider whether this statute violates the Law of the Land Clause of the North Carolina Constitution because defendants neither assigned error on those grounds nor argued that claim before the trial court. He also dissented on the grounds that N.C.G.S. § 136-112(1) does not violate North Carolina's Equal Protection Clause. We agree with Judge Horton on both grounds.

I.

[1] We first conclude that the Court of Appeals erred because the question of whether this statute violates the Law of the Land Clause was not properly presented. As Judge Horton pointed out, Rule 10(c) of the North Carolina Rules of Appellate Procedure requires that an appellant state the legal basis for all assignments of error. N.C. R. App. P. 10(c). We have also held that arguments not made before the trial court are not properly before the Court of Appeals. *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995). Here, defendants in their appeal to the Court of Appeals failed to assign error on the grounds that N.C.G.S. § 136-112(1) violates the Law of the Land Clause. Also, defendants did not argue to the trial court that the Law of the Land Clause was an independent reason to strike down the statute. Likewise, they did not even make this argument before the Court of Appeals. Even though defendants argued and assigned error to the effect that N.C.G.S. § 136-112(1) denied defendants equal protection under the law, they never raised the issue of a due process violation under our state Constitution's Law of the Land Clause. Thus, the Court of Appeals erred in considering the constitutionality of the statute on those grounds, and we disavow their reasoning and reverse their holding.

II.

We also agree with Judge Horton that N.C.G.S. § 136-112(1) does not deprive defendants the equal protection of the law, although we agree on different grounds from those stated in the dissent. Thus, for the reasons stated below, we reverse the Court of Appeals' holding

that N.C.G.S. § 136-112(1) violates the Equal Protection Clause of the North Carolina Constitution. We also hold that it comports with the United States Constitution.

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws. N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws."); U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). To determine if a regulation violates either of these clauses, North Carolina courts apply the same test. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies when a regulation classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 36 L. Ed. 2d 16, 33 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465 (1988); *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12 (1992); *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

In concluding that defendants were denied equal protection under N.C.G.S. § 136-112(1), the Court of Appeals applied strict scrutiny. *Rowe*, 138 N.C. App. at 344, 531 S.E.2d at 846. We conclude that it was error to do so. In fact, as explained below, N.C.G.S. § 136-112(1) does not trigger strict scrutiny because it

neither classifies on the basis of a suspect classification nor infringes upon a fundamental right. Furthermore, N.C.G.S. § 136-112(1) satisfies rational-basis scrutiny because there are rational reasons for DOT and other condemnors to use different systems to calculate just compensation.

A.

[2] We begin our analysis by explaining why N.C.G.S. § 136-112(1) receives only rational-basis scrutiny. Strict scrutiny applies only when a regulation classifies persons on the basis of certain suspect characteristics or infringes the ability of some persons to exercise a fundamental right. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Not even defendants contend that they are part of a suspect class deserving the extraordinary protection provided by strict scrutiny. They do, however, contend that N.C.G.S. § 136-112(1) infringes upon a fundamental right: the right to just compensation.

Defendants argue that the Court of Appeals correctly concluded that N.C.G.S. § 136-112(1) infringes upon a fundamental right. They claim that the statute violates their right to just compensation. We disagree. Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution. It is specifically enumerated in the Fifth Amendment to the United States Constitution and has been applied to the states through the 14th. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239, 41 L. Ed. 979, 985 (1897). The right to just compensation is not expressly mentioned in the North Carolina Constitution, but "this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause." *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989); *see also Eller v. Board of Educ. of Buncombe County*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) ("When private property is taken for public use, just compensation must be paid . . . . While this principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' . . . .").

Since a fundamental right is involved, we must determine if that right is infringed upon by application of N.C.G.S. § 136-112(1). If defendants' right to just compensation is impacted by the statute, then that impact would warrant a review under the strict-scrutiny standard. If there is no infringement, then the rational-basis standard would apply.

The Court of Appeals held that defendants did not receive just compensation because the statute allows the jury to consider "general benefits" when it calculates just compensation for a partial taking. "General benefits" are defined as increases in the value of land "which arise from the fulfillment of the public object which justified the taking [and] which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment." *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 434, 126 S.E.2d 107, 112 (1962) (citations omitted); *see also* 3 Julius L. Sackman, *Nichols on Eminent Domain* § 8A.02[4][a] (rev. 3d ed. 2000). Examples include the rise in property value due to increased traffic flow, an aesthetic upgrading of a neighborhood, or more convenient parking. 3 *Nichols on Eminent Domain* § 8A.02[4][a]. In contrast, "special benefits" are increases in the value of land "which arise from the peculiar relation of the land in question to the public improvement." *Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112; *see also* 3 *Nichols on Eminent Domain* § 8A.02[4][b]. An example is the rise in property value due to newly acquired frontage on a public street. 3 *Nichols on Eminent Domain* § 8A.02[4][b].

Both of these types of benefits may be considered by the jury when calculating just compensation under N.C.G.S. § 136-112(1). That statute provides that when, as here, only part of a tract is condemned for the construction of a highway, just compensation for the condemnation is

> the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). Because this statute allows a jury to consider "general benefits," the Court of Appeals held that it "allows a compensation which is unjust to the condemnee." *Rowe*, 138 N.C. App. at 342, 531 S.E.2d at 845.

We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider "general benefits." *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918). We are also convinced that the Law of the Land Clause of the North Carolina Constitution allows a jury to consider "general benefits" when it calculates just compen-

sation. Allowing the jury to consider how "general benefits" affect the market value of the condemnee's remaining land is in accord with persuasive federal precedent, with the consistent practice of this Court, and with the purposes underlying the requirement of just compensation.

It is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider "general benefits" when calculating just compensation. The United States Supreme Court stated in *McCoy v. Union Elevated R.R. Co.* that

> we are unable to say that [a property owner] suffers deprivation of any fundamental right when a state . . . permits consideration of the actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages.

Id. at 366, 62 L. Ed. at 1166. This holding, however, was based on the Fourteenth Amendment to the United States Constitution, *id.* at 363, 62 L. Ed. at 1165, and although "[d]ecisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution . . . do not control an interpretation by this Court of the law of the land clause of our state Constitution[, they] are . . . persuasive [authority]," *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) (citations omitted). Even though this interpretation is only persuasive authority, we believe it correctly explains the requirements of just compensation.

This interpretation of just compensation accords with the long practice of our state. Although this Court has never specifically addressed the constitutionality of allowing the fact-finder to consider "general benefits," allowing fact-finders to do so has been the practice of this Court since at least 1893. *See, e.g.*, *Robinson v. State Highway Comm'n*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Proctor v. State Highway & Public Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949); *Wade v. State Highway Comm'n*, 188 N.C. 210, 124 S.E. 193 (1924); *Miller v. City of Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *see also Department of Transp. v. Mahaffey*, 137 N.C. App. 511, 528 S.E.2d 381 (2000). In 1893 in *Miller v. City of Asheville*, this Court addressed a jury instruction issue arising out of the legislative change applying "special benefits" and "general benefits" in condemnation proceedings. While no constitutional issues were raised, Justice Clark stated for the Court:

> Whether the [condemning authority] can reduce damages by all the benefits accruing the [condemnee], rests with the sovereign when it confers the exercise of the right of eminent domain. . . . [Thus] the present act, which extends the assessment of benefits to all received by the landowner, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and to that alone, he has a constitutional and vested right.

112 N.C. at 768, 16 S.E. at 764. This Court has also stated:

> It is firmly established in this State that "Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. . . ." Proctor v. State Highway and Public Works Commission, 230 N.C. 687, 691, 55 S.E.2d 479, 482. This rule has been approved many times . . . .

Kirkman, 257 N.C. at 432-33, 126 S.E.2d at 111.

Allowing the fact-finder to consider "general benefits" follows not only persuasive authority and long practice, it also fulfills the purpose underlying the requirement of just compensation: to ensure that persons being required to provide land for public projects are put in the same financial position as prior to the taking. *Accord United States v. 50 Acres of Land*, 469 U.S. 24, 30, 83 L. Ed. 2d 376, 383 (1984) (referring to "the basic principles of indemnity embodied in the Just Compensation Clause"); *cf. State Highway Comm'n v. Phillips*, 267 N.C. 369, 374, 148 S.E.2d 282, 286 (1966) ("In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained by the landowner."). As the United State Supreme Court has stated, a condemnee "is entitled to be put in as good a position pecuniarily as if his property has not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 1244 (1934).

Here, the argument of defendants, which was accepted by the Court of Appeals, would result in defendants being fully compensated

for the land lost *and* being additionally compensated for "general benefits" accruing to their remainder and to the surrounding property owners. While defendants may deem the denial of such a result unfair, it in no way denies them just compensation. As noted by Justice Clark in *Miller*, the legislature has decided that the state can reduce damages by all of the benefits accruing and that decision rests with the legislature in conferring the right of eminent domain. *Miller*, 112 N.C. at 768, 16 S.E. at 764. Just compensation is had when the balance is struck between the damages and benefits conferred. "To that, and to that alone, [defendants have] a constitutional and vested right." *Id.* If defendants are dissatisfied with that result, then their recourse is with the legislature.

[3] Furthermore, because the Law of the Land Clause requires only that a condemnee be indemnified, it permits a fact-finder to consider "general benefits" accruing to a condemnee's remaining property. For the purposes of just compensation, damages are measured by the change in the fair market value of the land. *See* 26 Am. Jur. 2d *Eminent Domain* § 298 (1996); *accord Olson*, 292 U.S. at 257, 78 L. Ed. at 1244. A condemnee is thus indemnified if she receives the difference between the fair market value of her property before the condemnation and the fair market value of her remainder after the condemnation. That change in market value is clearly affected by "general benefits" accruing to her remaining property; a benefit is no less real simply because it is shared by a condemnee's neighbor. Therefore, because the Law of the Land Clause requires only that the state indemnify the condemnee, because a condemnee's loss is measured by the change in the market value of her property and because that market value is affected by "general benefits," the Law of the Land Clause allows a fact-finder to consider "general benefits" when calculating just compensation. It follows that N.C.G.S. § 136-112(1) satisfies that clause. Because N.C.G.S. § 136-112(1) neither infringes defendants' right to just compensation nor classifies persons on the basis of a suspect characteristic, it does not trigger strict scrutiny under the Equal Protection Clauses of the North Carolina or United States Constitution. Instead, that statute receives only rational-basis scrutiny.

B.

[4] Defendants contend that N.C.G.S. § 136-112(1) fails rational-basis scrutiny. We disagree. Rational-basis scrutiny requires only that the classification made by the statute be rationally related to a legitimate

government objective. *Nordlinger*, 505 U.S. at 10, 120 L. Ed. 2d at 12 ("[U]nless a classification warrants some form of heightened review . . . , the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."); *Texfi*, 301 N.C. at 149, 269 S.E.2d at 149 ("[T]he lower tier of equal protection analysis . . . merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate government interest."). It gives wide latitude to the legislature; if there is any plausible policy reason for the classification, the test is satisfied. *Nordlinger*, 505 U.S. at 11, 120 L. Ed. 2d at 13 ("In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . ."); *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) ("[I]n instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity.").

In article 9, "Condemnation," of chapter 36 of the North Carolina General Statutes, the General Assembly has set out the process for the acquisition of property by DOT using the power of eminent domain. Within that article is N.C.G.S. § 136-112, "Measure of Damages." That statute specifically sets out, as previously noted, that just compensation is determined by the fair market value of the property immediately before the taking and immediately after the taking with consideration given to "general benefits" and "special benefits." N.C.G.S. § 136-112(1).

In contrast, article 1 of chapter 40A of the North Carolina General Statutes provides that "[i]t is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors." N.C.G.S. § 40A-1 (1999). The statute further provides for the repeal of all other provisions in laws, charters, or local acts authorizing different procedures. *Id.* It is obvious that in 1981 the General Assembly chose to consolidate and make uniform a myriad of laws pertaining to the exercise of eminent domain by public and private condemnors.

Chapter 40A thus sets out both the procedure for calculation of just compensation, N.C.G.S. ch. 40A, art. 3, and the measure of just compensation, N.C.G.S. ch. 40A, art. 4, for landowners affected by the exercise of eminent domain. The statute covers: (a) "Private Condemnors," such as corporations, boards of trustees, and railroads; (b) "Local Public Condemnors," to include both municipalities

and counties; and (c) "Other Public Condemnors," such as hospital authorities, housing authorities, and watershed-improvement districts. Each section also lists with some specificity the types of public uses that these condemnors can undertake through the use of eminent domain.

In determining just compensation for a taking by one of these local or private entities for any of the range of permissible purposes, the General Assembly opted to provide a measure of just compensation for the affected property owners that ensures a choice in a partial taking. N.C.G.S. § 40A-64(b) allows a property owner to choose the greater of the fair market value before and after the property is taken or the fair market value of the property taken. It is this choice available under N.C.G.S. § 40A-64 and not available under N.C.G.S. § 136-112 that defendants contend violates their constitutional rights.

Defendants claim that this classification between condemnees is not rationally related to any legitimate governmental purpose. However, we agree with the DOT: defendants have failed to carry their burden of proving that there is no rational reason for this distinction. As the DOT suggests, the General Assembly could have determined that public and private condemnors can offset some of their costs through user fees for the service installed through the condemnation, services such as water or sewage facilities. Thus, the General Assembly could rationally have believed that public and private condemnors should pay damages using either of the two methods allowed by N.C.G.S. § 40A-64.

Furthermore, it is perfectly reasonable for the General Assembly to have determined that, having given the power of eminent domain across this state to every municipality and county; every housing authority; and every private corporation involved in power generation, railroads, telephones, etc., the best way to ensure that a citizen whose property was taken by eminent domain would receive just compensation was by giving him a choice. The circumstances under N.C.G.S. § 40A govern a huge range of types of uses, condemning authorities, and circumstances that would require just compensation. Such a situation is drastically different from the uniform practice of the DOT, an agency of the state, condemning property all across the state for roads. Either of these justifications is sufficient to withstand rational-basis review. Therefore, this classification does not violate the Equal Protection Clause of the United States or North Carolina Constitution.

N.C.G.S. § 136-112(1) is a valid exercise of the legislative power of the North Carolina General Assembly. It does not violate the Equal Protection Clause of the United States or North Carolina Constitution. We therefore reverse the Court of Appeals as to this issue.

Based upon the foregoing, we reverse the decision of the Court of Appeals.

REVERSED.

TAMMY LYNN McCOWN, ADMINISTRATRIX OF THE ESTATE OF JAMES ROBERT McCOWN, DECEASED EMPLOYEE v. CURTIS HINES, EMPLOYER, AND MIKE HINES D/B/A MIKE HINES HEATING AND AIR CONDITIONING, EMPLOYER, AND N.C. HOME BUILDERS SELF-INSURED FUND, INC.

No. 554A00

(Filed 20 July 2001)

Workers' Compensation— independent contractor—roofer—factors

The Court of Appeals properly reversed the Industrial Commission's opinion and award concluding that an employer-employee relationship existed at the time of the injury where plaintiff possessed the independence necessary for classification as an independent contractor. Applying the factors in *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, the evidence was uncontradicted that plaintiff was engaged in the independent calling of roofing, that plaintiff had independent use of his specialized skills and knowledge without any requirements that he adopt one particular roofing method, that plaintiff was hired only for a short-term roofing job, and that plaintiff was free to set his own hours.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 140 N.C. App. 440, 537 S.E.2d 242 (2000), reversing the opinion and award entered by the North Carolina Industrial Commission on 3 June 1999. Heard in the Supreme Court 19 April 2001.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., and N. Victor Farah; and Wilkins and Wellons, by Allen Wellons, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for defendant-appellees.

PARKER, Justice.

The issue before this Court is whether the Court of Appeals erred in holding that James Robert McCown ("plaintiff")[1] was an independent contractor and in reversing the Industrial Commission's ("Commission") determination that plaintiff was an employee entitled to workers' compensation benefits.

In March 1997 plaintiff filed a claim for workers' compensation benefits for an injury received while re-roofing a house. At the compensation hearing, the deputy commissioner received the following evidence:

In April 1996 defendant Curtis Hines contacted plaintiff about re-roofing a rental house owned by his son, defendant Mike Hines, d/b/a Mike Hines Heating and Air Conditioning. Plaintiff had been doing roofing work for approximately ten years; and plaintiff had previously done roofing work for several people in the community, including Curtis Hines. Plaintiff had also done flooring and carpentry work for Curtis Hines. Plaintiff had no conversation or agreement with either Curtis Hines or Mike Hines about the amount or method of payment for the roofing job before beginning the work. Plaintiff testified that, although he had been paid a flat rate or "by the square" for other roofing jobs, Curtis Hines had paid him by the hour for his prior work. According to plaintiff the rate was $11.00 per hour, and plaintiff assumed that he would be paid in the same manner for roofing the rental house. Curtis Hines testified that he had previously paid plaintiff "by the square" and that he would "not hire anybody by the hour to do contract work"; and Mike Hines assumed that plaintiff would be paid $15.00 per square as he had been paid for past work.

Plaintiff worked on re-roofing the rental house for three days before his accident. Throughout those three days, Curtis Hines and Mike Hines were present only periodically at the work site. Although

1. James Robert McCown instituted this action as plaintiff-employee. Upon McCown's subsequent death, the administratrix of his estate, Tammy Lynn McCown, was substituted as the plaintiff. However, for the purposes of clarity, use of the term "plaintiff" in this opinion will refer to James Robert McCown.

he did not feel completely free to leave the work site without getting fired, plaintiff set his own hours and decided when to take lunch. At the work site, plaintiff used his own hammer and nail apron; and plaintiff testified that any other equipment was provided for him. However, Mike Hines claimed that plaintiff also provided his own ladder and shovel. Additionally, Curtis Hines instructed plaintiff to use some old, mismatched shingles; and while Curtis Hines directed the placement of the mismatched shingles on the roof, he did not instruct plaintiff about such details as the number of nails to put in each shingle or how to overlap the shingles.

On 8 April 1996 plaintiff arrived at work and helped another worker unload shingles from a trailer. Curtis Hines arrived at the work site before lunch and instructed plaintiff to tear off the shingles from the other side of the house, and plaintiff complied with Curtis Hines' instruction. Later, Curtis Hines and Mike Hines delivered a truckload of shingles to the work site; and plaintiff complied with Curtis Hines' request to help unload the shingles. Plaintiff then informed Curtis Hines that he needed more tar paper to finish papering the roof before it rained. Curtis Hines gave plaintiff another roll of tar paper and stated, "Here it is. Get it papered in before it rains on you." Later that day, plaintiff fell from the roof of the house and suffered a severe spinal cord injury that left him totally and permanently disabled. The next day plaintiff's father asked Mike Hines to pay plaintiff $170.00 for the work, and Mike Hines wrote a check payable to plaintiff in the amount of $170.00. According to plaintiff he had worked a total of seventeen hours on the job over a three-day period.

On 19 June 1998, based on the evidence presented at the 5 March 1998 hearing, the deputy commissioner concluded that, at the time of the accident, plaintiff was an independent contractor who had contracted to provide roofing services for defendant Mike Hines. The deputy commissioner filed an opinion and award dismissing plaintiff's claim for lack of jurisdiction. On 3 May 1999 the full Commission reversed the deputy commissioner's opinion and award, concluding that plaintiff was hired as an employee by Curtis Hines, acting as an agent for Mike Hines, d/b/a Mike Hines Heating and Air Conditioning Company. The full Commission awarded plaintiff permanent and total disability benefits at the compensation rate of $266.66 per week from 8 April 1996 and continuing for the remainder of his natural life.

On appeal the Court of Appeals reversed the Commission's award of total disability benefits. *McCown v. Hines*, 140 N.C. App. 440, 444, 537 S.E.2d 242, 244-45 (2000). The Court of Appeals held that the Commission erred in its conclusion that plaintiff had satisfied his burden of establishing that an employer-employee relationship existed at the time of the accident. For the reasons that follow, we affirm the decision of the Court of Appeals.

To maintain a proceeding for workers' compensation, the claimant must have been an employee of the party from whom compensation is claimed. *See Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988). Thus, the existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact. *See id.* As this Court explained in *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976):

> [T]he finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

See also Perkins v. Arkansas Trucking Servs., Inc., 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000). Additionally, the claimant bears the burden of proving the existence of an employer-employee relationship at the time of the accident. *See Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

Whether an employer-employee relationship existed at the time of the injury is to be determined by the application of ordinary common law tests. *See Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437; *Lucas*, 289 N.C. at 219, 221 S.E.2d at 262; *Richards v. Nationwide Homes*, 263 N.C. 295, 302, 139 S.E.2d 645, 650 (1965). Under the common law, an independent contractor "exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437; *see also Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944). In contrast, an employer-employee relationship exists "[w]here the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed." *Youngblood*, 321 N.C. at

384, 364 S.E.2d at 437; *see also Hayes*, 224 N.C. at 15, 29 S.E.2d at 139-40.

In *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140, this Court identified eight factors to consider in determining which party retains the right of control and, thus, whether the claimant is an independent contractor or an employee:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

See also Youngblood, 321 N.C. at 388-89, 364 S.E.2d at 440 (Exum, C.J., dissenting) (recognizing that the *Hayes* factors are assessed to facilitate the determination of which party retains the right to control and direct the details of the work). No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor. *See Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438; *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140.

Having carefully reviewed the record evidence in this case, we hold that application of the *Hayes* factors tends to show that plaintiff was an independent contractor at the time of the injury. First, plaintiff was engaged in the independent calling of roofing. *See Midgette v. Branning Mfg. Co.*, 150 N.C. 333, 343, 64 S.E. 5, 9 (1909) (citing the "roofing and cornice business" as an example of an independent calling). Plaintiff had been engaged in roofing for ten years and testified that roofing requires a "certain degree of skill and experience" and that he had acquired a familiarity with roofing methods, procedures, and safety precautions. The fact that plaintiff had also performed a variety of other work as a hired laborer, such as carpentry, flooring, or small home repairs, does not diminish his specialized skills and expertise as a roofer. Similarly, the fact that plaintiff did not have a business address or a truck with a company logo is not determinative

of whether plaintiff engaged in a distinct occupation or calling. This Court has previously considered the provision of equipment by the worker as evidence of independence. *Youngblood*, 321 N.C. at 384-85, 364 S.E.2d at 438. Here, Mike Hines claimed that plaintiff provided his own equipment, which plaintiff's father reclaimed after the accident; and plaintiff admitted the possibility that he had provided his own shovel in addition to his hammer and nail apron.

Second, plaintiff had independent use of his special roofing skills and knowledge. Curtis Hines, acting as an agent for his son, required plaintiff to use mismatched shingles and instructed plaintiff as to the placement of the mismatched shingles on the roof. However, these directions amounted to nothing more than aesthetic decisions within the control of the owner. *See, e.g., McCraw v. Calvine Mills, Inc.*, 233 N.C. 524, 527, 64 S.E.2d 658, 660 (1951) (distinguishing the owner's right to control the method of doing the work from the right merely to "require certain definite results conforming to the contract"). Further, Curtis Hines' requests for assistance in unloading the shingles and his comment about papering the roof before it rained were not statements indicative of his control over the details of plaintiff's work. Plaintiff made his own determinations concerning the details of his roofing work, such as the number of nails to put in each shingle and the proper overlapping of the shingles. In short, Curtis Hines did not interfere at any point with plaintiff's own exercise of his specialized knowledge regarding roofing methods and procedures.

Third, plaintiff failed to satisfy his burden of proof concerning the manner in which he was paid for his work. Plaintiff contends that Curtis Hines had paid him an hourly wage of $11.00 for his past work. Plaintiff admitted that he did not discuss with Curtis Hines the payment for this job and that he simply assumed that he would be paid $11.00 per hour. However, Curtis Hines testified that he would not pay anyone by the hour for contract work. Documents tendered into evidence showed that plaintiff had previously charged Curtis Hines by the square or job for roofing work, and plaintiff admitted that other customers had paid him by the square for roofing work. Further, Gary Beasley, the roofer who completed the roofing work on Mike Hines' rental house, testified that he was paid by the square of shingles for his work and that roofers seldom get paid on an hourly basis. Finally, Mike Hines testified that he paid plaintiff $170.00 as requested by plaintiff's father. According to Mike Hines, $170.00 seemed like "a pretty fair price"; and, considering plaintiff's physical condition, he did not want to contest the requested amount. In light of this con-

flicting evidence, especially considering plaintiff's admission that he never discussed his wages with Curtis Hines, plaintiff failed to establish that he was paid by the hour rather than on a quantitative basis.

Fourth, plaintiff was not subject to discharge for adopting one method of doing the work rather than another. Defendants did not have any personal experience in or knowledge about the installation of roofs; and plaintiff was permitted full discretion in the details of his roofing work. Further, both defendants were absent from the work site for long periods of time, leaving plaintiff alone to perform his roofing duties; and neither defendant ever climbed onto the roof to inspect whether plaintiff's work conformed to certain methods or standards.

Fifth, plaintiff was not in the regular employ of either Curtis Hines or Mike Hines. Plaintiff had never performed any work for Mike Hines prior to this roofing job on the rental house, and plaintiff was hired only for the limited purpose of re-roofing the rental house. Further, although plaintiff had done some work for Curtis Hines in the past, that work was only periodic as Curtis Hines needed him. Plaintiff's last job for Curtis Hines prior to working on Mike Hines' house had been in August 1995, eight months before the accident. Plaintiff also worked for other people in the community between jobs with Curtis Hines.

Sixth and Seventh, plaintiff failed to satisfy his burden of proof concerning his freedom to use and control assistants. At most plaintiff's evidence showed that he did not have the funds to pay an assistant. Plaintiff did not testify as to his freedom to hire and supervise any necessary assistants, and Mike Hines testified that he never discussed with plaintiff the possibility of using any assistants. Thus, in light of the lack of any evidence concerning the use of assistants, plaintiff failed to establish that he was not permitted to hire and supervise assistants.

Eighth, and finally, plaintiff selected his own time. Plaintiff testified that neither defendant instructed him when to arrive in the morning, when to take lunch, or when to leave at the end of the day. Further, defendants were absent from the work site for long periods of time, leaving plaintiff to work independently and unsupervised. Plaintiff testified that he did not feel free to leave the work site anytime he wanted to because "if [the work] wasn't done, I would have been fired." This assertion, however, was a recognition of his

obligation to complete the roofing work in a timely manner rather than a statement that Curtis Hines or Mike Hines controlled his hours.

After applying the *Hayes* factors to the record evidence in this case, we hold that plaintiff possessed the independence necessary for classification as an independent contractor at the time of the accidental injury. The evidence was uncontradicted that plaintiff was engaged in the independent calling of roofing, that plaintiff had independent use of his specialized skills and knowledge without any requirements that he adopt one particular roofing method, that plaintiff was hired only for a short-term roofing job, and that plaintiff was free to set his own hours. Absent an employer-employee relationship, the Commission lacked jurisdiction over plaintiff's claim. Accordingly, we hold that the Court of Appeals properly reversed the full Commission's opinion and award concluding that an employer-employee relationship existed at the time of the injury.

AFFIRMED.

STACEY J. CHAPPELL v. ANTHONY W. ROTH AND TONY ROTHE

No. 68A01

(Filed 20 July 2001)

Arbitration and Mediation— automobile accident—motion to enforce mediated settlement agreement

The Court of Appeals erred in a case arising out of an automobile accident by reversing the trial court's denial of plaintiff's motion to enforce a mediated settlement agreement that provided as a condition of the settlement for a release "mutually agreeable to both parties" because the settlement agreement was not an enforceable contract when the parties never agreed upon the terms of the release, and the settlement agreement did not establish a method by which to settle the terms of the release.

Justice EDMUNDS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 502, 539 S.E.2d

666 (2000), reversing and remanding an order entered 6 April 2000 by Balog, J., in Superior Court, Guilford County. Heard in the Supreme Court 14 May 2001.

Donaldson & Black, P.A., by Arthur J. Donaldson and Rachel Scott Decker, for plaintiff-appellee.

Frazier & Frazier, L.L.P., by Torin L. Fury, for defendant-appellants.

PARKER, Justice.

The issue before this Court is whether the Court of Appeals erred in reversing the trial court's denial of plaintiff's motion to enforce a mediated settlement agreement that provided, as a condition of the settlement, for a release "mutually agreeable to both parties." For the reasons which follow, we reverse the decision of the Court of Appeals.

On 11 February 1999 plaintiff Stacey J. Chappell filed an action against defendant Anthony W. Roth (a/k/a Tony Rothe or Tony Roth) and unnamed defendant State Farm Mutual Automobile Liability Insurance Company seeking damages for personal injuries sustained in an automobile accident. On 21 December 1999 the parties participated in a court-ordered mediated settlement conference at which the parties reached a settlement agreement containing the following terms and conditions: "Defendant will pay $20,000 within [two] weeks of date of settlement in exchange for voluntary dismissal (with prejudice) and full and complete release, mutually agreeable to both parties."

Following the settlement conference, defendants presented plaintiff with a proposed release. However, plaintiff objected to a provision in the release on the basis that "it imposed burdens on the plaintiff which were not discussed at the conference and which are greater than those required by North Carolina law." Plaintiff then suggested alternatives to the release language, and defendants responded by requesting a return of the settlement draft. On 21 February 2000 plaintiff filed a motion to enforce the settlement agreement. The trial court denied plaintiff's motion on 6 April 2000.

A divided panel of the Court of Appeals reversed the trial court's ruling. *Chappell v. Roth*, 141 N.C. App. 502, 507, 539 S.E.2d 666, 669

(2000). The Court of Appeals explained that defendants must overcome a "strong presumption that a settlement agreement reached by the parties through court-ordered mediation under the guidance of a mediator is a valid contract." *Id.* at 505, 539 S.E.2d at 668. Consequently, the Court of Appeals remanded the case to the trial court for a determination of whether the contested provision in the release is a material term of the settlement agreement in light of all the circumstances; and if defendants fail to satisfy their burden of proving materiality, then the trial court should enforce the settlement agreement. In his dissent Judge Greene concluded that, as the parties never agreed upon the terms of the release, the settlement agreement was not an enforceable contract. Defendants appealed to this Court based on the dissent.

This Court has previously stated that compromise agreements, such as the mediated settlement agreement reached by the parties in this case, are governed by general principles of contract law. *McNair v. Goodwin*, 262 N.C. 1, 7, 136 S.E.2d 218, 223 (1964). For an agreement to constitute a valid contract, the parties' " 'minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.' " *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (quoting *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921)); *see also Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (explaining that no contract results "[w]hen there has been no meeting of the minds on the essentials of an agreement"); *Normile v. Miller*, 313 N.C. 98, 108, 326 S.E.2d 11, 18 (1985) (stating that no contract exists absent a meeting of the minds or mutual assent between the parties).

Based on these principles, we hold that, absent agreement by the parties concerning the terms of the release, the settlement agreement did not constitute an enforceable contract. We recognize that settlement of claims is favored in the law, *Rowe v. Rowe*, 305 N.C. 177, 186, 287 S.E.2d 840, 846 (1982); *Fisher v. John L. Roper Lumber Co.*, 183 N.C. 485, 489, 111 S.E. 857, 859 (1922), and that mediated settlement as a means to resolve disputes should be encouraged and afforded great deference. Nevertheless, given the consensual nature of any settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement.

Plaintiff contends that the settlement agreement is enforceable as to those terms upon which the parties reached agreement, namely

defendants' payment of $20,000 to plaintiff in exchange for a voluntary dismissal with prejudice. We disagree.

In the present case the mediated settlement agreement provided that defendants would pay $20,000 to plaintiff in exchange for a voluntary dismissal with prejudice and a "full and complete release, mutually agreeable to both parties." The "mutually agreeable" release was part of the consideration, and hence, material to the settlement agreement. The parties failed to agree as to the terms of the release, and the settlement agreement did not establish a method by which to settle the terms of the release. Thus, no meeting of the minds occurred between the parties as to a material term; and the settlement agreement did not constitute a valid, enforceable contract. Accordingly, the Court of Appeals erred in reversing the trial court's ruling denying plaintiff's motion to enforce the settlement agreement.

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

REVERSED.

Justice EDMUNDS dissenting.

Although the majority acknowledges North Carolina's strong and consistent policy favoring settlement of contested cases, I believe this opinion undermines that policy. The mediator who conducted the settlement conference reported to the trial court that plaintiff and defendants had reached "agreement on all issues." Specifically, the parties agreed that defendants would pay plaintiff $20,000 in exchange for a voluntary dismissal with prejudice and a full and complete release mutually agreeable to the parties. Thereafter, defendants sought to add to the release a hold-harmless provision in order to address our holding in *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 455 S.E.2d 655 (1995). Both parties agree that this provision was not discussed during the settlement conference even though it arose from an opinion published long before the mediation and presumably was known to the attorneys for the parties. Plaintiff objected to the provision, then filed a motion to enforce the settlement agreement, but the trial court denied plaintiff's motion.

The Court of Appeals apparently realized that it could not determine from the record whether defendant's proposed provision was

material to the settlement agreement. Accordingly, that court remanded the case to the trial court with instructions to conduct a hearing to determine whether the contested provision was material under the circumstances of the case. The majority of this Court concludes that the release is material as a matter of law and that because the parties failed to agree as to the "terms" of the release, there is no enforceable contract. However, only a single release term, the hold-harmless provision, remained unresolved.

I agree with the majority that an agreement between the parties to mediate does not imply a surrender of their rights to a trial. Nevertheless, I do not believe that every hitch encountered in ironing out the details of a mediation nullifies that mediation. A contract survives if the parties differ over a term that is not material. *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E.2d 800 (1967); *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 358 S.E.2d 566 (1987). The majority's result permits a mediation to be derailed whenever either party elaborates on the particulars of their mediated agreement. I believe that the Court of Appeals' resolution was proper and that the trial court is better able than we to determine whether the sole contested term in this case is material. Because I believe the majority opinion is inconsistent with the long-standing policy favoring settlement of contested cases, I would affirm the Court of Appeals. Accordingly, I respectfully dissent.

DALE E. TAYLOR, B.J. FORE, DILLARD A. BROWN, HARVEY R. COOK, JR., THOMAS P. DEIGHTON, JAMES M. FLOYD, CATHY ANN HALL, GRANT HAROLD, MARY ROSE HART, RAYMOND HIGGINS, KENNETH D. HINSON, ALLEN C. JONES, JAMES T. MALCOLM, III, RANDY W. MARTIN, RICHARD N. OULETTE, RALPH PITTMAN, SID A. POPE, DANIEL L. POWERS, II, DARYL D. PRUITT, LISA D. ROBERTSON, RICKY E. SHEHAN, GREGORY F. SNIDER, TIMOTHY C. STOKER, ANN R. STOVER, JOAN C. SMITH, INDIVIDUALLY, AND FOR THE BENEFIT OF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. CITY OF LENOIR, A MUNICIPAL CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, BODY POLITIC AND CORPORATE; O.K. BEATTY, JOHN W. BRITTE, JR., JAMES M. COOPER, RONALD E. COPLEY, CLYDE R. COOK, JR., BOB ETHERIDGE, JAMES R. HAWKINS, SHIRLEY A. HISE, WILMA M. KING, GERALD LAMB, W. EUGENE MCCOMBS, WILLIAM R. MCDONALD, III, DAVID G. OMSTEAD, PHILLIP M. PRESCOTT, JR., JAMES W. WISE, AS TRUSTEES; MICHAEL WILLIAMSON, AS DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION, AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA; RICHARD H. MOORE, AS TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT RETIREMENT SYSTEM; AND THE STATE OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE

No. 95A01

(Filed 20 July 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 660, 542 S.E.2d 222 (2001), dismissing as untimely filed the appeal from an order entered 5 March 1999 by Sitton, J., in Superior Court, Caldwell County. Heard in the Supreme Court 16 May 2001.

Kuehnert & Bellas, PLLC, by Daniel A. Kuehnert, for plaintiff-appellants Dale E. Taylor, B.J. Fore, Dillard A. Brown, Thomas P. Deighton, James M. Floyd, Raymond Higgins, and Ricky E. Shehan.

Groome, Tuttle, Pike & Blair, by Edward H. Blair, Jr., for defendant-appellee City of Lenoir.

Roy A. Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for defendant-appellees Board of Trustees of the North Carolina Local Governmental Employees' Retirement System and its Individually Named Members or their Successors, Michael Williamson (successor to Dennis Ducker), Richard H. Moore (successor to Harlan E. Boyles), and the State of North Carolina.

PER CURIAM.

Pursuant to Rule 25 of the North Carolina Rules of Appellate Procedure, the record on appeal is deemed timely filed for good cause shown by the plaintiffs. The opinion of the Court of Appeals dismissing the appeal is, therefore, vacated and this case is remanded to that court for determination of the issues on the merits.

VACATED AND REMANDED.

ROBERT BACON, RICHARD CAGLE, AND ELTON McLAUGHLIN v. R. C. LEE, WARDEN OF CENTRAL PRISON, MICHAEL F. EASLEY, GOVERNOR OF NORTH CAROLINA, & ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA

No. 209A91-4

(Filed 2 August 2001)

1. Constitutional Law— North Carolina—due process—clemency procedures—Governor was former Attorney General

A plaintiff's attempt to impose additional constraints upon the Governor of North Carolina's discharge of clemency powers arising from alleged violations of plaintiff's due process rights, based on the fact that the Governor previously served as Attorney General of North Carolina and therefore counsel of record for the State during the majority of plaintiff's appellate and post-conviction proceedings, is unpersuasive and the trial court erred by restraining the Governor's consideration of plaintiff's clemency request in a capital case because: (1) clemency proceedings are conducted by the executive branch under its discretionary authority, independent of direct appeal and collateral relief proceedings; (2) minimal due process applicable to state clemency procedures do not include the right of an inmate seeking clemency to have his or her request reviewed by a Governor possessing the level of impartiality normally required of a judge presiding over an adjudicatory proceeding; (3) plaintiff received notice of clemency procedures and he has fully availed himself of these procedures; (4) plaintiff has not alleged that the Governor has or will render a decision in a manner that violates plaintiff's

rights; (5) despite the potential for the Governor's previous roles influencing his clemency determinations, the people of North Carolina have opted to vest their elected Governor with virtually plenary clemency authority under Article III, Section 5(6) of the North Carolina Constitution; and (6) the Rule of Necessity reveals that the Governor cannot delegate the exercise of the clemency authority under Article III, Section 5(6) of our Constitution, and there is no evidence that the Lieutenant Governor is required to act based on the Governor's inability to perform his duties.

2. Constitutional Law— equal protection—cruel and unusual punishment—clemency procedures—Governor was former Attorney General

A plaintiff's attempt to impose additional constraints upon the Governor of North Carolina's discharge of clemency powers arising from alleged violations of plaintiff's equal protection rights and right to be free from cruel and unusual punishment under the United States Constitution, based on the fact that the Governor previously served as Attorney General of North Carolina and therefore counsel of record for the State during the majority of plaintiff's appellate and post-conviction proceedings, is unpersuasive and the trial court erred by restraining the Governor's consideration of plaintiff's clemency request in a capital case because: (1) plaintiff cannot show that he has been or will be treated differently than other similarly situated death row inmates for purposes of pursuing clemency; and (2) plaintiff's basic premise that clemency is constitutionally required in a capital punishment system is erroneous as a matter of law.

3. Constitutional Law— North Carolina—law of the land clause—clemency procedures—Governor was former Attorney General

A plaintiff's attempt to impose additional constraints upon the Governor of North Carolina's discharge of clemency powers under the North Carolina Constitution arising under the law of the land clause of Article 1, based on the fact that the Governor previously served as Attorney General of North Carolina and therefore counsel of record for the State during the majority of plaintiff's appellate and post-conviction proceedings, is unpersuasive and the trial court erred by restraining the Governor's consideration of plaintiff's clemency request in a capital case because due process rights that apply to clemency procedures in

North Carolina extend no further than the minimal safeguards for due process rights.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order issued 15 May 2001 by LaBarre, J., in Superior Court, Wake County, restraining the Governor of North Carolina, Michael F. Easley, from considering the clemency request of plaintiff Robert Bacon. Heard in the Supreme Court 7 June 2001.

Thomas F. Loflin III for plaintiff-appellees; J. Kirk Osborn for plaintiff-appellee McLaughlin; and Stephen R. Greenwald, pro hac vice, for plaintiff-appellees Bacon and McLaughlin.

Roy A. Cooper, Attorney General, by Barry S. McNeill, Edwin W. Welch, and Valérie B. Spalding, Special Deputy Attorneys General, for defendant-appellants.

MARTIN, Justice.

Plaintiffs instituted the instant civil action to challenge the constitutionality of the Governor's exercise of his clemency power under Article III, Section 5(6) of the Constitution of North Carolina.[1]

Plaintiff Robert Bacon (Bacon) was convicted of the first-degree murder of Glennie Leroy Clark at the 18 May 1987 Criminal Session of Superior Court, Onslow County. After a capital sentencing proceeding, the jury recommended a sentence of death, and the trial court entered judgment in accordance with that recommendation. On 5 April 1990 this Court found no error in Bacon's first-degree murder conviction but remanded the case to the trial court for a new capital sentencing proceeding. *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990). On 19 February 1991 a second jury recommended the death penalty, and the trial court entered judgment in accordance with that recommendation. On 29 July 1994 this Court found no error in Bacon's capital sentencing proceeding. *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994). On 21 February 1995 the United States Supreme Court denied Bacon's petition for writ of certiorari. *Bacon v. North Carolina*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995).

On 25 September 1995 Bacon filed a motion for appropriate relief (MAR) in Superior Court, Onslow County. On 20 November 1995 the

1. We assume, for purposes of the present case, that jurisdiction is proper under 42 U.S.C. § 1983. *See, e.g., Martinez v. California*, 444 U.S. 277, 283 n.7, 62 L. Ed. 2d 481, 488 n.7 (1980).

trial court denied Bacon's MAR. On 15 February 1996 Bacon filed a motion to reconsider the denial of his MAR. The trial court granted Bacon's motion and heard oral argument. On 10 May 1996 the trial court issued an order denying all claims within Bacon's MAR. On 7 February 1997 this Court denied Bacon's petition for writ of certiorari to review the trial court's order. *State v. Bacon*, 345 N.C. 348, 483 S.E.2d 179 (1997). On 6 October 1997 the United States Supreme Court denied Bacon's petition for writ of certiorari. *Bacon v. North Carolina*, 522 U.S. 843, 139 L. Ed. 2d 75 (1997).

On 26 November 1997 Bacon filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. That court granted the writ as to Bacon's claim of ineffective assistance of counsel. Bacon and the State of North Carolina both appealed to the United States Court of Appeals for the Fourth Circuit. On 30 August 2000 the Fourth Circuit reversed the district court on Bacon's claim of ineffective assistance of counsel and otherwise affirmed the district court's denial of relief. *Bacon v. Lee*, 225 F.3d 470 (4th Cir. 2000). On 26 March 2001 the United States Supreme Court denied Bacon's petition for writ of certiorari. *Bacon v. Lee*, —— U.S. ——, 149 L. Ed. 2d 360 (2001). On 9 May 2001 Bacon submitted a clemency request to the Governor of North Carolina.

Governor Easley served as Attorney General of North Carolina from January 1993 to January 2001 and therefore served as counsel of record for the State of North Carolina during the majority of Bacon's appellate and post-conviction proceedings.

Plaintiff Richard Cagle (Cagle) was convicted of the first-degree murder of Dennis Craig House and was thereafter sentenced to death at the 15 June 1995 Criminal Session of Superior Court, Cumberland County. On 24 July 1997 this Court found no error in Cagle's first-degree murder conviction and death sentence. *State v. Cagle*, 346 N.C. 497, 488 S.E.2d 535 (1997). On 15 December 1997 the United States Supreme Court denied Cagle's petition for writ of certiorari. *Cagle v. North Carolina*, 522 U.S. 1032, 139 L. Ed. 2d 614 (1997).

Cagle filed a MAR in 1998, which the trial court denied in 2000. Cagle filed a motion to reconsider the denial of his MAR in March 2000, which was denied in November 2000. On 11 January 2001 the trial court entered an amended order dismissing Cagle's MAR upon reconsideration.

Governor Easley served as Attorney General of North Carolina and therefore served as counsel of record for the State of North Carolina during Cagle's appellate and post-conviction proceedings from 1995 until January 2001.

Plaintiff Elton McLaughlin (McLaughlin) was convicted of the first-degree murders of James Elwell Worley, Shelia Denise Worley, and Psoma Wine Baggett at the 10 September 1984 Special Session of Superior Court, Bladen County. After a capital sentencing proceeding, the trial court sentenced McLaughlin to death for the James Worley murder and to life imprisonment for the other two murders. On 7 September 1988 this Court found no error in McLaughlin's convictions and sentences. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988). The United States Supreme Court thereafter granted certiorari and vacated the death sentence in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *McLaughlin v. North Carolina*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990).

On 3 October 1991 this Court remanded the case for a new capital sentencing proceeding. *State v. McLaughlin*, 330 N.C. 66, 408 S.E.2d 732 (1991). McLaughlin was again sentenced to death in 1993. On 8 September 1995 this Court found no error in his second capital sentencing proceeding. *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995). On 20 February 1996 the United States Supreme Court denied McLaughlin's petition for writ of certiorari. *McLaughlin v. North Carolina*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996).

In 1997 McLaughlin filed a MAR in Superior Court, Bladen County, which the trial court denied in 1998. On 24 June 1999 this Court denied McLaughlin's petition for writ of certiorari to review the trial court's order denying his MAR. *State v. McLaughlin*, 537 S.E.2d 489 (N.C. 1999). On 19 November 1999 the United States Supreme Court denied McLaughlin's petition for writ of certiorari. *McLaughlin v. North Carolina*, 528 U.S. 1025, 145 L. Ed. 2d 418 (1999). McLaughlin has since initiated habeas corpus proceedings in the United States District Court for the Eastern District of North Carolina.

Governor Easley served as District Attorney for the Thirteenth Prosecutorial District, which includes Bladen County, from 1982 to 1992. In this capacity he served as "the local prosecutor" at McLaughlin's trial in 1984. As noted above, the United States Supreme Court vacated McLaughlin's 1984 death sentence in 1990. *McLaughlin v. North Carolina*, 494 U.S. 1021, 108 L. Ed. 2d 601. McLaughlin

received his second death sentence in 1993. The imposition of this death sentence, as well as part of McLaughlin's appeal and post-conviction proceedings arising therefrom, occurred during Governor Easley's service as Attorney General of North Carolina.

On 11 May 2001 plaintiffs instituted the instant civil action with the filing of a complaint entitled, "Class Action: Complaint for Temporary, Preliminary & Permanent Injunctive Relief & for a Declaratory Judgment." Named defendants include R. C. Lee, Warden of Central Prison in Raleigh; Michael F. Easley, Governor of North Carolina; and Roy Cooper, Attorney General of North Carolina.

Plaintiffs allege in their first claim for relief that they have "the right to petition for [executive] clemency at any time after conviction, pursuant to Art. III, § 5(6) of the North Carolina Constitution," and that they have a due process right under Article I, Sections 1, 19, 21, 27, and 35 of the North Carolina Constitution and the Eighth and Fourteenth Amendments to the United States Constitution for their clemency petition to "be considered and decided by a neutral and impartial decision maker, untainted by his prior participation in [any] Plaintiff's prosecution." Plaintiffs allege that because Governor Easley "was the Attorney General of North Carolina throughout part, or all, of each and every Plaintiff's appellate and post-conviction review proceedings in state and/or federal court, and was also the local prosecutor in the initial trial proceedings of Plaintiff McLaughlin, he has an inherent conflict of interest that precludes him from fairly considering any Plaintiff's clemency request, and [therefore] does not qualify as a neutral and impartial decision maker."

Plaintiffs' second claim for relief is "grounded in each of the Plaintiffs' [sic] cognizable liberty interest in his continued life and existence, and his right, under the North Carolina Constitution and the U.S. Constitution, to equal protection of law against deprivation of such cognizable interest." Plaintiffs further allege, upon information and belief, that there is a class of "five convicted capital defendants under sentence of death in North Carolina who were not involved in litigation in opposition to the Attorney General's Office when Defendant Easley was the Attorney General." According to plaintiffs, Governor Easley may consider clemency petitions originating from that class of five death row inmates without violating those inmates' due process rights. In contrast, because of previous proceedings involving Governor Easley and the class consisting of plaintiffs and putative class members, clemency requests arising

from within this class of persons "will be considered and decided by a party who does not qualify as a neutral and impartial decision maker, resulting in unconstitutionally disparate treatment and a denial of equal protection of the law under Art. I, §§ 1, 19, 21, 27 & 35 of the North Carolina Constitution and under the Eighth [Amendment] and equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution."

Plaintiffs, in their third claim for relief, allege a "cruel and unusual punishment [claim] under the Eighth and Fourteenth Amendments to the U.S. Constitution, and under Art. I, §§ 19 & 27 of the North Carolina Constitution."

In their prayer for relief, plaintiffs seek injunctive relief and entry of "a declaratory judgment that the exercise of the power of clemency by Defendant Easley with respect to any of the Plaintiffs would constitute a violation of such Plaintiff's rights to due process, equal protection of the law and freedom from cruel and unusual punishment under the state and federal constitutions, and in violation of 42 U.S.C. § 1983."

On 14 May 2001 defendants filed a response in the trial court alleging plaintiffs were not entitled to relief as a matter of law. On 15 May 2001 the trial court issued a temporary restraining order that stayed Bacon's execution scheduled for 18 May 2001 and restrained Governor Easley from considering Bacon's clemency request. Also, on 15 May 2001, defendants filed directly in this Court their "Emergency Petitions for Writs of Certiorari, Prohibition & Supersedeas, and Motion to Vacate Superior Court's Order and to Dismiss Bacon's Civil Complaint," to which plaintiffs filed a response.

On 15 May 2001 this Court, pursuant to N.C. R. App. P. 2, vacated the trial court's temporary restraining order to the extent it prohibited or restrained the Governor of North Carolina from conducting a clemency hearing in Bacon's case under Article III, Section 5(6) of the Constitution of North Carolina. Later that day, Governor Easley met with attorneys and representatives for Bacon and with attorneys for the State of North Carolina.[2]

On 17 May 2001 this Court, in the exercise of its supervisory authority pursuant to Article IV of the Constitution of North Carolina

2. On 19 July 2001 Governor Easley's office advised the Clerk of this Court that Bacon's clemency request remained pending before the executive authority.

and N.C. R. App. P. 2, entered an order allowing the defendants' emergency petition for writ of certiorari, staying any further proceedings in the trial court, and calendaring this matter for oral argument before this Court on 7 June 2001. In its order, the Court expressed "no opinion as to the merit, or lack of merit, of Plaintiffs' legal challenge to the Governor's power of executive clemency under Article III, Section 5(6) of the Constitution of North Carolina."

I.

Before addressing the allegations raised in the instant complaint, we briefly consider the background of the doctrine of executive clemency and the justiciability of clemency procedures. First, the genesis of executive clemency in the United States is found in the English common law. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-12, 122 L. Ed. 2d 203, 224 (1993); *Schick v. Reed*, 419 U.S. 256, 262, 42 L. Ed. 2d 430, 436 (1974); *Ex parte Grossman*, 267 U.S. 87, 110, 69 L. Ed. 527, 531 (1925); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160, 8 L. Ed. 640, 643-44 (1833). In *Wilson*, Chief Justice Marshall stated:

> As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

32 U.S. (7 Pet.) at 160, 8 L. Ed. at 643-44.

In England the power to grant pardons belonged almost exclusively to the Monarch. *See Schick*, 419 U.S. at 260-62, 42 L. Ed. 2d at 435-36 ("by 1787 the English prerogative to pardon was unfettered except for a few specifically enumerated limitations" such as impeachments). Traditionally, the exercise of clemency authority has been considered "a matter of grace," *see, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81, 140 L. Ed. 2d 387, 396 (1998), or "an act of grace," *see, e.g., Wilson*, 32 U.S. (7 Pet.) at 160, 8 L. Ed. at 644. Clemency was designed to give the executive the authority to exempt "the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *Id.* In *Ex parte Grossman*, the United States Supreme Court observed that clemency "may afford relief from [the] undue harshness or evident

mistake in the operation or enforcement of the criminal law." 267 U.S. at 120, 69 L. Ed. at 535.

The United States Supreme Court recently reaffirmed the traditional conception of clemency as an Executive Branch function separate from adjudicatory proceedings within the Judicial Branch. *See Herrera*, 506 U.S. at 411-13, 122 L. Ed. 2d at 224-25. The Court noted that one of the great advantages of clemency in England was " 'that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.' " *Id.* at 412, 122 L. Ed. 2d at 224 (quoting 4 William Blackstone, *Commentaries on the Laws of England* *397). Consequently, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 69 L. Ed. 2d 158, 165 (1981).

We observe that all fifty states have incorporated clemency provisions in their respective constitutions.[3] The people of North Carolina have vested their Governor with virtually absolute clemency authority since the adoption of their first Constitution in 1776. *See* N.C. Const. of 1776, § XIX ("[T]he Governor . . . shall have the Power of granting Pardons and Reprieves, except where the Prosecution shall be carried on by the General Assembly . . . ."). In that first Constitution, the people vested the pardon and reprieve power exclusively in the Governor, their executive. In the Constitution of 1868, the people of North Carolina again vested their executive with plenary authority to grant reprieves, commutations, and pardons, "after conviction, for all offences, (except in cases of impeachment,)

3. See Ala. Const. amend. 38; Alaska Const. art. III, § 21; Ariz. Const. art. V, § 5; Ark. Const. art. VI, § 18; Cal. Const. art. V, § 8; Colo. Const. art. IV, § 7; Conn. Const. art. IV, § 13; Del. Const. art. VII, § 1; Fla. Const. art. IV, § 8; Ga. Const. art. IV, § 2; Haw. Const. art. V, § 5; Idaho Const. art. IV, § 7; Ill. Const. art. V, § 12; Ind. Const. art. V, § 17; Iowa Const. art. 4, § 16; Kan. Const. art. I, § 7; Ky. Const. § 77; La. Const. art. IV, § 5(E); Me. Const. art. V, pt. 1, § 11; Md. Const. art. II, § 20; Mass. Const. pt. II, ch. 2, § 1, art. 8; Mich. Const. art. V, § 14; Minn. Const. art. V, § 7; Miss. Const. art. V, § 124; Mo. Const. art. IV, § 7; Mont. Const. art. VI, § 12; Neb. Const. art. IV, § 13; Nev. Const. art. V, § 13; N.H. Const. pt. 2, art. 52; N.J. Const. art. V, § 2; N.M. Const. art. V, § 6; N.Y. Const. art. IV, § 4; N.C. Const. art. III, § 5(6); N.D. Const. art. V, § 7; Ohio Const. art. III, § 11; Okla. Const. art. VI, § 10; Or. Const. art. V, § 14; Pa. Const. art. IV, § 9; R.I. Const. art. IX, § 13; S.C. Const. art. IV, § 14; S.D. Const. art. IV, § 3; Tenn. Const. art. III, § 6; Tex. Const. art. IV, § 11; Utah Const. art. VII, § 12; Vt. Const. ch. II, § 20; Va. Const. art. V, § 12; Wash. Const. art. III, § 9; W. Va. Const. art. VII, § 11; Wis. Const. art. V, § 6; Wyo. Const. art. IV, § 5.

upon such conditions as he may think proper . . . ." N.C. Const. of 1868, art. III, § 6. Under the Constitution of 1971, the third and present State Constitution, the power to grant pardons, reprieves, and commutations continues to be the exclusive prerogative of the executive. The Constitution provides in part:

> The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.

N.C. Const. art. III, § 5(6).[4]

Plaintiffs contend that the United States Supreme Court effectively overruled its prior jurisprudence regarding executive clemency procedures in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 140 L. Ed. 2d 387 (1998). According to plaintiffs, "*Woodard* completely changed the landscape, and swept away the precedential value of any cases decided before it that turned on the notion that clemency proceedings were immune from due process safeguards."

In *Woodard*, the defendant was sentenced to death in the state courts of Ohio for an aggravated murder committed in the course of a carjacking. *Woodard*, 523 U.S. at 277, 140 L. Ed. 2d at 393. When he failed to obtain a stay of execution more than forty-five days prior to his scheduled execution date, the Ohio Adult Parole Authority (the Authority) informed the defendant, with three days' notice, that on 9 September 1994 he could have a clemency interview, followed by a hearing on 16 September. *Id.* at 277, 289, 140 L. Ed. 2d at 394, 401. In response, the defendant did not request an interview but instead objected to the proposed date for the interview and requested that his counsel be permitted to attend, and participate in, the clemency interview and hearing. *Id.* at 277, 140 L. Ed. 2d at 394. The Authority failed to respond to the defendant's requests. *Id.* On 14 September 1994 the defendant filed suit in the United States District Court for

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4. N.C.G.S. § 147-21 prescribes the form and content of a pardon application. It provides:

> Every application for pardon must be made to the Governor in writing, signed by the party convicted, or by some person in his behalf. And every such application shall contain the grounds and reasons upon which the executive pardon is asked, and shall be in every case accompanied by a certified copy of the indictment, and the verdict and judgment of the court thereon.

N.C.G.S. § 147-21 (1999).

the Southern District of Ohio alleging that Ohio's clemency process violated, among other things, his Fourteenth Amendment due process rights. *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1181-82 (6th Cir. 1997).

The district court granted the State of Ohio's motion for judgment on the pleadings. *Id.* at 1181. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed in part and reversed in part. *Id.* at 1194. The court determined that there was no federally created life or liberty interest in clemency. *Id.* at 1183-84 (relying on *Dumschat*, 452 U.S. at 464-65, 69 L. Ed. 2d at 164-66). Because the Governor's decision to grant clemency remained within his sole discretion, regardless of the Authority's recommendation, the court also determined that the defendant did not have any state-created life or liberty interest in clemency. *Id.* at 1184-85. The court then considered a "second strand" of due process analysis "center[ed] on the role of clemency in the entire punitive scheme." *Id.* at 1186. Relying on *Evitts v. Lucey*, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 827 (1985), the Sixth Circuit observed that "[t]he Constitution does not require a state . . . to provide a system of appeals, but if the state chooses to do so, the appeal, too, must comply with the basic requirements of due process." *Woodard*, 107 F.3d at 1186. According to the court, this reasoning applied to other post-conviction avenues of relief made available by the government, including clemency. *Id.* The court determined that "due process at the clemency stage will necessarily be minimal . . . because of the great distance from the truly fundamental process." *Id.* at 1187. As a result, the Sixth Circuit remanded the case to the district court to address defendant's due process claim under this "second strand of due process analysis." *Id.* at 1188.

The United States Supreme Court reversed the Sixth Circuit's decision. The Court's principal opinion, a plurality opinion of four justices authored by Chief Justice Rehnquist, reaffirmed the *Dumschat* holding—that clemency decisions " 'have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.' " *Woodard*, 523 U.S. at 276, 140 L. Ed. 2d at 395-96 (quoting *Dumschat*, 452 U.S. at 464, 69 L. Ed. 2d at 165). According to the principal opinion, "[c]lemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant . . . . They are conducted by the executive branch, independent of direct appeal and collateral relief proceedings." *Id.* at 284, 140 L. Ed. 2d at 398. If the procedural constraints that Woodard requested were implemented,

"the executive's clemency authority would cease to be a matter of grace committed to the executive authority." *Id.* at 285, 140 L. Ed. 2d at 399. Accordingly, the Court determined that Ohio's clemency procedures did not violate the Fourteenth Amendment Due Process Clause. *Id.* at 288, 140 L. Ed. 2d at 400-01.

Justice O'Connor, concurring by separate opinion, determined that a prisoner under a death sentence retains a life interest after proper conviction to which due process safeguards attach. *Id.* at 289, 140 L. Ed. 2d at 401 (O'Connor, J., concurring). She concluded that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* Justice O'Connor ultimately concluded, however, that none of the defendant's allegations "amount[ed] to a due process violation" as a matter of law. *See id.* at 290, 140 L. Ed. 2d at 402 (no remand to district court necessary in order to make factual determinations on Woodard's due process claim).

Justice Stevens, concurring in part and dissenting in part, stated that a prisoner retained a "life interest protected by the Due Process Clause." *Id.* at 292, 140 L. Ed. 2d at 403 (Stevens, J., concurring in part and dissenting in part). He concluded that because clemency proceedings involved the "final stage of the decisional process that precedes an official deprivation of life," they must satisfy the basic requirements of due process. *Id.* at 295, 140 L. Ed. 2d at 405. Accordingly, Justice Stevens stated in dissent that the case should be remanded to the district court to determine "whether Ohio's procedures meet the minimum requirements of due process." *Id.*

Justice O'Connor's concurring opinion represents the holding of the Court because it was decided on the narrowest grounds and provided the fifth vote. *See Romano v. Oklahoma*, 512 U.S. 1, 9, 129 L. Ed. 2d 1, 11 (1994) (the Court acknowledged the fifth vote and concurrence on narrow grounds is controlling); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 49 L. Ed. 2d 859, 872 n.15 (1976) ("the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"). Three justices joined in the principal opinion authored by Chief Justice Rehnquist, and three justices concurred in Justice O'Connor's concurring opinion. Thus, eight justices essentially concluded that Woodard's due process allegations failed as a matter of law.

II.

[1] The primary question presented by the instant case is whether Governor Easley's consideration of clemency requests from plaintiffs or putative class members violates the Fourteenth Amendment Due Process Clause in light of the *Woodard* decision. More particularly, we must determine whether the minimal due process applicable to state clemency procedures includes the right of an inmate seeking clemency to have his or her request reviewed by an executive possessing the level of impartiality normally required of a judge presiding over an adjudicatory proceeding.

As a preliminary matter, we note that, pursuant to Article III, Section 5(6) of the State Constitution, the Governor may grant clemency at any time "after conviction." N.C. Const. art. III, § 5(6). Nevertheless, we take judicial notice of the fact that the executive in North Carolina does not ordinarily consider clemency requests in capital cases until the applicant has exhausted all avenues of relief within the federal and state judiciary. We recognized this custom and practice of the executive in our order of 17 May 2001, where we observed that *Woodard* claims "will normally only be raised after finality has attached to the capital murder conviction in our criminal courts and the condemned inmate has made his [or her] final plea for mercy to the Governor."

Apart from Bacon, the instant record does not reflect that Cagle, McLaughlin, or any putative class member has exhausted his or her federal and state post-conviction remedies. In the absence of this threshold showing, the claims asserted by these named plaintiffs and putative class members are not ripe for review. *Cf. United States v. Smith*, 96 F.3d 1350, 1351 (11th Cir. 1996) (per curiam); *Samra v. State*, 771 So. 2d 1108, 1117 (Ala. Crim. App. 1999), *aff'd*, 771 So. 2d 1122 (Ala.), *cert. denied*, 531 U.S. 933, 148 L. Ed. 2d 255 (2000). Moreover, we do not address the claims asserted by the putative class members because the instant action has not been certified as a class action. Accordingly, we remand the claims asserted by Cagle and McLaughlin to the trial court for entry of an order of dismissal without prejudice.

We review Bacon's claims pursuant to our supervisory authority under Article IV of the Constitution of North Carolina and N.C. R. App. P. 2. The Rules of Civil Procedure do not apply to proceedings in this Court. *See* N.C.G.S. § 1A-1, Rule 1 (1999) ("These rules

shall govern the procedure in the superior and district courts of the State of North Carolina."). We now consider Bacon's due process claim.

We initially note that, since *Woodard*, the federal courts have generally followed a cautious approach to the question of the amount of process due inmates seeking clemency. For instance, in *Roll v. Carnahan*, 225 F.3d 1016 (8th Cir. 2000), prisoners in Missouri contended their Governor could not be fair and impartial when considering clemency petitions because he was engaged in a campaign for the United States Senate where one of the issues was clemency in capital cases. *Id.* at 1017. While recognizing that *Woodard* ensured minimal due process rights within clemency proceedings, the court concluded the "complaint that the governor will not be objective fail[ed]" because clemency decisions were left to the sole discretion of the Governor under the Missouri Constitution. *Id.* at 1018.

Similarly, in *Duvall v. Keating*, 162 F.3d 1058 (10th Cir.), *cert. denied*, 525 U.S. 1061, 142 L. Ed. 2d 571 (1998), a prisoner argued he was denied due process in his pursuit of clemency because the Governor of Oklahoma had previously stated he would not grant clemency to murderers. *Id.* at 1060. The Oklahoma Constitution provided for a clemency petition to be reviewed by the Pardon and Parole Board (the Board) following an impartial investigation. *Id.* Although the Governor's decision was discretionary, he could commute a sentence only upon the favorable recommendation of the Board. *Id.* In that case, the Board deadlocked and thus did not send a recommendation to the Governor. *Id.* The court, relying on *Woodard*, held:

> Because clemency proceedings involve acts of mercy that are not constitutionally required, the minimal application of the Due Process Clause only ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.

Id. at 1061. The court declined to review "the substantive merits of the clemency decision." *Id.* (citing *Dumschat*, 452 U.S. at 464, 69 L. Ed. 2d at 165). Because the prisoner had not shown he was deprived of any procedure allowed him by the State Constitution or otherwise shown that the procedures used were arbitrary, the court

concluded that the prisoner had not been denied due process. *Id.* at 1061-62.

In another case, a prisoner alleged he had been denied due process in pursuit of clemency for various reasons, including that the State Attorney General had formerly served as his prosecutor and later as counsel to the Parole Board and counsel to the Governor. *Workman v. Summers*, 136 F. Supp. 2d 896, 897 (M.D. Tenn. 2001). The court held that "[t]he decision of the Governor to grant or deny clemency is not reviewable" and limited its analysis to a review of state clemency procedures. *Id.* at 898. Because the prisoner had not shown that he had been denied access to the clemency process or had been subjected to an arbitrary determination or arbitrary procedure, the court held that he had received "the minimal due process required for a clemency proceeding." *Id.* at 899.

The United States Court of Appeals for the Fourth Circuit considered, and rejected, a similar claim in *Buchanan v. Gilmore*, 139 F.3d 982 (4th Cir. 1998), albeit before the issuance of *Woodard*. There, the court reviewed a claim that the Governor of Virginia should be disqualified from considering a prisoner's application for clemency because he had served as Attorney General in prior proceedings in that prisoner's case. *Buchanan*, 139 F.3d at 983. The court ordered the case to be dismissed, concluding the prisoner essentially sought a second, procedurally barred, habeas corpus review through his section 1983 petition. *Id.* at 984. It noted that under Virginia law the Lieutenant Governor was authorized to act only when the Governor was unable to discharge his duties, and cited with approval another federal decision applying the "Rule of Necessity" to clemency proceedings in similar situations. *Id.* at 983-84 (citing *Pickens v. Tucker*, 851 F. Supp. 363 (E.D. Ark.), *aff'd*, 23 F.3d 1477 (8th Cir.), *cert. denied*, 511 U.S. 1079, 128 L. Ed. 2d 457 (1994)).

We find the rationale of these decisions persuasive and conclude that Bacon has not alleged any cognizable violation of his due process rights in connection with the clemency procedures available to him under North Carolina law. We do not believe *Woodard* intended to repudiate entirely the cardinal principle that clemency decisions are normally not a matter to be litigated in courts of law. *See, e.g.*, *Dumschat*, 452 U.S. at 464, 69 L. Ed. 2d at 165. Instead, we conclude, after review of *Woodard*, that state clemency procedures generally comport with due process when a prisoner is afforded notice and the opportunity to participate in clemency procedures,

and the clemency decision, though substantively a discretionary one,[5] is not reached by means of a procedure such as a coin toss. *See Woodard*, 523 U.S. at 289-90, 140 L. Ed. 2d at 401-02 (O'Connor, J., concurring). Our consideration of the amount of process due Bacon incidental to his clemency request is guided in part by Justice O'Connor's observation in *Woodard*: "It is clear that 'once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly.' " 523 U.S. at 288, 140 L. Ed. 2d at 401 (quoting *Ford v. Wainwright*, 477 U.S. 399, 429, 91 L. Ed. 2d 335, 359 (1986) (O'Connor, J., concurring in result in part and dissenting in part)).

In our view, Bacon's due process rights are not violated by Governor Easley's consideration of his clemency request. It is undisputed that Bacon received notice of clemency procedures and that he has fully availed himself of these procedures. Moreover, Bacon has not alleged that Governor Easley has, or will, render a decision in a manner that violates *Woodard*. Bacon contends, however, that Governor Easley "has an inherent conflict of interest that precludes him from fairly considering" Bacon's clemency request because of his prior service as Attorney General of North Carolina.

We disagree with Bacon's assertion that the people's elected executive could be divested of one of his or her express constitutional powers, in this case the exclusive authority over clemency decisions under Article III, Section 5(6) of the Constitution of North Carolina, because he or she previously served as Attorney General. All executives assume office after a unique composite of life experiences which undoubtedly influences their discharge of clemency power. Despite the potential for the executive's previous roles—whether as attorney, chemist, farmer, or otherwise—to influence his or her clemency determinations, the people of North Carolina have nonetheless opted to vest their Governor with virtually plenary clemency authority.

Significantly, Governor Easley is not the first North Carolina executive to have served previously as Attorney General. In 1917 former Attorney General Thomas Bickett assumed the office of

5. By referring to the exercise of the executive's clemency authority as substantively discretionary, we observe that the decision to grant or deny clemency in any particular case is entirely dependent, at least in North Carolina, on the individual discretion of the executive. Our intent here is to distinguish between the necessarily discretionary nature of the clemency decision "on the merits" and *Woodard's* procedural requirements.

Governor of North Carolina. As Governor, Bickett considered, and granted, a number of clemency, pardon, and reprieve petitions from prisoners whose appeals he had handled while serving as Attorney General. See *State v. Foster*, 172 N.C. 960, 90 S.E. 785 (1916) (Attorney General Bickett personally signed the State's brief; argued the State's case before this Court; and later, as Governor, granted Foster a commutation); *State v. Johnson*, 172 N.C. 920, 90 S.E. 426 (1916) (Attorney General Bickett personally signed the State's brief on appeal and later commuted Johnson's sentence).[6] Both then, and now, acceptance of Bacon's argument would undeniably repudiate the people's constitutional election concerning the role of their elected executive within the clemency process. *See* N.C. Const. of 1868, art. III, § 6; N.C. Const. of 1971, art. III, § 5(6). After careful review, we are unpersuaded that *Woodard* intended to disrupt the orderly role of the executive in discharging clemency power by making his or her background or previous life experiences a justiciable controversy under the Due Process Clause of the Fourteenth Amendment. Our holding remains unaltered regardless of whether Bacon's due process allegations are premised on an "inherent conflict of interest" theory, as alleged in the complaint, or on an "actual bias" theory, as asserted in brief before this Court.

Our conclusion is supported by the nature of executive clemency and its constitutional placement within our tripartite system of government. The nature of executive clemency is fundamentally different than adjudicatory proceedings within the Judicial Branch of government. A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 736-37 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *Bulova Watch Co. v. Brand Distribs.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974) (observing that *stare decisis* "promotes stability in the law and uniformity in its application").

6. Bacon notes, and we acknowledge, that Bickett served as Governor before the advent of modern due process jurisprudence. We also recognize, however, that historic custom and practice are relevant to the determination of the amount of process due in a particular context. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 675-79, 51 L. Ed. 2d 711, 733-35 (1977) (reviewing the historic practice of corporal punishment in schools in determining the process due a student being disciplined).

Furthermore, courts generally consider only evidence of record in their disposition of adjudicatory proceedings. As recognized by the United States Supreme Court: " 'It is a constituent part of the judicial system that the judge sees only with judicial eyes . . . . The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause.' " *Herrera*, 506 U.S. at 413, 122 L. Ed. 2d at 225 (quoting *Wilson*, 32 U.S. (7 Pet.) at 161, 8 L. Ed. at 644).

In contrast, because the nature of clemency is inherently one of executive "grace" or "mercy," the decision to grant or deny a clemency request does not bind the executive, or his or her successor, in future clemency reviews.

> The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in the light of what he determines to be materially different factual situations. . . .
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> . . . .
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> . . . The exercise by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder . . . and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another Governor might, theoretically, have reached opposite conclusions.

State v. Jarrette, 284 N.C. 625, 657-58, 202 S.E.2d 721, 742-43 (1974), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1206 (1976); *see also* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 97 (1993). Also, unlike judicial proceedings, the clemency decision-maker is generally not limited in discharging his or her extrajudicial function by rules of evidence, rules of procedure, or other indicia of judicial proceedings. *Cf. Dumschat*, 452 U.S. at 466, 69 L. Ed. 2d at 166 (recognizing that "unfettered discretion" conferred on Connecticut's Board of Pardons placed "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied"); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) ("The exercise of the power of pardon lies in the uncontrolled discretion of the governor, and in determining whether to exercise the power he is not restricted by strict rules of evidence."); Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. Rev. 327,

331 (1992) ("Clemency involves a search for answers that goes beyond judicial fact-finding . . . ."). Finally, the clemency decision is necessarily influenced by the unique background and life experiences, and presumably the social and political philosophy, of the executive decision-maker.

As one commentator stated in highlighting differences between judicial proceedings and the exercise of clemency authority:

> *Mercy cannot be quantified or institutionalized.* It is properly left to the conscience of the executive entitled to consider pleas and should not be bound by court decisions meant to do justice.
>
> . . . .
>
> *Mercy is not the same as justice nor is it the opposite. Executive clemency allows for discretion in a way that courtroom procedure cannot.* It broadens the relevance of the philosophical and moral implications of an individual crime in a way that a judicial determination of guilt or innocence should not. As one clemency applicant eloquently describes it: When a chief executive considers clemency, he or she acts as the "distilled conscience" of the citizenry.

Brown, *The Quality of Mercy*, 40 UCLA L. Rev. at 328-30 (footnotes omitted) (emphasis added).

In sum, clemency determinations by the Executive Branch are fundamentally different than adjudicatory proceedings within the Judicial Branch. Bacon's unilateral attempt, therefore, to superimpose recusal principles developed by, and applicable to, judges is wholly foreign to the executive's consideration of clemency requests.

Moreover, we do not read *Woodard* to diminish substantially the undeniable textual commitment of clemency to the Executive Branch of government. By analogy to presidential clemency powers, see U.S. Const. art. II, § 2(1) (President has the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment"), we do not believe that Bacon's proposed expansion of the range of justiciable matters relating to executive clemency would be consistent with the federal separation of powers doctrine. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 120, 46 L. Ed. 2d 659, 745 (1976)

(per curiam); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-30, 79 L. Ed. 1611, 1620 (1935); *Kilbourn v. Thompson*, 103 U.S. 168, 190-91, 26 L. Ed. 377, 387 (1880). As recently expressed by Justice Breyer:

> [T]he principal function of the separation of powers[] . . . is to maintain the tripartite structure of the . . . Government—and thereby protect individual liberty—by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, [424 U.S. at 122, 46 L. Ed. 2d at 746]. *See* The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"); *see also, e.g., Bowsher v. Synar*, 478 U.S. 714[, 92 L. Ed. 2d 583] (1986) (invalidating congressional intrusion on Executive Branch); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50[, 73 L. Ed. 2d 598] (1982) (Congress may not give away Article III "judicial" power to an Article I judge); *Myers v. United States*, 272 U.S. 52[, 71 L. Ed. 160] (1926) (Congress cannot limit President's power to remove Executive Branch official).

Clinton v. City of New York, 524 U.S. 417, 482, 141 L. Ed. 2d 393, 441 (1998) (Breyer, J., dissenting) (citations omitted).

In *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443, 53 L. Ed. 2d 867, 891 (1977), the United States Supreme Court applied a two-part test to resolve a separation of powers challenge. According to the Court, "in determining whether [the challenged assertion of power] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* Next, assuming the potential for disruption is present, the Court must "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority" of the intervening branch of government. *Id.* Application of this two-part test suggests to us that Bacon's requested superimposition of judicial recusal principles upon the executive—if occurring at the federal level—would likely violate the federal separation of powers doctrine. Similarly, "[b]ecause [state] clemency [procedures] involve acts of mercy that are not constitutionally required," *Duvall v. Keating*, 162 F.3d at 1061, expanding *Woodard* to make a state executive's background or life experiences the subject of an adjudicatory proceeding is likewise unjustified.

Bacon contends, and we agree, that separation of powers principles under North Carolina law must necessarily yield when inconsistent with federal law. *See* U.S. Const. art. VI, cl. 2. Unlike the United States Constitution,[7] however, the Constitution of North Carolina includes an *express* separation of powers provision. N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). Moreover, the separation of powers doctrine is well established under North Carolina law. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 595-601, 286 S.E.2d 79, 81-84 (1982) ("Since North Carolina became a state in 1776, three constitutions have been adopted . . . . [E]ach of our constitutions has explicitly embraced the doctrine of separation of powers."); *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922) (the judiciary has no supervisory power over the legislature performing its constitutional duty of levying taxes under the North Carolina Constitution); *State v. Holden*, 64 N.C. 829, 830 (1870) (the power of the Governor to declare a county or counties in a state of insurrection and to call out the militia is a discretionary power "vested in the Governor by the Constitution and laws of the State, and cannot be controlled by the judiciary.").

Therefore, similar to the due deference the federal judiciary naturally exhibits toward the President's exercise of clemency authority by virtue of the separation of powers doctrine, we likewise believe that this Court should exhibit a similar, or perhaps even greater, deference toward a Governor's exercise of clemency authority when, as here, the people have included an *express* separation of powers provision within their State Constitution. *Cf. Printz v. United States*, 521 U.S. 898, 918-22, 138 L. Ed. 2d 914, 934-36 (1997) (recognizing the importance of our nation's dual "spheres" of government as a guarantor of liberty complementary to the separation of powers doctrine).

Because we are not persuaded that *Woodard* intended to transform state clemency procedures into another adjudicatory proceeding, we note the basic premise of the political question doctrine

7. Although the separation of powers doctrine is incontrovertibly a fundamental characteristic of our national constitutional landscape, nowhere in the United States Constitution is this principle stated expressly. *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201, 72 L. Ed. 845, 849 (1928); *see also* The Federalist No. 47 (James Madison) (rejecting the proposition put forth by "respectable adversaries to the Constitution" that the United States Constitution is violative of the separation of powers doctrine as espoused by Montesquieu).

to the extent it helps explain the traditional nonjusticiability of federal and state clemency procedures. The political question doctrine controls, essentially, when a question becomes "not justiciable . . . because of the separation of powers provided by the Constitution." *Powell v. McCormack*, 395 U.S. 486, 517, 23 L. Ed. 2d 491, 514 (1969). "The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions . . . ." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 178 (1986). "It is well established that the . . . courts will not adjudicate political questions." *Powell*, 395 U.S. at 518, 23 L. Ed. 2d at 515. A question may be held nonjusticiable under this doctrine if it involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 686 (1962). In the present case, Article III, Section 5(6) of the State Constitution expressly commits the substance of the clemency power to the sole discretion of the Governor. N.C. Const. art. III, § 5(6). Thus, beyond the minimal safeguards applied to state clemency procedures by *Woodard*, judicial review of the exercise of clemency power would unreasonably disrupt a core power of the executive.

In view of the foregoing, we conclude that Bacon's demand for the equivalent of a judicial arbiter to consider his clemency request does not fall within the minimal due process rights applied by *Woodard* to state clemency procedures.[8] Bacon's due process claim therefore fails as a matter of law.

Alternatively, even if Bacon adequately alleges a *Woodard* violation, the Governor cannot delegate the exercise of the clemency authority under Article III, Section 5(6) of the State Constitution. As such, the Rule of Necessity applies, enabling Governor Easley to consider Bacon's clemency request.

Article III, Section 5 of the State Constitution enumerates the express duties of the Governor. N.C. Const. art III, § 5. One of these express duties is the clemency power. N.C. Const. art III, § 5(6). The

8. We observe that the myriad of constitutional and prudential justifications supporting the executive's discretionary and exclusive role in clemency would easily support, in the absence of a *Woodard* violation, the erection of a presumption of nonjusticiability of clemency determinations. *Cf. Heckler v. Chaney*, 470 U.S. 821, 84 L. Ed. 2d 714 (1985).

exercise of clemency power is the "exclusive prerogative" of the Governor and cannot be delegated. *See State v. Lewis*, 226 N.C. 249, 251, 37 S.E.2d 691, 693 (1946) (construing clemency provision of the Constitution of 1868); *State v. Clifton*, 125 N.C. App. 471, 481, 481 S.E.2d 393, 399, *disc. rev. improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997); *see also Messages, Addresses, and Public Papers of Terry Sanford: Governor of North Carolina* 552 (M. Mitchell ed. 1966) ("To decide when and where such mercy should be extended is a decision which must be made by the Executive. It cannot be delegated even in part to anyone else, and thus the decision is a lonely one.").[9]

Bacon nonetheless argues that Article III, Section 6 of the State Constitution allows the Governor to delegate the clemency power to the Lieutenant Governor. *See* N.C. Const. art. III, § 6 (Lieutenant Governor "shall perform such additional duties as the . . . Governor may assign to him.") We do not agree. The people of North Carolina have consistently reposed in their Governor the virtually unlimited power to bestow mercy upon persons convicted of crime. *See* N.C. Const. of 1776, § XIX; N.C. Const. of 1868, art. III, § 6; N.C. Const. of 1971, art. III, § 5(6). With this trust and responsibility comes the associated political accountability that, again, rests solely in the person of the Governor.

Under our State Constitution, the people have specified that the Lieutenant Governor may only act as Governor in the case of the Governor's absence "from the State, or during the physical or mental incapacity of the Governor to perform the duties of his office." N.C. Const. art. III, § 3(2). None of those conditions have been alleged, nor do they appear in the record. Accordingly, only the Governor, or the Lieutenant Governor in his or her capacity as Acting Governor under Article III, section 3(2), may exercise the clemency authority established by the people of North Carolina in their Constitution.

We therefore invoke the Rule of Necessity and conclude that, even if any of Bacon's claims are cognizable in a court of law, the Governor nonetheless remains fully able to consider, and resolve, Bacon's clemency request. *See, e.g., United States v. Will*, 449 U.S. 200, 213-15, 66 L. Ed. 2d 392, 405-06 (1980); *Bolin v. Story*, 225 F.3d 1234, 1238-39 (11th Cir. 2000); *Long v. Watts*, 183 N.C. 99, 102, 110

9. Courts in other states have reached a similar conclusion. *See, e.g., Ex parte Lindsey*, 47 Ala. App. 729, 261 So. 2d 68 (1972); *In re McKinney*, 33 Del. 434, 138 A. 649 (1927); *People ex rel. Milburn v. Nierstheimer*, 401 Ill. 465, 82 N.E.2d 438 (1948); *In re St. Amour*, 127 Vt. 576, 255 A.2d 667 (1969).

S.E. 765, 767 (1922). We draw further support from federal cases that have applied the Rule of Necessity within the specific context of state clemency procedures. *See Buchanan v. Gilmore*, 139 F.3d at 983-84; *Pickens v. Tucker*, 851 F. Supp. at 365-66. In both *Buchanan* and *Pickens*, as here, the respective State Constitutions vested clemency power exclusively in the Governor and provided that the Lieutenant Governor could act only when the Governor was unable to perform his duties. *Buchanan*, 139 F.3d at 983; *Pickens*, 851 F. Supp. at 366. Accordingly, despite the fact that each Governor had formerly served as Attorney General, the courts applied the Rule of Necessity and determined that the Governor could exercise his exclusive clemency authority. Likewise, in the present case, the Rule of Necessity operates to enable Governor Easley to consider, and resolve, Bacon's clemency request.[10]

III.

[2] Bacon alleges, in his second claim for relief, that Governor Easley's consideration of his clemency request violates his right to equal protection of the law under the United States Constitution.[11] Specifically, Bacon alleges that equal protection is denied where "one group of convicted capital defendants will have their clemency petitions decided by a neutral and impartial decision-maker, and another group, similarly situated, by a decision-maker who does not qualify as neutral and impartial because of his previous involvement in their cases as Attorney General, or local prosecutor."

We observe, as an initial matter, that *Woodard* did not recognize an equal protection claim within the context of executive clemency. *Woodard*, 523 U.S. 272, 140 L. Ed. 2d 387. In any event, Bacon's equal protection claim fails because we cannot conclude that Bacon has been, or will be, treated differently for purposes of pursuing clemency than other similarly situated death row inmates. *See*

10. We summarily reject Bacon's argument that the Rule of Necessity is trumped by his *Woodard* arguments under the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI, cl. 2. The Rule of Necessity is a doctrine recognized within federal jurisprudence and routinely applied by the federal courts. *See, e.g., United States v. Will*, 449 U.S. 200, 66 L. Ed. 2d 392.

11. Bacon also asserts an equal protection claim under Article I, Section 19 of the State Constitution. When resolving challenged classifications under the equal protection clause of the State Constitution, this Court applies the same test used by federal courts under the parallel clause in the United States Constitution. *See Department of Transp. v. Rowe*, — N.C. —, —, — S.E.2d —, — (July 20, 2001) (No. 506A98-2); *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978).

Nordlinger v. Hahn, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12 (1992) (requiring a minimal showing that defendants treated similarly situated persons differently to support an equal protection claim); *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 884 (1979) (citing the "settled rule that the Fourteenth Amendment guarantees equal laws, not equal results"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33, 36 L. Ed. 2d 16, 43 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). Accordingly, Bacon's equal protection claim fails as a matter of law.

Bacon also alleges, in his third claim for relief, a violation of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Bacon's claim rests upon the premise that "a capital punishment system without clemency would constitute cruel and unusual punishment." Accordingly, he argues, "the Constitution must give some structural limitation to what constitutes a clemency proceeding."

Bacon's basic premise—that clemency is constitutionally required in a capital punishment system—is erroneous as a matter of law. In *Herrera* the United States Supreme Court observed that "although the Constitution vests in the President a pardon power, it does not require the States to enact a clemency mechanism." 506 U.S. at 414, 122 L. Ed. 2d at 225; *see also Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) ("The Constitution of the United States does not require that a state have a clemency procedure . . . ."); *Duvall v. Keating*, 162 F.3d at 1062 (finding no basis for the plaintiffs' allegation of an Eighth Amendment violation within the clemency context). Consequently, Bacon's Eighth Amendment claim fails as a matter of law.

IV.

[3] We now consider Bacon's claims asserted directly under the Constitution of North Carolina. *See Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Within his first, second, and third claims for relief, Bacon asserts claims under Article I, Sections 1, 19, 21, 27, and 35 of the State Constitution.

Bacon's principal claim under the State Constitution arises under the law of the land clause. See N.C. Const. art. I, § 19. We have previ-

ously determined that the term "law of the land" as used in this provision is synonymous with "due process of law" as used in the Fourteenth Amendment to the United States Constitution. *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). While "[d]ecisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on this Court . . . , such decisions, although persuasive, do not control an interpretation by this Court of the law of the land clause in our state Constitution." *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990); *see also State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988) (recognizing that this Court "ha[s] the authority to construe [the Constitution of North Carolina] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision"); *Bulova Watch* Co., 285 N.C. at 474, 206 S.E.2d at 146 (observing that "in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding on this Court").

Since the establishment of their first Constitution in 1776, the people of North Carolina have committed the power to grant or deny clemency to the sole discretion of the Governor. *See* N.C. Const. of 1776, § XIX; N.C. Const. of 1868, art. III, § 6; N.C. Const. of 1971, art. III, § 5(6). Moreover, in each of their three Constitutions, the people have included an express separation of powers clause. *See* N.C. Const. of 1776, Declaration of Rights § 4; N.C. Const. of 1868, art. I, § 8; N.C. Const. of 1971, art. I, § 6. Under the present Constitution, the separation of powers clause provides that "[t]he legislative, executive, and supreme judicial power of the State government *shall be* forever separate and distinct from each other." N.C. Const. art. I, § 6 (emphasis added). As noted in an eminent treatise on the State Constitution, "separation of powers is one of the fundamental principles on which [North Carolina] government is constructed." *See* Orth, *The North Carolina State Constitution: A Reference Guide* 42. The same Constitution establishing the judicial power in the Judicial Branch, and vesting the exclusive authority to resolve clemency requests in the Executive Branch, provided that the operation of these functions be "forever separate and distinct." N.C. Const. art. I, § 6.

As a result, we conclude that the framers of our State Constitution, in contemplating clemency, did not intend to impose additional constraints upon their executive's discharge of clemency power beyond those applicable to state clemency procedures under the United States Constitution. As such, to the extent that due process rights apply to clemency procedures in North Carolina, they extend no further than the minimal due process rights required by *Woodard*. Therefore, Bacon's state constitutional claims—all essentially attacks on the Governor's exercise of clemency power—are not reviewable beyond the minimal safeguards applied to state clemency procedures by *Woodard*.

Accordingly, we reverse the order of the trial court dated 15 May 2001 and remand this case to the trial court with instructions to enter an order of dismissal with prejudice as to all claims asserted by plaintiff Robert Bacon. We further direct the trial court to enter an order of dismissal without prejudice as to all claims asserted by the remaining named plaintiffs.

REVERSED.

BABB v. THOMPSON

No. 174P01

Case below: 142 N.C. App. 212

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

BOWERS v. CITY OF THOMASVILLE

No. 291P01

Case below: 143 N.C. App. 291

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001. Justice Martin recused.

BRANDON v. BRANDON

No. 279P01

Case below: 143 N.C. App. 185

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

CENTURA BANK v. QUEENSBORO INDUS., INC.

No. 237P01

Case below: 142 N.C. App. 706

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

CITY OF HILLSBOROUGH v. WILLIAMS

No. 296P01

Case below: 143 N.C. App. 347

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

COLLINS v. LUFFMAN

No. 197P01

Case below: 142 N.C. App. 522

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 June 2001. Conditional petition by plaintiff as to additional issues for discretionary review pursuant to G.S. 7A-31 dismissed as moot 11 June 2001.

DAVIDSON v. UNIV. OF N.C. AT CHAPEL HILL

No. 243P01

Case below: 142 N.C. App. 544

Petition by defendant for writ of supersedeas denied 19 July 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001. Alternative petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 July 2001. Conditional petition by plaintiff for discretionary review as to additional issues pursuant to G.S. 7A-31 denied 19 July 2001. Temporary stay dissolved 19 July 2001.

DEVANEY v. CITY OF BURLINGTON

No. 299P01

Case below: 143 N.C. App. 334

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

ERWIN v. TWEED

No. 240P01

Case below: 142 N.C. App. 643

Petition by unnamed defendant (N.C. Farm Bureau Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

FARRIS v. BURKE CTY. BD. OF EDUC.

No. 272PA01

Case below: 143 N.C. App. 77

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 19 July 2001. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 19 July 2001.

FOX-KIRK v. HANNON

No. 213P01

Case below: 142 N.C. App. 267

Petition by plaintiff (Susan Fox-Kirk, Guardian Ad Litem for Whitney P. Kirk (Minor)) for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed as moot 19 July 2001.

FRYE v. LEE

No. 381P01

Case below: Wake County Superior Court

Petition by plaintiffs for writ of certiorari to review the order of the Superior Court, Wake County, denied 17 July 2001. Petition by plaintiffs for writ of prohibition denied 17 July 2001. Petition by plaintiffs for writ of supersedeas denied 17 July 2001. Motion by plaintiffs to vacate superior court's order denied 17 July 2001. Motion by plaintiffs to stay the setting of execution dates denied 17 July 2001.

GOLDS v. CENTRAL EXPRESS, INC.

No. 250P01

Case below: 142 N.C. App. 664

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

GRAHAM v. MOCK

No. 293P01

Case below: 143 N.C. App. 315

Notice of appeal by plaintiffs pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 July 2001. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

GREENE CIT. FOR RESP. GROWTH, INC. v.
GREENE CTY. BD. OF COMM'RS

No. 333P01

Case below: 143 N.C. App. 702

Motion by defendant and intervenor for temporary stay allowed 16 July 2001.

GURKIN v. CRAWFORD

No. 344P01

Case below: 144 N.C. App. 448

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 19 July 2001.

HILL v. GARRISON

No. 549P00-2

Case below: 142 N.C. App. 706

Petition by defendant pro se (Thomas W. Hill) for discretionary review pursuant to G.S. 7A-31 denied 11 June 2001. Justice Martin recused.

IN RE ESTATE OF LUNSFORD

No. 362A01

Case below: 143 N.C. App. 646

Petition by petitioner (Randy Lunsford) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 19 July 2001.

IN RE JONES

No. 289P01

Case below: 143 N.C. App. 347

Petition by respondent (Jennifer McArdle Panarello) for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

INVESTORS TITLE INS. CO. v. MONTAGUE

No. 241P01

Case below: 142 N.C. App. 696

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

LACOMB v. JACKSONVILLE DAILY NEWS CO.

No. 221P01

Case below: 142 N.C. App. 511

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

LEGRANDE v. STATE

No. 215A96-12; Reassigned number 462P01-3

Case below: Stanly County Superior Court

Motion by plaintiff pro se for civil claim against the State of N.C. for erroneous convictions, imprisonments and sentence to death dismissed 19 July 2001.

LEGRANDE v. STATE

No. 215A96-13; Reassigned number 462P01-4

Case below: Stanly County Superior Court

Application by plaintiff pro se for writ of habeas corpus denied 19 July 2001.

MCLAWHORN v. R.B.R. & S.T.

No. 294P01

Case below: 143 N.C. App. 347

Petition by third party defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

MCNALLY v. ALLSTATE INS. CO.

No. 235P01

Case below: 142 N.C. App. 680

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 June 2001.

MOORE CTY. EX REL. EVANS v. BROWN

No. 249P01

Case below: 142 N.C. App. 692

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

NATIONWIDE MUT. INS. CO. v. McCRARY

No. 323P01

Case below: 143 N.C. App. 185

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

PETTY v. PETTY

No. 268P01

Case below: 143 N.C. App. 185

Notice of appeal by defendant-intervenor (Steve Petty) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 July 2001. Petition by defendant-intervenor (Steve Petty) for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

SIMS v. CHARMES/ARBY'S ROAST BEEF

No. 194P01

Case below: 142 N.C. App. 154

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

SODERLUND v. KUCH

No. 311P01

Case below: 143 N.C. App. 361

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. ATWATER

No. 247P01

Case below: 142 N.C. App. 706

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. BERRY

No. 298P01

Case below: 143 N.C. App. 187

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. BOYD

No. 34P01

Case below: 141 N.C. App. 350

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 19 July 2001. Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 19 July 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 19 July 2001 for the limited purpose of remand to the North Carolina Court of Appeals for reconsideration in light of *State v. Lucas*. Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 19 July 2001.

STATE v. CLARK

No. 314P01

Case below: 138 N.C. App. 392

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 July 2001.

STATE v. FLOYD

No. 280P01

Case below: 143 N.C. App. 128

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 July 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. FULP

No. 342P01

Case below: 144 N.C. App. 428

Motion by the Attorney General for temporary stay allowed 2 July 2001.

STATE v. GEORGE

No. 324P01

Case below: 143 N.C. App. 717

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. GUICE

No. 33P01

Case below: 141 N.C. App. 177

Notice of appeal by Attorney General pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 July 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 19 July 2001 for limited purpose of remand to the North Carolina Court of Appeals for reconsideration in light of *State v. Lucas*. Petition by Attorney General for writ of supersedeas denied 19 July 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 19 July 2001. Motion by defendant to lift stay allowed 19 July 2001.

STATE v. HOLMES

No. 282P01

Case below: 142 N.C. App. 614

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 July 2001.

STATE v. HOOPER

No. 302P01

Case below: 143 N.C. App. 569

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 July 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. JONES

No. 316P01

Case below: 143 N.C. App. 514

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STATE v. KALEY

No. 38A95-2

Case below: 143 N.C. App. 186

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 July 2001. Petiton by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 July 2001.

STATE v. KEEL

No. 134A93-9

Case below: Edgecombe County Superior Court

Motion by Attorney General to lift stay of execution denied 19 July 2001.

STATE v. McQUAIG

No. 120P01

Case below: 142 N.C. App. 214

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 19 July 2001. Notice of appeal by Attorney General pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 July 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 19 July 2001 for limited purpose to remand to the North Carolina Court of Appeals for reconsideration in light of *State v. Lucas*. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 19 July 2001.

STATE v. MOORE

No. 556A90-4

Case below: Forsyth County Superior Court

Application by defendant for writ of habeas corpus denied 17 July 2001.

STATE v. RIDGEWAY

No. 273A01

Case below: 143 N.C. App. 186

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 July 2001.

STATE v. ROBERTS

No. 200A01

Case below: 142 N.C. App. 424

Petition by Attorney General for writ of supersedeas denied 19 July 2001. Motion by Attorney General to vacate judgment of Court of Appeals allowed 19 July 2001.

STATE v. SIMMONS

No. 276P01

Case below: 143 N.C. App. 186

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

STEWART v. SOUTHEASTERN REG'L MED. CTR.

No. 219P01

Case below: 142 N.C. App. 456

Petition by defendants (Michel C. Pare, Carolina Neurological Services, P.C., Thomas J. Meakem, M.D., Leroy Roberts, M.D., and Carolina Regional Radiology, P.A.) for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

THIGPEN v. NGO

No. 292A01

Case below: 143 N.C. App. 209

Petition by defendant (Corazon Ngo, M.D.) for discretionary review pursuant to G.S. 7A-31 and Appellate Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 19 July 2001. Petition by defendant (Onslow County Hospital Authority) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 19 July 2001.

THIGPEN v. NGO

No. 332A01

Case below: 143 N.C. App. 223

Petition by defendants (Marshall B. Frink, M.D., National Emergency Services, Inc. and CP/National, Inc. a/k/a/ Community Physicians/National, Inc.) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 19 July 2001.

THOMAS v. BOST

No. 305P01

Case below: 143 N.C. App. 570

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

TILLY v. HIGH POINT SPRINKLER

No. 274P01

Case below: 143 N.C. App. 142

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 July 2001.

APPENDIXES

PRESENTATION OF
JUSTICE LYCURGUS VARSER
PORTRAIT

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 RULES OF
PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING PRACTICAL TRAINING
OF LAW STUDENTS

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 CONTINUING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICES PLANS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FEE DISPUTE RESOLUTION

Presentation of the Portrait

of

LYCURGUS RAYNER VARSER

Associate Justice
Supreme Court of North Carolina
1924-1925

June 7, 2001

OPENING REMARKS
and
RECOGNITION OF EVERETT HENRY
BY
CHIEF JUSTICE I. BEVERLY LAKE, JR.

The Chief Justice welcomed the guests with the following remarks:

It is my pleasure to welcome you on behalf of the Court to this special ceremony honoring Justice Varser. Due to the efforts of the Supreme Court Historical Society, the presentation of Justice Varser's portrait today closes a gap in our portrait collection, and it allows us to appropriately remember our history and a valued member of this Court.

There are many people to thank for making possible the donation of this portrait to the Court's collection. It is my understanding that our Supreme Court Historical Society took a photograph that had been hanging in the Robeson County Courthouse many years back, and had an oil on canvas of Justice Varsar painted. The Robeson County Bar and Mr. Hugh Humphries donated the frame which holds the portrait. Mrs. Sarah Britt, widow of Senator Luther Britt with whom I had the great pleasure of serving, organized the Robeson County Bar's participation. We are most grateful to the Historical Society, the Robeson County Bar, Mrs. Britt, and Mr. Humphries for making this addition to our collection possible.

Chief Justice Lake welcomed official and personal guests of the Court. The Chief Justice then recognized the Varser family.

Transcribing these ceremonies is Peter Browne Ruffin, III, great, great, great-grandson of former Chief Justice Thomas Ruffin, whose portrait hangs behind me, and Chief Justice Fredrich Nash, whose portrait is to the left of Chief Justice Ruffin. Also present in the Courtroom is the great-grandson of Thomas Ruffin, Peter Browne Ruffin, and his son, Peter Browne Ruffin, Jr. The elder Mr. Ruffin unveiled the statue of his great-grandfather, Thomas Ruffin, in the portico of the Court of Appeals Building across the mall in 1916 when he was eight years old. I understand Mr. Ruffin remembers this event well in that it was one of the first nights he was allowed to stay up late! We welcome you all.

The Chief Justice recognized Mr. Everett Henry, former law partner of Justice Varser, to present the portrait to the Court.

PRESENTATION ADDRESS
BY
EVERETT HENRY

May it please the Court, Chief Justice Lake and Associate Justices.

Many years ago I had the privilege of taking the oath of office where I assumed certain obligations, and one of these obligations was to represent my client to the best of my ability. I learned at the foot of Judge L. R. Varser. His name is the first name on my license to practice law. Today I take it to be a privilege to bring to mind a few of the things that he did in life. He died in 1959, having been appointed to the Supreme Court of North Carolina and having been appointed and served as Chairman of the Board of Law Examiners from 1933 until his death on 19 October 1959. If you obtained a law license in the State of North Carolina between 1933 and 1959, his name appeared on your law certification that you presented to the court when you were sworn in. But who was this man whom we honor today? He was born in Gates County in 1878. He was orphaned at the age of seven or eleven. The exact date I am unable to find. He attended Reynoldson Academy in Gates County.

He entered Wake Forest College in 1895 and completed his academic and law studies in 1901. He was admitted to the bar in August 1901. He practiced law in Kinston until 1911 when he came to Robeson County to the Town of Lumberton and joined the firm of Angus Wilton McLean and Dickson McLean. He served as state senator from Robeson County in 1921 and 1923 and was active in McLean's campaign for Governor. On 16 March 1925, Chief Justice Hoke resigned and was succeeded as Chief Justice by Justice Walter P. Stacy. Governor McLean appointed L.R. Varser to take the place of Justice Stacy. He was appointed on 16 March 1925 and authored his first opinion on April 1, 1925. He served the shortest time on the Supreme Court of any person who did not die in office or was not re-elected. He served nine and one-half months. During that period of time, he authored 65 opinions, two concurring opinions and one dissenting opinion on subjects ranging from from the writ of perambulation to mosquito nuisance.

I had the privilege of working with Judge Varser when I returned from the Army in 1956. I would take subtle facts to Judge Varser and

ask him if he could lead me on the path on which I might find the answer in my research. He could not remember the name of the case but he would say, "Everett, if you will look in Volume 189 at probably page 465, I think you will find a case on point." It might well have been an opinion by Varser, and I could always find the case on point.

He retired from the Supreme Court bench 31 December 1925 to return to Lumberton to go into the active practice of law. Stephen McIntyre had died in 1925, and Judge Varser came back bearing the title of Judge, which he carried with him all of his life, and formed the firm of Varser, Lawrence, Proctor and McIntyre. He continued to serve in that firm and with subsequent partners until his death in 1959.

Judge Varser's life was a life of service. I have given you but a brief moment of his service to the legal profession. He was a champion of the rights of the minorities. He believed that every man was entitled to representation, and that every lawyer had the duty to do his best for his client. His life was a life of service to his church. He was an active member of the First Baptist Church of Lumberton where he was voted a lifetime deacon and served as its permanent chairman. He authored the church constitution and its covenants which are embodied in its bylaws. He served as trustee to Wake Forest College, Meredith College, and the Baptist Children's Home's of North Carolina.

In 1948, Wake Forest College honored him with a Doctor of Laws, and he was cited in 1959 shortly before his death for distinguished service to North Carolina by Wake Forest College.

He became a lasting friend to what is now UNC-Pembroke but which at that time was Pembroke Indian Normal School. When in the legislature he introduced a bill and obtained for them a grant of $75,000 with which to construct a building.

As Chairman of the Board of Law Examiners, he was helpful to all young lawyers but especially to those who asked how to study and prepare for the bar examination. His stock answer was there is no right or wrong answer. We want to see your reasoning. We want to see how you think. All of the questions are taken from the North Carolina Supreme Court volumes.

R.C. Lawrence, who was a prominent lawyer and writer in Robeson County and partner of Judge Varser, wrote in the "State of Robeson": For his ability to tell you what the law is, I rank him but

slightly lower than Dean Samuel Mordecai, founder of the Duke Law School.

As I said earlier, not only could he tell you what the law was, but he could cite to you by statute number, by volume, and by page.

I had the privilege of traveling with him, of driving him because he never drove an automobile, and as we would go to court in Scotland County, in Bladen County, in Columbus County, he would teach me history. He would tell me something of what had transpired. He never ceased to thirst for knowledge and to share it with others. At the time of his death, Jack Sharpe, editor of The Robesonian, wrote that at different times he could have been referred to as Senator, as Justice, as Judge, or as Doctor. He concluded: "It was by the title of Judge that he was known. He was a man who recognized and upheld authority, both temporal and spiritual, and became a symbol of the law by which man regulates and shapes his life."

Judge Varser was an outstanding tree. A big oak that still lives on, though the body is crumbled, by what he has taught others in his life of activity, in his life of living in a Christian way, and in his service to humanity. It is my privilege today to try to present him to this Court so that you might know a little about this outstanding jurist.

Thank you.

Chief Justice Lake called upon Mr. Murchison Biggs for additional remarks.

May it please the court, that's a hard act to follow. However I was asked to give a few remarks, more in reminiscence of Judge Varser than for any other purpose.

When I was a small boy, I lived in a house in Lumberton, NC on Sixth Street between Walnut and Pine. Judge Varser's house in turn was on Fifth Street between Walnut and Pine so that we were right in the middle of the block. His back door backed up to Mr. R.C. Lawrence's back door, and Mr. Lawrence's front door faced the front door of my house.

When I was a little boy, Lawrence was in active practice. I can remember back in those days there was no air conditioning, and to give you some insight into what it was like to practice law in those days, particularly some of the major lawyers, the windows were open in the houses. What was happening in the house across the street, if it made any noise, it waved right directly into your living room, so

you knew what was going on. Many, many nights, you would hear Lawrence's typewriter over there in his study just rattling until ten, eleven, or twelve o'clock at night. He was, of course, Varser's partner, and I came to know Judge Varser because of the fact that, as Everett has just said, he never drove a car, he walked from his home to his office, a matter of some four or five blocks at that time. It was an afternoon parade, literally, to see Judge Varser coming down the street with that gold-headed cane with that Panama hat on, and for a little boy, this gentleman coming down the street looked like the nearest thing to God I ever saw. Mrs. Varser, the first Mrs. Varser, was, as he, kind to the children in the block and we came to know them quite well. Mrs. Varser occasionally would have the boys in to her front porch. She had an old Victorian house with a porch that wrapped all the way around, and would have us in to the front porch where we would have ice cream and cookies and punch in the afternoons. As time grew on, I went to Wake Forest and got my law degree and came back to take the bar examination. There were only a few of us that took it when I took it in August 1945, and when I concluded the exam, I went back to the hotel. The old Sir Walter Hotel made very special arrangements for those of us who were taking the bar so that we could leave our luggage in the rooms until the exam was over and check out after the examine was over. I went to the hotel and got my luggage and checked out and went down to the dining room which was on the right hand side of the front entrance of the hotel, and was going to have a light dinner before driving home. I looked across the dining room, and there were Judge and Mrs. Varser—Mrs. Varser with her fox fur strung over shoulder and her diamonds glittering in her ears. Judge Varser was sitting there with all his dignity, and he happened to look up and see me and motioned me to come to him. I walked over to him and he pulled me down real close and said, "Don't you ever tell a soul, but I just wanted you to know you passed the bar." This was one of the greatest moments of my life up to that point in time.

Later, when I went to practice law in Lumberton, I rented a one-room office in the same building where Varser offices were. He had suggested to me if I needed any help, to come up there and see him. So after I had had the office doors open for eight or ten months, somebody finally walked in the front door and I had me a real live case, but I didn't know what to do with it. So, I jumped on the elevator and went up to the fourth floor to see if Judge Varser could tell me what to do. I walked into his office and told him what the case was about and I said, "Judge Varser, what am I going to do for my client?" He cocked his head to one side, which is the way he carried

it most of the time, and he said, "Young man, have you looked up the statute?" There was a long pause and I said, "No sir." He said, "Well go back downstairs and look it up and don't come back up here again until you do."

He taught me the one thing that you shouldn't do was to go up there and ask for help until you had first helped yourself, but if you did that, the door was open to you and he became my mentor.

When I began the practice of law, the Robeson County Bar was a remarkable institution. The phrase came to my mind "and there were giants in the earth in those days." And there were. There was Varser, there was Horace Stacy, Sr., there was Dickson McLean, there was R.C. Lawrence. I could go on and on and list others of equal renown, but that bar had a practice that spread all over the whole eastern half of North Carolina. You could go to almost any court in the eastern half of North Carolina and you would run into one of the Lumberton bar at the call of the calendar, particularity in the September and October sessions. It was a remarkable outfit and Varser was its leader and he became my chief mentor. And for that, I'm grateful.

I am so glad we finally arranged to have a portrait to hang in this building because he was one of it greats, even though he was here only a short time. He was a great Christian, he was a great lawyer, and among all other things, he shone as an example to the young lawyers of what an honorable, decent, learned lawyer ought to be.

Thank you.

ACCEPTANCE OF JUSTICE VARSER'S PORTRAIT BY CHIEF JUSTICE LAKE

Thank you. On behalf of the Supreme Court, it is with pleasure that I accept the portrait as a part of the collection which will hang on the third floor of this building. We are delighted to have this work of art, and we sincerely appreciate the efforts of all who helped to make this ceremony a reality.

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 RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were 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. 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 nonlawyer, 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 amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar 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 29th day of May, 2001.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of 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 Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar and 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 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 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 of 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 tudents graduation, whichever is earlier. For any student who passes that examination, a certification hall 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 ~~provid-~~

~~ed 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 notice~~s~~ 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~~ , 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 _____, 19____ _____ 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 _____, 10__~~

~~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/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 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

A. 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 responsibilities. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

. . . .

.1602 General Course Approval

. . . .

©) 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 27 April, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th 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 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 July 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 .1500, Rule .1525 Confidentiality, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1525 ~~Confidentiality,~~RESERVED

~~Unless otherwise directed by the Supreme Court of North Carolina, the files, records, and proceedings of the board, as they relate to or arise out of any failure of any active member to satisfy the requirements of these rules shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the board or upon the request of the active member affected or as they may be introduced in evidence or otherwise produced in proceedings before the Disciplinary Hearing Commission or under these rules.~~

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 27, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of September, 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 17th day of October, 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 17th day of October, 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 RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 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 Rule 3.8 Special Responsibilities of a Prosecutor be amended as follows (additions underlined, deletions interlined):

27 N.C.A.C. Chapter 2, Revised Rules of Professional Conduct

Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

. . .

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client

in connection with an investigation of someone other than the lawyer, unless:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Comment

. . .

[5] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Revised Rules of Professional Conduct 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 27, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of September, 2001.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 17th day of October, 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 Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 17th day of October, 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 meetings on April 27 and July 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, Section .1500, Rule .1518 Continuing Legal Education Program be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1518 Continuing Legal Education Program

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an additional hour of continuing legal education instruction ~~be required to attend a specially designed three hour block course of instruction devoted to the areas of professional responsibility or professionalism or any combination thereof which will satisfy~~ on substance abuse and debilitating mental conditions, as defined in Rule .1602 (c), which shall be in addition to the requirement of Rule .1518(b)(1) above.

(c) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)~~(1)~~ above~~, but may not include those hours required by Rule .1518(b)(2) above~~. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

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 meetings on April 27 and July 27, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of September, 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 6th day of November, 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 6th day of November, 2001.

s/G.K. Butterfield, Jr.
G.K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners on August 21, 2001, and approved by the Council of the North Carolina State Bar at its quarterly meeting on October 19, 2001.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners concerning fees, as particularly set forth in Rule .0404 of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

Rule .0404 Fees

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of ~~$500.00.~~$600.00.

(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of ~~$1,000.00.~~$1,200.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00

(4) is filing after the deadline set out in Rule .0403 (1) shall be accompanied by a late fee of ~~$200.00~~ $250.00 in addition to all other fees required by these rules.

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 Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners at a regularly called meeting on August 21, 2001, and were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on October 19, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 26th day of November, 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 Board of Law Examiners as adopted by the North Carolina Board of Law Examiners and approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 5th day of February, 2002.

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 Board of Law Examiners 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 5th day of February, 2002

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 PREPAID LEGAL SERVICES PLANS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 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 prepaid legal services plans, as particularly set forth in 27 N.C.A.C. 1E, Section .0300 and 27 N.C.A.C. 2, Rule 7.3, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0300 Rules Concerning Prepaid Legal Services Plans

.0301 Registration Requirement

No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below.

. . . .

.0304 Advertising of State Bar Approval Prohibited

Prepaid legal services plans approved by the North Carolina State Bar shall register with the North Carolina State Bar on or before January 31, 1992. Effective January 31, 1992, the approval of these existing plans is revoked and the plans shall not advertise, communicate, or represent in any way that the North Carolina State Bar approved the plan. If a plan advertises or otherwise represents that it is registered with the North Carolina State Bar, such advertisement or representation shall include a statement that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar. This statement shall be made in conjunction with the representation about registration and it shall be conspicuous.

....

.0310 Definition of Prepaid Plan

A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in

exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of the need for the service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. [This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]

27 N.C.A.C. 2, Revised Rules of Professional Conduct

Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not, by in-person or live telephone contact, solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

....

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal services plan subject to the following:

(1) Definition. A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of the need for the service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

(2) Conditions for Participation.

(I) The plan must be operated by an organization that is not owned or directed by the lawyer;

(ii) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;

(iii) The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;

(iv) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;

(v) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and

(vi) Notwithstanding the prohibitions in paragraph (a), the plan may use in-person or telephone contact to solicit memberships or subscriptions provided:

(a) The solicited person is not known to need legal services in a particular matter covered by the plan; and

(b) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.

~~operated by an organization not owned or directed by the lawyer which uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, so long as such contact does not involve coercion, duress, or harassment and is not false, deceptive, or misleading.~~

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 prepaid legal services plans were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 19, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of November, 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 5th day of February, 2002.

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 5th day of November, 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 LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 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 legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2400, be amended as follows (additions are underlined, deletions are interlined):

.2405 Standards for Certification as a Specialist in Family Law

Each applicant for certification as a specialist in family law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in family law:

....

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability in family law.

(1) Terms—The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

(A) contempt (Chapter 5A of the North Carolina General Statutes);

(B) adoptions (Chapter 48);

(C) bastardy (Chapter 49);

(D) divorce and alimony (Chapter 50);

(E) Uniform Child Custody Jurisdiction and Enforcement Act (Chapter 50A);

(F) domestic violence (Chapter 50B);

(G) marriage (Chapter 51);

(H) powers and liabilities of married persons (Chapter 52);

(I) ~~Uniform Reciprocal Enforcement of Support Act (Chapter 52A)~~ Uniform Interstate Family Support Act (Chapter 52C);

(J) Uniform Premarital Agreement Act (Chapter 52B);

(K) termination of parental rights, as relating to adoption and termination for failure to provide support ~~(Article 24B of Chapter 7A);~~ (Chapter 7B, Article 11);

(L) garnishment and enforcement of child support obligations ~~(Chapter 110-136 *et seq.*);~~ (Chapter 110, Article 9);

(M) Parental Kidnapping Prevention Act (28 U.S.C. §1738A);

(N) Internal Revenue Code §§ 71 (Alimony), 215 (Alimony Deduction, 121 (Exclusion of Gain from the Sale of Principal Residence), 151 and 152 (Dependency Exemptions), 1041 (Transfer of Property Incidental to Divorce), 2043 and 2516 (Gift Tax Exception), 414(p) (Defining QDRO Requirements), 408 (d)(6) (IRA Transfer Requirements for Non-Taxable Event), and regulations interpretive of these Code sections; and

(O) Federal Wiretap Law.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning the family law specialty were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 19, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of November, 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 5th day of February, 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 pro-

vided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of February, 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 CONCERNING FEE DISPUTE RESOLUTION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 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 fee dispute resolution, as particularly set forth in 27 N.C.A.C. 1D, Section .700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

.0706 Processing Requests for Fee Dispute Resolution

(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the mat-

ter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes first.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 19, 2001.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of November 2001.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 5th day of February, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of February, 2002.

s/G.K. Butterfield, Jr.
G.K. Butterfield, Jr.
For the Court

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Capital sentencing—strategy—defendant's wishes—The trial court did not err in a capital prosecution for first-degree murder by ordering defense counsel to defer to defendant's wishes not to present mitigating evidence. **State v. Grooms, 50.**

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Effective assistance of counsel—deferring to defendant's wishes not to present mitigating evidence—The trial court did not deny defendant his right to effective assistance of counsel in a capital prosecution for first-degree murder by ordering defense counsel to defer to defendant's wishes not to present mitigating evidence. **State v. Grooms, 50.**

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Effective assistance of counsel—testing of DNA samples—State's failure to inform defense counsel—Defendant was not denied effective assistance of counsel in a capital prosecution for first-degree murder even though the State failed to inform defense counsel that the SBI had completed DNA testing which precluded defense counsel from making a timely request to observe the SBI's remaining test procedures. **State v. Grooms, 50.**

Equal protection—cruel and unusual punishment—clemency procedures—Governor was former Attorney General—A plaintiff's attempt to

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ment in a capital sentencing proceeding where defendant contended on appeal that the prosecutor falsely represented to the jurors that they had promised to decide defendant's case without sympathy, but the court had told the jurors that they must be as free from bias, prejudice, or sympathy as humanly possible and the prosecutor properly argued that the jury should follow the law and render a verdict without prejudice or sympathy for either side. **State v. Call, 400.**

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First-degree murder—short-form indictment—The short-form indictments used to charge defendant with first-degree murder were constitutional. **State v. Davis, 1.**

First-degree murder—short-form indictment—Although the short-form indictment used to charge defendant with first-degree murder did not allege the elements of premeditation and deliberation, the trial court did not err in concluding the indictment was constitutional. **State v. Holman, 174.**

First-degree murder—short-form indictment—The North Carolina short-form indictment for first-degree murder is constitutional. **State v. Meyer, 92.**

First-degree murder—short-form indictment—constitutionality—The short-form murder indictment used to charge defendant with first-degree murder was constitutional. **State v. King, 457.**

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of N.C.G.S. § 15A-1214 whereby defendant examined prospective jurors on individual voir dire prior to the State's exercising its challenges and passing the panel. **State v. Lucas, 534.**

Capital sentencing—alternate juror—substituted during deliberations—error—The trial court erred in a capital first-degree murder prosecution by denying defendant's motion for a mistrial under N.C.G.S. § 15A-1061 based on the post-verdict removal of a juror for juror misconduct committed during the guilt-innocence phase of deliberations and the substitution of an alternate juror for the sentencing proceeding. **State v. Poindexter, 440.**

Challenge for cause—ability to render fair and impartial verdict—The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's challenge for cause under N.C.G.S. § 15A-1212 of a prospective juror who initially indicated he would vote for the death penalty if the jury found defendant guilty of the charges but indicated upon further questioning that he could remain a fair and impartial juror, could follow the law, and could consider both sentencing options. **State v. Grooms, 50.**

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Challenge for cause—relationship with victim's family and State's witnesses—participated in pretrial protest of case—The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's challenge for cause under N.C.G.S. § 15A-1212 of a prospective juror who had a relationship with the victim's family and two of the State's witnesses, and who also participated in a pretrial protest of the delay in bringing this case to trial. **State v. Grooms, 50.**

Peremptory challenges—African-American prospective jurors—race-neutral explanations—The trial court did not err in a capital first-degree murder prosecution by overruling defendant's objection to the State's use of peremptory challenges to strike African-American prospective jurors. **State v. King, 457.**

Peremptory challenge—black prospective juror—race-neutral explanations—The trial court did not err in a capital trial by overruling defendant's objection to the State's use of a peremptory challenge to strike from the jury a black prospective juror. **State v. Hardy, 122.**

Selection—capital sentencing—residual mitigation—The trial court did not abuse its discretion in a capital sentencing proceeding by preventing defendant from asking a prospective juror whether he could consider residual mitigation under the catchall circumstance, N.C.G.S. § 15A-2000(f)(9), where the prospective juror had indicated that he could follow the law as instructed by the trial court and the court's instruction on the catchall mitigating circumstance after the evidence was heard was proper. **State v. Meyer, 92.**

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patient, and loving suported the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. **State v. Davis, 1.**

Capital—aggravating circumstance—especially heinous, atrocious or cruel murder—evidence sufficient—The evidence in a capital sentencing proceeding was sufficient to support submission of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. **State v. Call, 400.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel murder—not overbroad—The aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), is not unconstitutionally vague and overbroad. **State v. Call, 400.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel—not unconstitutionally vague—The especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague. N.C.G.S. § 15A-2000(e)(9). **State v. Meyer, 92.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel—sufficiency of evidence—The trial court did not err in a capital sentencing proceeding by submitting the especially heinous, atrocious, or cruel aggravating circumstance where defendant argued that the jury was permitted to vicariously apply the circumstance based on the conduct of his accomplice but, considered in the light most favorable to the State, there was sufficient evidence from which the jury could conclude that defendant personally participated in the killing of both victims, defendant pled guilty to both first-degree murders, and defendant does not dispute that the manner in which both victims were murdered is sufficient to warrant this circumstance. N.C.G.S. § 15A-2000(e)(9). **State v. Meyer, 92.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel—sufficiency of evidence—The trial court did not err during a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel in a situation where defendant-husband chased and rammed his victim-wife's car, returned to the parking lot once the first officer had left, shot the victim in the back, got back into his car, shot the victim again, and left the victim helpless on the ground. **State v. Holman, 174.**

Capital—aggravating circumstances—especially heinous, atrocious or cruel—sufficiency of the evidence—There was sufficient evidence in a capital sentencing proceeding to submit the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where a jury could infer from the evidence that the victim was aware of his impending death but was helpless to prevent it, and defendant's decision to kick, pistol-whip and taunt his felled and dying victim showed an unusual depravity of mind and a physically agonizing and unnecessarily tortuous death. N.C.G.S. § 15A-2000(e)(9). **State v. Hooks, 629.**

Capital—aggravating circumstances—murder committed to avoid lawful arrest—The trial court did not err in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody. **State v. Fowler, 599.**

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defendant challenged the admissibility of prior recorded testimony of a witness then in Mexico and there was a discussion by the prosecutor of recessing the hearing until the witness could return, but defendant never made a motion for a continuance or objected to the trial court's negative response to the prosecutor's suggestion. **State v. Call, 400.**

Capital—death penalty—not disproportionate—A sentence of death was not disproportionate where defendant stole from the victim after being taken into her home; without adequate provocation, he furtively waited in her home for her to return so that he could shoot her; and, while she was attempting to call for help, he hacked her to death with a meat cleaver in the presence of her two foster children. The case is not substantially similar to any of the cases where the death penalty was found disproportionate, there is no question of the specific intent to kill, and the victim was killed in her own home. **State v. Davis, 1.**

Capital—death penalty—not disproportionate—The trial court did not err by imposing the death sentence where defendant kidnapped, raped, choked, beat, mutilated, and stabbed the victim to death, then abandoned the victim's body in a wooded area, and the jury found four aggravating circumstances. **State v. Grooms, 50.**

Capital—death penalty—not disproportionate—Death sentences for two first degree-murders were not disproportionate where defendant was convicted of two counts of first-degree murder; the three aggravating circumstances found by the jury are among the four which have been found sufficient to support a death sentence standing alone; although an accomplice received a sentence of life imprisonment, defendant pled guilty to two counts of first-degree murder, admitting guilt on any and all theories available to the State, including premeditation and deliberation and felony murder; these murders were found to be part of a course of conduct which included crimes of violence against another person, and the victims were killed in their home; and, based on the brutal nature of the crimes, these cases are more similar to cases in which the sentence of death was found proportionate than to those in which it was found disproportionate. **State v. Meyer, 92.**

Capital—death penalty—not disproportionate—The trial court did not err by imposing the death sentence where defendant killed the victim during a restaurant robbery and planned to kill him before the robbery. **State v. Hardy, 122.**

Capital—death penalty—not disproportionate—The trial court did not err by imposing the death sentence where defendant chased and rammed his wife's car in a parking lot, returned to the parking lot after an officer had left, shot his wife in the back, got back into his car and shot his wife again, and left his wife helpless on the ground. **State v. Holman, 174.**

Capital—death penalty—not disproportionate—The trial court did not err by imposing the death sentence in a first-degree murder case. **State v. Cummings, 281.**

Capital—death penalty—not disproportionate—Sentences of death for three first-degree murders were proportionate where the record supports the aggravating circumstances found by the jury, there was no suggestion that the

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Capital—jury question—unanimous recommendation for life sentence—The trial court did not err in a capital first-degree murder prosecution by its response to the jury's question concerning whether a recommendation of a life sentence had to be unanimous. **State v. King, 457.**

Capital—life imprisonment—instruction—The trial court in a capital sentencing proceeding did not err in its instructions by not using the phrase "life imprisonment without parole" rather than "life imprisonment" every time it referred to the alternative to death. **State v. Davis, 1.**

Capital—mitigating and aggravating circumstances—weight given to each—Although defendant contends the trial court committed plain error in a capital first-degree murder prosecution by instructing the jury in a manner that allegedly allowed the jury to impose a death sentence by finding mitigating circumstances and aggravating circumstances of equal value, this argument has been repeatedly rejected. **State v. King, 457.**

Capital—mitigating circumstance—age of defendant—evidence not sufficient—The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance for the age of the defendant, N.C.G.S. § 15A-2000(f)(7), where defendant was twenty years old at the time he committed the crimes, in honors English and history classes in high school and a voracious reader, had completed his general equivalency diploma, served in the military, and did well in quartermaster school. **State v. Meyer, 92.**

Capital—mitigating circumstance—defendant had adjusted and could adjust to a lifetime of incarceration—The trial court did not err during a capital sentencing proceeding by excluding testimony from defendant's father regarding a conversation the father had with defendant during defendant's pretrial incarceration to show the mitigating circumstance that defendant had adjusted and could adjust to a lifetime of incarceration. **State v. Hardy, 122.**

Capital—mitigating circumstance—defendant has family and friends who support him—The trial court did not err during a capital sentencing proceeding by excluding testimony from defendant's friend as to the impact defendant's death would have on the friend in an effort to show the mitigating circumstance that defendant has family and friends who support him. **State v. Hardy, 122.**

Capital—mitigating circumstances—defendant's confession—The trial court did not err by failing to submit several requested mitigating circumstances including that he cooperated with officers regarding his burglary, that he confessed freely and voluntarily to the murder of a different victim, and that he cooperated with officers in the investigation of the murder of a different victim. **State v. Cummings, 281.**

Capital—mitigating circumstances—mental or emotional disturbance—substance abuse—The trial court did not err in a capital sentencing proceeding by not submitting as a mitigating circumstance that defendant committed the murder under the influence of mental or emotional disturbance where defendant's expert testified that defendant had primitively developed skills for emotional expression, social connection, and adult functioning as a result of the early onset of chronic substance dependence and that both marijuana abuse and alcohol dependence are mental disorders **State v. Hooks, 629.**

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Capital—mitigating circumstances—no significant history of prior criminal activity—The trial court did not err in a capital first-degree murder prosecution by failing to submit the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance of no significant history of prior criminal activity where defendant had previously been convicted of another first-degree murder. **State v. King, 457.**

Capital—mitigating circumstance—no significant history of prior criminal activity—The trial court did not err in a capital sentencing proceeding by instructing the jury that the submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity was required by law when defendant had requested that this mitigating circumstance be submitted. **State v. Lucas, 534.**

Capital—mitigating circumstance—no significant history of prior criminal activity—instructions—There was no plain error in a capital sentencing proceeding in the court's instruction on the mitigating circumstance of no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). **State v. Davis, 1.**

Capital—mitigating circumstances—peremptory instructions—evidence controverted—The trial court did not err in a capital sentencing proceeding by refusing to give peremptory instructions on four mitigating circumstances where the evidence of the circumstances was controverted. **State v. Davis, 1.**

Capital—mitigating circumstance—peremptory instructions—jury instructed in accord with request—There was no error in a capital sentencing proceeding where defendant contended that the court failed to peremptorily instruct the jury on a mitigating circumstance, but the court instructed the jury in accordance with defendant's request. **State v. Call, 400.**

Capital—mitigating circumstances—peremptory instructions not required—The trial court did not err in a capital sentencing proceeding by failing to peremptorily instruct the jury on the mitigating circumstances of impaired capacity to appreciate the criminality of the offense and the age of the defendant where defendant's evidence supporting these two circumstances was controverted. **State v. Call, 400.**

Capital—nonstatutory mitigating circumstances—codefendant's treatment by the justice system—The trial court did not err in a capital resentencing proceeding by refusing to submit three nonstatutory mitigating circumstances relating to the codefendant's treatment by the justice system and his punishment for his involvement in the offense. **State v. Lucas, 534.**

Capital—nonstatutory mitigating circumstances—consideration by jury—The trial court did not err in a capital resentencing proceeding by its instruction to the jurors as to how they should consider nonstatutory mitigating circumstances. **State v. Lucas, 534.**

Capital—nonstatutory mitigating circumstance—depression—The trial court did not err during a capital sentencing proceeding by failing to submit defendant's requested nonstatutory mitigating circumstance that he was depressed after he returned from military service in Korea. **State v. Meyer, 92.**

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