No. 25-5469

IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN CHRISTOPHER BELL and ANTWAUN KYRAL SIMS,

***Petitioners*,**

v.

STATE OF NORTH CAROLINA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

APPENDIX TO BRIEF IN OPPOSITION

JEFF JACKSON
ATTORNEY GENERAL

Teresa M. Postell
Special Deputy Attorney General
Counsel of Record

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6558
tpostell@ncdoj.gov

APPENDIX TO BRIEF IN OPPOSITION

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STATE OF NORTH CAROLINA
ONSLOW COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CRS 2989-2991

STATE OF NORTH CAROLINA,
Plaintiff,

v.

BRYAN CHRISTOPHER BELL,
Defendant.

ORDER

THIS MATTER came before the undersigned Superior Court Judge presiding upon the MOTION FOR APPROPRIATE RELIEF (MAR) and AMENDED MOTION FOR APPROPRIATE RELIEF (AMAR) filed by Defendant, Bryan Christopher Bell, [hereinafter "Bell"], and the STATE'S ANSWER TO DEFENDANT'S MOTION FOR APPROPRIATE RELIEF, AMENDED MOTION FOR APPROPRIATE RELIEF and MOTION FOR SUMMARY DENIAL. Based upon a review of the record, file, exhibits, transcripts, and written arguments of counsel, the undersigned enters the following findings and conclusions of law.

PROCEDURAL HISTORY

1. On 2 October 2000, Bell was indicted for First-Degree Murder of Elleze Thornton Kennedy. On 27 November 2000, Bell was indicted for First-Degree Kidnapping, Assault with a Deadly Weapon Inflicting Serious Injury, and Burning of Personal Property.

2. Pursuant to a change of venue, Bell and co-defendant Antwaun Sims, who was charged with the same offenses, were capitally tried before a jury and Judge Jay D. Hockenbury at the 9 July 2001 Special Criminal Session of Onslow County Superior Court.

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Copies: Sandra Wallace-Smith
Michael R. Ramos
Dionne R. Gonder-Stanley
DA: E. Lee

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BY Beth H. Watson
Assistant, Deputy, Clerk Superior Court

3. At the close of the guilt-phase evidence, the State took a voluntary dismissal of the charges of assault with a deadly weapon inflicting serious injury against defendant Bell and co-defendant Sims.

4. On 14 August 2001, the jury found Bell and Sims guilty of First-Degree Murder based on premeditation, deliberation, and malice as well as under the felony murder rule; guilty of First-Degree Kidnapping; and guilty of Burning of Personal Property.

5. Following a sentencing hearing pursuant to N.C.G.S. § 15A-2000, the jury, on 24 August 2001, found as aggravating circumstances that: (1) Bell had been previously convicted of a felony involving the use of violence to the person, (2) the murder was committed for the purpose of avoiding a lawful arrest, (3) the murder was committed while Bell was engaged in the commission of first-degree kidnapping, (4) the murder was committed for pecuniary gain and, (5) the murder was especially heinous, atrocious or cruel.

6. Bell presented the jury with fifteen possible mitigating circumstances to be considered. One or more members of the jury found eight of the mitigating circumstances. The jury unanimously rejected the remaining seven mitigating circumstances.

7. The jury found the mitigating circumstances insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant imposition of a penalty of death in each case.

8. Bell filed notice of apppeal.

9. On 7 October 2004, the Supreme Court entered its opinion holding that Bell received a fair trial and capital sentencing proceeding, free of prejudicial error. State v. Bell, 359 N.C. 1, 603 S.E.2d 93 (2004). On 23 May 2005, the United States Supreme

Court denied Bell's subsequent Petition for Writ of Certiorari. Bell v. North Carolina, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005).

10. After the appointment of post-conviction counsel, Bell's Motion for Appropriate Relief was filed on or about 12 May 2006. The State on February 5, 2010 filed its Answer to Defendant's Motion for Appropriate Relief and Motion for Summary Denial.

11. On 13 April 2012, Bell filed an amendment to his MAR. The State filed its Answer to Bell's AMAR and Motion for Summary Denial.

12. The Court has reviewed all records concerning this trial, the complete case files, the transcript, and the North Carolina Supreme Court opinion, and has considered the briefs and exhibits presented by Bell and the State in this matter.

SUMMARY OF THE FACTS

The North Carolina Supreme Court's summary of the facts -- as supported by the trial transcript -- is set forth below:

> The evidence at trial tended to show that on 3 January 2000, [Bell] met two friends, Antwaun Sims and Chad Williams, at a game room in Newton Grove. At [Bell]'s request, Williams brought a BB gun with him to Newton Grove and gave it to [Bell] upon arrival at the game room. After spending some time at the game room, [Bell], Sims, and Williams left for the Newton Grove traffic circle where they "hung out," smoked marijuana, and drank brandy. [Bell] told Sims and Williams that he wanted to steal a car so that he could leave town, and Sims said he was "down for whatever." At that point, [Bell] spotted Elleze Kennedy leaving Hardee's, and he said, "I want to rob the lady for her Cadillac."
>
> The evidence further showed that [Bell], Sims, and Williams followed Kennedy to her nearby home and watched as she exited her car and turned to lock the door. [Bell] then ran up to Kennedy, pointed the BB gun at her and said, "Give me your keys." Kennedy threw her keys into the yard and began to scream, at which time, [Bell] hit her with the gun, knocking her to the ground.
>
> Sims and Williams found the car keys and then put Kennedy into the

car. Kennedy bit Williams as he grabbed her, and Williams punched her in the jaw to make her release his hand. [Bell] sat in the back seat with Kennedy. Sims drove the car, and Williams sat in the front passenger seat. At one point, Kennedy asked [Bell] why he was so mean and where he was taking her. He responded by hitting Kennedy in the face with the BB gun. Kennedy, bleeding badly at that point due to repeated beatings, laid her head against the door and did not say anything else.

[Bell] instructed Sims to drive to the Bentonville Battleground and, upon arrival, [Bell], Sims, and Williams pulled Kennedy from the car and placed her in the trunk. They got back in the car and drove toward Benson. Kennedy was unconscious when placed in the trunk, but she later awoke and began moving around in the trunk. [Bell] told Sims to turn up the radio so that he did not have to listen to Kennedy in the trunk.

The three men then went to the trailer of Mark Snead, Williams' cousin. They went inside and smoked marijuana with Snead. The men told Snead that the car was rented and that the three were traveling to Florida. Soon thereafter, the three left Snead's trailer and went to the trailer of two individuals referred to as Pop and Giovonni Surles, where Sims used Pop's phone to call his girlfriend, and then the three left. Before leaving the trailer park, Williams got out of the car and walked back to Snead's trailer because, as he testified at trial, he did not wish to go anywhere with Kennedy in the trunk of the car. [Bell] and Sims returned a short time later and told Williams that they had released Kennedy, after which Williams left with them.

[Bell], Sims, and Williams made one more stop in Benson to clean the blood from the backseat of the car. They then drove towards Fayetteville on Interstate 95. Sims stopped for gas at a truck stop, and [Bell] looked through Kennedy's purse and found four dollars to use towards gas. While at the gas station, Williams heard movement in the trunk of the car and realized Kennedy was still trapped in the trunk. Williams confronted [Bell] with his suspicions, and [Bell] told Williams he was "tripping." [Bell] disposed of the BB gun and Kennedy's credit cards by throwing them out of the window along Interstate 95. Once in Fayetteville, Sims stopped the car, and he and [Bell] went to the trunk. According to Williams' trial testimony, Sims slammed the trunk repeatedly on Kennedy as she was trying to get out.

[Bell] then decided that the group needed to return to Kennedy's house in Newton Grove to look for the scope to the BB gun. [Bell] did not find the gun scope, but he did find one of Kennedy's shoes. He picked it up and put it in the car. As they were leaving the house, Williams again asked [Bell] and Sims to release Kennedy. [Bell] told Williams they would release Kennedy, but they had to go somewhere else to do so.

> The trio left Kennedy's house a second time and drove the car down a path into a field, parking on a hill at the edge of the clearing. Sims turned off the headlights and opened the trunk. Williams testified at trial that he could hear Kennedy moaning. Williams asked [Bell] what he was going to do. [Bell] responded, "Man, I ain't trying to leave no witness. This lady done seen my face. I ain't trying to leave no witness." With that, [Bell] shut the trunk on Kennedy. [Bell] then got a lighter from Sims and set his coat on fire, threw the burning coat into the car, and shut the door.

State v. Bell, 359 N.C. 1, 9-11, 603 S.E.2d 93, cert. denied, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005). Other evidence, including the documentary evidence submitted by the parties, will be discussed below in conjunction with Bell's claims.

STANDARD OF REVIEW

1. The Court has assessed the claims in Bell's MAR pursuant to the standards in N.C.G.S. § 15A-1420 (1996) and State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (1998).

2. Bell's claims of ineffective assistance of counsel have been assessed pursuant to the standards enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984) and State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985)(adopting two-part test of Strickland).

3. The burden of proof as to factual issues in a MAR is on the defendant by a preponderance of the evidence. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991); see N.C.G.S. § 15A-1420(c)(5) (1997).

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO CLAIMS RAISED BY BELL.

CLAIM I

STATE'S ALLEGED FAILURE TO DISCLOSE IMPEACHING EVIDENCE PERTAINING TO THE STATE'S WITNESS

In his first claim, Bell alleges that the State failed to disclose impeaching evidence in violation of Bell's rights under the Fourteenth Amendment to the United States Constitution in accordance with Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). He maintains that the State's witness, Chad Williams, falsely testified at trial that he met only once with the State's attorney, yet timesheets of Williams' counsel proves that there were three additional meetings between Williams and the State on 26 July 2001, 31 July 2001 and 6 August 2001. Bell asserts that the State's failure to correct Williams' trial testimony resulted in the deliberate introduction to the jury of evidence the State knew to be false, evidence that Bell maintains was prejudicial to him pursuant to Brady v. Maryland.

Because the issue of "false testimony" is one which this Court can determine based exclusively on the pleadings and the record, no evidentiary hearing is necessary. See State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (1998).

The burden is on Bell to establish a Brady violation by showing: (1) that the evidence at issue is favorable to his guilt or punishment, that it is exculpatory or impeaching; (2) that the evidence was suppressed by the State, "either willfully or inadvertently," or was unavailable to the defendant from other sources; and (3) that there is a reasonable probability that had this evidence been disclosed the result of the proceeding would have been different, i.e., that "prejudice must have ensued." Fullwood v. Lee, 290 F.3d 663, 685 (4th Cir. 2002) (citations omitted), cert. denied, 537 U.S. 1120, 123 S. Ct. 890, 154 L. Ed. 2d 799 (2003).

The Brady obligation covers impeachment evidence as well as exculpatory evidence. Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S. Ct. 2188, 2190, 165 L. Ed. 2d 269, 272 (2006). Therefore, if true, additional meetings between the State and Williams could have been used to impeach Williams' testimony. First, the evidence that Bell presents to prove his claim--the timesheets of Williams' counsel--do not establish that there were other meetings with the State.

Next, even if the court were to believe Bell, Bell has failed to establish that this "evidence" was material, that he was prejudiced by its nondisclosure. He has failed to establish that there is a reasonable probability that the knowledge of these alleged additional meetings between Williams and the State *would have changed the jurors' verdict*. Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 506 (1995). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-10, 96 S. Ct. 2392, 2400, 49 L. Ed. 2d 342, 353 (1976). The question is not whether a defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Espousing the United States Supreme Court's position on the issue of materiality, the North Carolina Supreme Court has stated:

> "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." State v. Berry, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting Kyles v. Whitley, 514 U.S.

> 419, 434, [115 S. Ct. 1555, 1566,] 131 L. Ed. 2d 490, 506 (1995)). Materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434, [115 S. Ct. at 1566, 131 L. Ed. 2d at 506]. Rather, defendant must show that the government's suppression of evidence would "'undermine[] confidence in the outcome of the trial.'" Id. (quoting [United States v.] Bagley, 473 U.S. [667, 678, 105 S. Ct. 3381, 3381, 87 L. Ed. 2d 481, 491 (1985)]).

State v. Williams, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008). An assessment of materiality of evidence is made in light of the totality of circumstances. United States v. Bagley, 473 U.S. at 683, 105 S. Ct. at 3384, 87 L. Ed. 2d at 494.

Testimony was presented at Bell's trial that Williams gave three statements to the police. Special Agent Jay Tilley testified that on 6 January 2000 he interviewed Williams. At first, Williams gave a statement denying any involvement or knowledge of Mrs. Kennedy's murder and claiming not to have seen Bell or co-defendant Sims in the last few days. Agent Tilley stopped the interview as he did not believe that Williams was being truthful. Williams' father arrived. Agent Tilley gave Williams and his father some time alone to talk after he informed them of some of the evidence. (T Vol XX, pp 3666-67, 3674-77). Williams then gave a second statement. At trial, Agent Tilley recounted what Williams told him. (T Vol XX, pp 3677-79). Based on what Agent Tilley already knew, he was still skeptical about this statement and did not believe that Williams was telling the whole truth. Williams and his father talked again. Williams' father told him to tell the truth. Williams began giving a third statement, which was stopped when Williams received a

phone call from his counsel. Agent Tilley also recounted this statement at trial. (T Vol XX, pp 3680-84).

A year later, on 5 January 2001 after Williams had pled guilty, Agent Tilley interviewed Williams again. Williams waived his Miranda rights and gave a detailed statement to Agent Tilley pursuant to a plea agreement with the State. (T Vol XX, pp 3692-710). Then on 6 July 2001, Williams was interviewed in the District Attorney's Office, in the presence of his attorneys and Agent Tilley. The only instructions given to Williams were to "tell the truth." He was answering the District Attorney's questions from memory, without the benefit of his prior statement, but consistent with his 5 January 2001 statement, when he suddenly said that Antwaun Sims was not with him and Bell. After speaking with his attorneys, Williams explained the he had changed his statement because he had been threatened and because he was informed that co-defendant Sims and Sim's mother were recruiting others to testify against Williams. (T Vol XX, pp 3721-25).

This information was before the jury. Williams' credibility was already in question. Additionally, the jury heard Williams testify about meeting with the District Attorney, a meeting that took place after the previous statements he provided to Special Agent Tilley. Had the jury heard that three additional meetings took place long after the statements given to Agent Tilley--statements that were consistent with Williams' testimony at trial--it could not have reasonably put the whole case in such a different light as to undermine confidence in the sentence.

In light of the strength of the evidence supporting the jury's decision, there is not a reasonable probability that the result of Bell's sentencing proceeding would have been different. The alleged evidence, that Williams had four meetings with the State rather than

the one to which he testified, clearly is not prejudicial pursuant to Brady. Bell has failed to establish that there is a reasonable probability that the knowledge of these alleged additional meetings between Williams and the State would have changed the jurors' verdict. This claim is without merit and is DENIED.

CLAIM II

DEFENSE COUNSEL ALLEGEDLY FAILED TO ADEQUATELY INVESTIGATE AND EFFECTIVELY PRESENT EVIDENCE AT TRIAL AND/OR SENTENCING THAT BELL LACKED THE SPECIFIC INTENT TO COMMIT THE CRIMES OF FIRST-DEGREE MURDER AND FIRST-DEGREE KIDNAPPING.

Bell maintains that counsel was ineffective when he failed to discover evidence that Bell lacked the specific intent to commit first-degree murder and first-degree kidnapping. Bell maintains that had his trial counsel fully investigated and presented this "evidence" to his expert, trial counsel could have presented, as a defense to the crimes charged, Bell's lack of capacity to form the requisite intent.

In accordance with the Strickland v. Washington two-part test, to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that first, counsel's performance was deficient and second, that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; adopted in State v. Braswell, 312 N.C. at 562, 324 S.E.2d at 248. The North Carolina Supreme Court has found that "decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by [the] Court." State v. Prevatte, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), cert. denied, 538 U.S. 986, 123 S. Ct. 1800, 155 L. Ed. 2d 681 (2003). Bell must overcome the "strong presumption that, under

the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689, 104 S. Ct. at 694, 80 L. Ed. 2d at 694-95.

The evidence shows that Bell committed first-degree murder in this case when he unlawfully killed Mrs. Kennedy with malice and with premeditation and deliberation. See State v. Skipper, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), cert. denied, 513 U.S. 1134, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995). The North Carolina Supreme Court has stated that:

> "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." State v. Conner, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." Id. at 635, 440 S.E.2d at 836.

State v. Flippen, 344 N.C. 689, 694-95, 477 S.E.2d 158, 161-62 (1996). The evidence also proves that Bell committed first-degree kidnapping, when he unlawfully confined, restrained, or removed from one place to another Mrs. Kennedy, a person sixteen years of age or over, without her consent for the purpose of doing serious bodily injury to her, terrorizing her, and/or facilitating the commission of any felony. N.C.G.S. § 14-39.

On 3 January 2000, Bell asked Chad Williams to met him at Newton Grove. At Bell's request Williams brought with him a BB gun which belonged to his brother, a BB gun made of metal and resembling a real gun. Bell, having violated his probation, was preparing to leave town. When Williams arrived at Newton Grove, Bell asked about the BB gun, and Williams gave it to him. Bell told Williams and Sims, "If I have to, I'll rob somebody for their car just to get to where I got to go." (T. Vol XIX, p. 3369). As

Mrs. Kennedy drove by in her Cadillac, Bell decided to steal her car, and told Williams and Sims to follow him. When they saw Mrs. Kennedy in her carport, Bell told Williams and Sims to wait in the yard next door. Bell ran up, pulled out the BB gun, and demanded the keys. When Mrs. Kennedy started screaming, Bell hit her with the gun and Mrs. Kennedy fell to the ground. Bell took the keys and directed Williams and Sims to put Mrs. Kennedy in the backseat of the car. Sims drove the vehicle as Bell told him where to go.

There came a point when Bell directed the others to put Mrs. Kennedy in the trunk of her car. After driving for a while and making a few stops, including returning to Mrs. Kennedy's house to retrieve incriminating evidence, Williams asked about letting Mrs. Kennedy go. Bell responded, "Man, I ain't trying to leave no witness. This lady done seen my face. I ain't trying to leave no witness." (T. Vol XIX, p. 3436)

Bell asked Sims for a lighter and said he wanted to set his coat on fire because he had gotten blood all over it. After Bell, Sims and Williams exited the vehicle, Bell removed his coat, set it on fire and threw it into the backseat of the car. He stated to the others that he was going to stay there and watch his coat burn inside the car. Bell was closing the car door as Williams and Sims walked away. The next morning, Bell instructed Sims, to go back to the car and "check to see if the lady is dead. If she ain't, finish burning the car." Later, Bell told them that "if we get caught with this, don't tell nobody." (T Vol XIX, p 3436)

Both the murder and kidnapping of Mrs. Kennedy by Bell were established by these facts. However it is Bell's contention that his counsel were ineffective for failing to fully "investigate and present significant documentation and other evidence that would have supported a theory that, at the time of the crimes charged, Mr. Bell could not have formed the intent to commit any of the crimes charge, nor could he have premeditated and

deliberated the killing of Ms. Kennedy." (See Bell's MAR, ¶ 60). Yet most of the evidence that Bell claims counsel should have discovered and which would have resulted in trial counsel pursuing a defense of diminished capacity was already known to counsel and to their expert.

The defense team knew that Bell's biological father, Orlando Cornell, smoked marijuana and drank alcohol in front of Bell. They knew that Cornell provided Bell with these substances and that they smoked and drank together. (Bell MAR Exhibit Nos. 6, 7). They knew that there was physical fighting between Bell's mother and stepfather. (Bell MAR Exhibit Nos. 7, 20). They knew that Bell had relatives who were addicted to alcohol. (Bell MAR Exhibit No. 7). They knew that Bell, who was eighteen at the time of this crime, had been consuming marijuana and alcohol for several years. (Bell MAR Exhibit Nos. 6, 27 p. 6). They were also aware that Earl Holmes, Bell's stepfather, thought his wife, Pat Holmes, was having an affair with Orlando Cornell. (Bell MAR Exhibit No. 20 ¶ 8). They knew that Bell's mother worked out of town most of the first seven years of Bell's life and saw him only on the weekends. They also knew that when Bell's mother was out of town, he was cared for by his aunt Gwen Bell. (ST Vol IV, p 469).

"Diminished capacity is a means of negating the 'ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation.'" State v. Roache, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (quoting State v. Page, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998)). None of the "evidence" that Bell presents in this claim would have negated the facts or would have lessened Bell's culpability by showing that he lacked the capacity to commit these crimes.

Bell also maintains that had his trial counsel fully investigated and presented this "evidence" to his expert, trial counsel could have entered as a defense to the crimes charged a lack of capacity to form the requisite intent. However, most of this information was already known to Nathan Strahl, M.D., Bell's forensic expert. Dr. Strahl obtained a history of Bell's family and upbringing from Bell, the defense mitigation specialist, Nancy Pagani, and interviews with various family members. Dr. Strahl, testifying at sentencing, approximated Bell's emotional age at the time of the crimes to be that of a twelve-year-old child. (ST Vol III, p 397). He testified that Bell, who was eighteen at the time of these crimes, had a long, significant history of substance abuse. Although Dr. Strahl felt this was contributory to the crime, in his opinion, Bell was not impaired to the extent that he did not appreciate the criminality of his conduct. (ST Vol III, p 425). Dr. Strahl also testified that Bell was raised by his grandmother and aunt until he was seven, when his mother took him back. His father left when Bell was born. When Bell was twelve years old his father reentered his life. Dr. Strahl knew there was a great deal of animosity between Bell's natural mother and father.

Bell attempted to cover up his crime by removing any fingerprints from the car. (T Vol XVIII p 3456). The morning after the murder, Bell sent Sims to make sure Mrs. Kennedy was dead. He told Sims that if she was not dead he was to continue burning the car. (T Vol XVIII, pp 3444-46). He told Williams and Sims that if they were questioned they were not to admit to anything. Bell clearly intended for his action to result in Mrs. Kennedy's death, and he took steps to keep from getting caught. The State's overwhelming evidence of premeditation and deliberation could not have been overcome by the diminished-capacity evidence that post-conviction counsel claim they would have

established.

"[D]ecisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by [the] Court." State v. Prevatte, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), cert. denied, 538 U.S. 986, 123 S. Ct. 1800, 155 L. Ed. 2d 681 (2003). Bell has not overcome the strong presumption that, based upon the evidence in this case the strategy trial counsel pursued was sound. Strickland, 466 U.S. at 689, 104 S. Ct. at 694, 80 L. Ed. 2d at 694-95. He has not shown that trial counsel's performance was deficient based on alleged missed opportunities to present evidence of a lack of specific intent, and he has not shown that he was prejudiced by counsel's alleged deficient performance. This claim is without merit and is DENIED.

CLAIM III

ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO OBJECT TO CO-DEFENDANT CHAD WILLIAMS' ALLEGEDLY NONCORROBORATIVE STATEMENTS.

Bell maintains that counsel was ineffective when he failed to object to Chad Williams' prior out-of-court statements which were inconsistent with Williams' trial testimony in two respects. First, Williams testified that the BB gun used in the crime belonged to his brother. However, Agent Tilley testified that Williams previously stated that the gun belonged to Bell. Next, Williams testified to hearing that Sims was planning to get witnesses to testify against him and that Sims was talking about "knocking him off" for testifying. Agent Tilley testified that Williams had attributed the threats to co-defendants Sims and Bell. The North Carolina Supreme Court explained admissible corroborative evidence stating:

> In order to be admissible as corroborative evidence, a witness' prior

> consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.

State v. Walters, 357 N.C. 68, 89, 588 S.E.2d 344, 356-57, (citations omitted), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003). A prior statement is admissible as corroborative evidence of a witness' trial testimony on direct and cross-examination. State v. Baity, 340 N.C. 65, 70, 455 S.E.2d 621, 625 (1995); State v. Adams, 331 N.C. 317, 329, 416 S.E.2d 380, 386 (1992)

On direct examination, Chad Williams testified that the BB gun used in the crimes against Mrs. Kennedy belonged to his brother. (T Vol XVIII, p 3354). Bell's trial counsel made this fact abundantly clear during cross-examination of Chad Williams. (T Vol XVIII, pp 3525, 3526, 3549, 3551, 3557, 3584). Williams agreed with Bell's counsel that the BB gun belonged to Williams' brother. At one point during cross-examination, Bell's counsel asked:

> Now, you told the police then, when you were riding around with your lawyers, that Bell said he had dropped his pager and his rifle scope out, but it was actually your brother's scope, wasn't it?

Williams responded:

> Yes, sir. That came with my brother's BB gun.

(T Vol XIX, p 3584).

On direct examination by the State, Williams stated that when he left his house that day to go meet Bell, he brought the BB gun. (T Vol XVIII, p 3357). He testified that it was black and looked like a real gun. (T Vol XVIII, p 3354). He gave the gun to Bell when he saw him at the game room. (T Vol XVIII, p 3359). Williams also testified on direct

examination that it was Bell who thought they needed to go back to Newton Grove, after kidnapping Mrs. Kennedy, to find the scope for the BB Gun. (T Vol XIX, p 3430).

On re-cross-examination by Sims' counsel, Williams testified that the gun looked kind of like a Magnum .357, and that they would go behind the game room and shoot bottles with it. (T Vol XX, p 3660). During cross-examination by Sims' counsel, Williams testified that he told Agent Tilley that Bell wanted to go back to Mrs. Kennedy's to look for his pager and scope. (T Vol XIX, p 3508). Also on cross-examination by Bell, Williams testified that Bell was looking for the scope. (T Vol XIX, p 3556).

Agent Tilley testified at length about three statements given to him on 6 January 2000 and 5 January 2001. Agent Tilley testified that on 5 January 2001 Chad Williams told him the following about the BB gun:

> Williams said that when he left his house that day to go meet Bell, he brought the BB pistol. **The pistol belonged to Bell, and Williams had borrowed it.** The pistol was black and looked like a .357 magnum pistol. **Williams borrowed it a week before to shoot some bottles.** He gave the BB pistol to Bell at the game room and Bell had put it in his pants.
>
> . . . .
>
> Bell had lost his black scope and his pager, and he thought it was dropped at the old woman's house.

(T Vol XX, pp 3696-97, 3705). It is this testimony that Bell maintains trial counsel should have objected to as non-corroborative evidence.

Regarding the pretrial efforts to thwart his testifying at trial, Williams testified on direct examination that while he was in jail, he had been told by other people that he was going to be "knocked off" by co-defendant Sims if he "told that [Sims] was with us the whole time." (T Vol XIX, p 3464). Bell cross-examined Williams in detail about the threats. Specifically he was asked if he previously changed his story because "of a plan by

Antwaun Sims and Christopher Bell to get witnesses to testify against you in court," and "[w]ell, you were hearing people saying that [Bell] and [Sims] was going to knock you off; right?" (T Vol XIX, pp 3590, 3592). Finally, Bell and Sims questioned Chad Williams in detail about what he had told Agent Tilley. (T Vol XIX, pp 3496-501, 3503-04, 3508, 3562-76).

Bell has failed to establish the first prong of the Strickland test. The different claims about the ownership of the gun and the allegations regarding threats and who may have made them were before the jury prior to Agent Tilley's testimony regarding Williams' statement. The similarity of Williams' statements and his testimony lend credibility to his testimony, and any variations were slight. State v. Martin, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). Therefore, Agent Tilley's testimony was properly admitted as corroborative evidence. Not objecting to this clearly admissible testimony was an objectively reasonable decision by trial counsel, well within the range of reasonable professional judgment.

Bell has also failed to establish that he was prejudiced by the alleged unreasonable performance. During Agent Tilley's testimony, the trial court instructed the jury regarding corroborative evidence, stating in part:

> When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.

(T Vol XX, pp 3711-12). The trial court repeated virtually the same instruction during his charge to the jury. (T Vol XXV, p 4524). "It is presumed 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to

understand, make sense of, and follow the instructions given them.'" State v. Jennings, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting Francis v. Franklin, 471 U.S. 307, 324 n.9, 105 S. Ct. 1965, 1977 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), cert. denied, 510 U.S. 1028, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1993).

It was made clear during direct and cross-examination of Williams that the gun did not belong to Bell and that the threats were not prompted by Bell. Bell has failed to show how he was prejudiced by Agent Tilley's testimony. He has not established that but for the objectively unreasonable misconduct of his counsel there is a reasonable probability that his sentence would be different. See Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 2541-42, 156 L. Ed. 2d 471, 492-93 (2003); Strickland v. Washington, 466 U.S. at 694, 204 S. Ct. at 2068, 80 L. Ed. 2d at 698. This claim is without merit and is DENIED.

CLAIM IV

ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL DID NOT OBJECT TO THE JURY'S CONSIDERATION OF BOTH FIRST-DEGREE FELONY MURDER AND FIRST-DEGREE KIDNAPPING ON THE BASIS OF SERIOUS INJURY.

Bell asserts that the submission to the jury of first-degree murder and first-degree kidnapping on the basis of serious injury was a violation of double jeopardy. Therefore, he argues that counsel's failure to object to the submission of both charges amounted to ineffective assistance of counsel. Bell argues that the infliction of a serious injury was an essential element of both crimes. His claim is based on the premise that the jury used the victim's death as the serious injury to convict Bell of first-degree kidnapping, while also convicting him of the first-degree murder of that victim, violating double jeopardy.

There are two salient points that render this claim meritless. First, it is clear from the

record that proof of the murder was not made an essential element of first-degree kidnapping. Although first-degree murder was listed as one of the felonies facilitated in the kidnapping indictment, it was eliminated from consideration for kidnapping at the charge conference and when the kidnapping instruction was submitted to the jury. (T Vol XXIII, pp 4145, 4150, R p 5).

The cause of Mrs. Kennedy's death was carbon monoxide poisoning from inhalation of smoke and soot. (T Vol XV, p 2795). The trial court's kidnapping instructions to the jury made it clear that the serious injury in the kidnapping instruction had to be the result of assault with a BB gun or with fists. (T Vol XXV, pp 4554-55, R pp 107-08). Neither the assault with a BB gun nor with fists were the cause of Mrs. Kennedy's death. "Jurors are presumed to follow the trial court's instructions." State v. Gregory, 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996). Trial counsel's performance was not deficient where he failed to make a baseless objection. Consequently, Bell has failed to establish a reasonable probability that, but for the alleged unreasonable misconduct of his counsel, the result of the proceeding would have been different. This claim is without merit.

Secondly, first-degree kidnapping and first-degree murder each require proof of an additional fact which is not required for the other. Therefore, even if the jury was instructed that the murder of Mrs. Kennedy was an element of first-degree kidnapping there is no double jeopardy. This was made clear in State v. Parks, 324 N.C. 94, 376 S.E.2d 4 (1989). In Parks, the Court stated:

> 'Where . . . a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do

> not.' State v. Etheridge, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987). 'If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.' State v. Murray, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984). If at least one essential element of each crime is not an element of the other, the defendant may be prosecuted for both crimes, and such prosecution does not constitute double jeopardy under the fifth and fourteenth amendments to the Constitution of the United States or article I, section 19 of the Constitution of North Carolina.

State v. Parks, 324 N.C. at 97-98, 376 S.E.2d at 6-7. Unlike first-degree kidnapping, first degree murder does not require proving that Bell confined, restrained or removed Mrs. Kennedy without her consent.

Bell was not subjected to double jeopardy, therefore, trial counsel's performance was not deficient in this instance nor was Bell prejudiced by this alleged deficiency. This claim is without merit and is DENIED.

CLAIM V

BELL WAS ALLEGEDLY DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

Bell contends that he received ineffective assistance of counsel at the penalty phase of his trial. Specifically, Bell maintains that trial counsel were ineffective in that they failed to investigate, develop, and present sufficient mitigation evidence regarding parental neglect, abuse of Bell's mother by his stepfather, Bell's alcohol and marijuana use from a young age, and failed to present evidence that Bell's culpability was reduced by his impairment at the time of the crime. This claim is without substantive merit.

To prevail upon this claim, Bell must show that: (1) trial counsel's actions were outside the wide range of professionally competent performance, and then (2)

that he was prejudiced by these actions in that he received an unfair trial culminating in an unreliable result. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. Under either prong of the Strickland test, Bell's claim of ineffective assistance of trial counsel fails. Counsel has an obligation, when representing a defendant "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695; see Satcher v. Pruett, 126 F.3d 561, 572 (explaining that "in any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments" (quoting Strickland, 466 U.S. at 691, cert. denied, 522 U.S. 1010, 118 S. Ct. 595, 139 L. Ed. 2d 431 (1997).

In searching for mitigating evidence trial counsel is not "constitutionally required to interview every family member, neighbor, and coworker." Gilbert v. Moore, 134 F.3d 642, 655, cert. denied, 525 U.S. 840, 119 S. Ct. 103, 142 L. Ed. 2d 82 (1998). But rather Strickland, "permits counsel to 'make a reasonable decision that makes particular investigations unnecessary.'" Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624, 644 (2011).

The federal court made the following statement, which seems particularly relevant to the case at hand:

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions. This case is no exception. But the existence of such affidavits, artfully drafted though they may be,

> usually proves of little significance. This case is no exception in that respect, either. That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, Cape v. Francis, 741 F.2d 1287, 1302 (11th Cir. 1984), cert. denied, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 245 (1985), but perfection is not the standard of effective assistance. The widespread use of the tactic of attacking trial counsel by showing what might have been proves that nothing is clearer than hindsight -- -- except perhaps the rule that we will not judge trial counsel's performance through hindsight. See, e.g., Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.").

Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir.), cert. denied, 516 U.S. 856, 116 S. Ct. 160, 133 L. Ed. 2d 103, reh'g denied, 516 U.S. 982, 116 S. Ct. 490, 133 L. Ed. 2d 417 (1995). Counsel's choices with regard to further investigation must be considered while looking at the circumstances of the particular case in question and giving counsel's judgments a heavy measure of deference. Strickland, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

The record establishes that Bell's trial counsel were thorough, diligent, and effective in their investigation of and presentation of mitigation evidence. Trial counsel interviewed members of Bell's family and presented testimony from them at sentencing. Contrary to Bell's assertions, the ABA is not a constitutional code of conduct for lawyers. It does not dictate counsel's actions. While the professional rules of conduct can be a useful guide in evaluating the reasonableness of counsel's conduct, they cannot be viewed as definitive. Bobby v. Van Hook, 558 U.S. 4, 130 S. Ct. 13, 175 L. Ed. 2d 255. "[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only

cumulative, and the search for it distractive from more important duties." Id., 558 U.S. at 4, 130 S. Ct. at 19, 175 L. Ed. 2d at 261.

Counsel is entitled to a strong presumption that their focus on particular issues and not others represent trial tactics rather than neglect. Harrington v. Richter, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624, 645 (2011). In this case much of the evidence which Bell contends counsel failed to fully investigate was in fact known to counsel and presented to the jury. The jury was aware of Bell's use of alcohol and marijuana, which began at a young age and continued until Bell committed this crime. (ST Vol III, p 391). Evidence was presented indicating that there had been instances of acrimony between Bell's mother and stepfather (ST Vol IV, p 484), and about problems between Bell and his stepmother and stepfather because Bell wanted his biological mother and father to be together. (ST Vol IV, pp 492, 514).

Vicki Krch testified that Bell took care of his little brother Alex, and before Bell's father came into his life, Bell was respectful. Bell would come to her house visiting with her sons. But as a teenager, when his biological father came back into his life, Bell changed totally. He started acting tough. (ST Vol II, pp 245-6) James Carnell, Bell's uncle, testified that Bell moved in with him and his family and accepted and followed Mr. Carnell's rules.

Evidence which Bell now contends should have been presented in his case would have merely echoed evidence which was already before the jury. Presenting evidence that was merely cumulative of the evidence actually presented "would have offered an insignificant benefit, if any at all." Wong v. Belmontes, 558 U.S. 15, 130 S. Ct. 383, 388, 387, 175 L. Ed. 2d 328, 335 (2009) (*per curiam*). Trial counsel put on substantial mitigation evidence, most of it targeting the same theme as post-conviction counsel has

described. "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Waters v. State, 46 F.3d 1506, 1514 (11th Cir.) (quoting Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 U.S. 1241, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988)), cert. denied, 516 U.S. 856, 116 S. Ct. 160, 133 L. Ed. 2d 103 (analogous).

Unlike the circumstances in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) and Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), this case is analogous to the situation the United State's Supreme Court spoke of in Bobby v. Van Hook:

> This is not a case in which defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. Wiggins, 539 U.S., at 525, [123 S. Ct. at 2537,] 156 L. Ed. 2d [at 487], or would have been apparent from documents any reasonable attorney would have obtained, cf. Rompilla v. Beard, 545 U.S. [at] 389-393, [125 S. Ct. at 2467,] 162 L. Ed. 2d [at 376-77]. It is instead a case, like Strickland itself, in which defense counsel's "decision not to seek more" mitigating evidence from defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S., at 699, [104 S. Ct. at 2070,] 80 L. Ed. 2d [at 701].

Bobby, 558 U.S. at 4, 130 S. Ct. at 19, 175 L. Ed. 2d at 261.

Additionally, to assist in trying this case, Bell's trial counsel hired two mental health professionals to evaluate Bell--a psychiatrist, Dr. Nathan R. Strahl, and a psychologist, Dr. Claudia R. Coleman. Both doctors interviewed Bell and had detailed background information. Dr. Strahl testified at Bell's trial that he was aware that for the first seven years of his life Bell was raised by his grandmother and aunt. Bell contends in his MAR

that during those seven years he was taken care of by his aunt Kerry Bell who was only nine years older than Bell. However, the evidence shows that it was Gwen Bell, who was about nineteen years older than Bell, who was in charge when Bell's mother and grandmother were working during the week. (ST Vol IV, pp 469, 515; Bell's MAR Exhibit Nos. 16, 18, and 19).

With two young children to care for, Bell and his cousin Curtis Bell, it is quite likely that Kerry assisted her older sister Gwen, but it was Gwen who was responsible for their care. Dr. Strahl also knew that Bell's mother was only marginally involved with his upbringing at this time. He was also aware that Bell's alcohol and marijuana use began at a young age and continued until the crime. (ST Vol III, pp 388, 391, 405; see Bell's MAR exhibits no. 28).

Trial counsel was reasonable in relying on Dr. Strahl's expert opinion. Bell has now found another psychiatrist whose opinions he prefers to support another mitigation strategy--that Bell's "ability to make and carry out plans was extremely impaired as a result of acute intoxication and the long-term effects of chronic use of drugs and alcohol on his brain" (Bell MAR Exhibit No. 10 ¶ 23), and that Bell lacked the capacity to form the specific intent to commit the crimes charged due to intoxication, the effects of a mental disorder, and immaturity" (Bell MAR Exhibit No. 12 ¶ 16). That in hindsight Bell has now found another psychiatrist whose opinions he prefers does not mean that by relying on Dr. Strahl's (ST Vol III, pp 383-446) and Dr. Coleman (Bell MAR Exhibit No. 27), trial counsel's performance was deficient in any respect. See Campbell v. Polk, 447 F.3d 270, 285 (4th Cir.) (a defendant has no right to the effective assistance of expert witnesses), cert. denied, 549 U.S. 1098, 127 S. Ct. 834, 166 L. Ed. 2d 669 (2006).

To further assist with Bell's case, trial counsel also obtained the services of Nancy Pagani, a mitigation investigator, and Phillip Lane, a private investigator. The defense team discovered that there was physical fighting between Bell's mother and stepfather, fighting that left visible bruises on Patricia Bell. (Bell MAR Exhibit Nos. 7, 20). They also discovered that there was alcoholism in Bell's family and that Bell's biological father, Orlando, not only provided Bell with alcohol and marijuana, but also smoked and drank in front of him. (Bell MAR Exhibit No. 7).

Post-conviction counsel's belief that they would have done things differently, that they would have used information differently, and that they would have obtained a different result is purely subjective. Trial counsel's performance was within the wide range of professionally competent performance. Bell has failed to establish the first prong of Strickland.

In evaluating prejudice, a court must re-weigh the evidence in aggravation against the totality of available mitigating evidence. Wiggins v. Smith, 539 U.S. at 534, 123 S. Ct. at 2542, 156 L. Ed. 2d at 493. Bell maintains that trial counsel failed to present additional witnesses who would have provided additional evidence supporting mitigating circumstances such as:

a. The father of Mr. Bell provided him with alcohol and gave him access to marijuana when Mr. Bell was ten years old.

b. Because it was his father that initiated him into drinking and using marijuana, Mr. Bell continued using impaired substances until the day he was incarcerated.

c. Mr. Bell's family history of alcoholism contributed to his use and abuse of impairing substances.

d. Mr. Bell was abandoned by his mother when he was a baby when she

left him with her family and returned for sporadic visits lasting maybe fifteen minutes.

e. When Mr. Bell was seven years old, he was removed from a happy, loving, family-filled home and moved to a trailer in a drug infested trailer park where he was left alone for ten to twelve hours.

f. The affair between Mr. Bell's mother and biological father wreaked havoc on the emotional psyche of Mr. Bell.

g. Once the affair between Mr. Bell's mother and biological father was discovered by Mr. Bell's step-father, Mr. Bell witnessed numerous instances of his mother being physically abused by Earl Holmes.

h. Mr. Bell's witnessing of the physical abuse on his mother caused emotional injury to Mr. Bell.

i. Mr. Bell took care of his baby brother every day after school until his mother got home from work at nine or ten 0'clock.

j. Mr. Bell parented himself.

(Bell's MAR, p 64).

As previously stated, the jury was aware of Bell's use of alcohol and marijuana, which began at a young age and continued until Bell committed this crime. (ST Vol III, p 391). Evidence was presented that there were fights between Bell's mother and stepfather. The jurors were aware that, on at least one occasion, when Bell intervened, there was a confrontation between Bell and his stepfather. This confrontation resulted in a scar on Bell's neck that he still carries. (ST Vol IV, p 484). The jury heard evidence that during the first seven years of Bell's life his mother, Patricia, worked out of town during the week and only came home on weekends.

The jury heard testimony that there were problems between Bell and his stepmother and stepfather because Bell wanted his biological mother and father to be together. (ST Vol IV, p 492, 514). They heard testimony from Dr. Strahl and James Carnell, Bell's uncle,

about how Bell manipulated his biological parents, playing one against the other. (ST Vol III, pp 390, 410; Vol IV, p 498). He did not want to follow his mother's rules or his father's rules. As Mr. Carnell testified, "with his mom he wasn't going to be punished by someone that wasn't . . . his dad and with his dad he wasn't going to be punished by someone that wasn't his mom." (ST Vol IV, p 498). Presenting evidence that was merely cumulative of the evidence actually presented would not have resulted in a different outcome.

Bell's trial counsel presented fifteen mitigating circumstances, including:

(2) This murder was committed while the defendant was under the influence of mental or emotional disturbance.

. . . .

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

. . . .

(6) The lack of adequate role modeling during his formative years contributed to defendant's acceptance of peer pressure to form his opinions and to shape his behavior.

. . . .

(7) The defendant was intoxicated with alcohol and marijuana and this reduced his ability to make appropriate judgments.

. . . .

(9) The family trauma that was caused by the introduction of the father into the defendant's life when he was a young teenager caused distress, and it was after this that the defendant began using alcohol and drugs and getting into trouble.

. . . .

(10) The defendant had a chaotic and unstable home life lacking adequate parental guidance.

(R, pp 180-81). Mitigating circumstances 2, 4, 6, 7, 9, 10 were six of the eight circumstances which were found to have mitigating value by one or more jurors. The remaining two mitigating circumstances presented to the jury which were found to have mitigating value were: (8) the defendant has a desire to correct his deficiencies and wants to contribute in a positive way to society in the future and; (13) the defendant changed when his father came in the picture; that defendant walked different, talked different and acted like he was tough.

Trial counsel put on substantial mitigation evidence, most of it targeting the same theme as post-conviction counsel has described. "'The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.'" Waters v. State, 46 F.3d 1506, 1514 (11th Cir.) (quoting Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 U.S. 1241, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988)), cert. denied, 516 U.S. 856, 116 S. Ct. 160, 133 L. Ed. 2d 103 (1995). In fact, most if not all of the mitigating evidence presented by post-conviction counsel was a part of mitigating circumstances presented at sentencing, evidenced by those listed above.

The facts show that Bell and his co-defendants, at Bell's direction, stole Mrs. Kennedy's car. Bell hit the eighty-nine-year-old woman with a gun, knocking her to the ground. They put her in the backseat of her car. Bell sat in the backseat with her as he told his co-defendant who was driving the car where to go. At one point, Mrs. Kennedy asked Bell why he was so mean and where he was taking her. Bell responded by hitting Mrs. Kennedy in the face with the BB gun. Mrs. Kennedy, bleeding badly at that point due

to repeated beatings, laid her head against the door and did not say anything else. They placed Mrs. Kennedy in the trunk of the car and could hear her moving around and moaning.

After driving around and making a number of stops, including returning to Mrs. Kennedy's home to retrieve potentially damaging evidence against them, Bell declared, "Man, I ain't trying to leave no witness. This lady done seen my face. I ain't trying to leave no witness." With that, Bell shut the trunk on Mrs. Kennedy. Bell then got a lighter from co-defendant Sims; set his coat on fire; threw the burning coat into the backseat of car; and shut the door, leaving Mrs. Kennedy to die.

The evidence in aggravation was overwhelming, and the mitigating evidence presented was extensive. There is not a reasonable probability that the outcome would have been any different with the inclusion of the additional, and often cumulative, mitigated evidence presented in post-conviction. Bell has failed to show that he was prejudiced. This claim is without merit and is DENIED.

CLAIM VI

BELL ALLEGEDLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO USE AVAILABLE EVIDENCE TO IMPEACH WITNESSES WHO TESTIFIED FOR CO-DEFENDANT SIMS DURING THE SENTENCING PHASE OF THE TRIAL.

Bell argues that trial counsel were ineffective for not attempting to impeach Sophia Strickland, the mother of co-defendant Sims; Vicki Krch, the manager of Hardee's; and psychologist, Dr. Thomas Harbin, all of whom testified for his co-defendant, Sims, at the capital sentencing hearing.

A claim questioning trial counsel's "examination of witnesses is in effect a request to this Court to second-guess his counsel's trial strategy," which the North Carolina Supreme Court has declined to do. State v. Lowery, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). "Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are 'not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." Id. (quoting 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)). Mere allegations surrounding matters of trial tactics, without more, are not sufficient to meet the test set forth in Strickland and its progeny. See State v. Piche, 102 N.C. App. 630, 638, 403 S.E.2d 559, 564 (1991). Such attempts to substitute post-conviction counsel's opinion of how certain witnesses should have been handled with that of the attorneys who were actually there does not meet the standard of Strickland.

First, any attempt by Bell to impeach witnesses such as co-defendant's mother and a former supervisor who felt that Sims was a sweet young man represents a line of questioning that may have alienated the jury. Yet without running that risk, the information about Sims' behavioral problems in school, his legal troubles in Florida, and other negative information was brought out on cross examination by the State. (ST Vol II, pp 199-203).

Additionally, on cross-examination by Bell's trial counsel, Dr. Harbin admitted that Sims was impulsive and became increasingly disruptive and disrespectful in school. Dr. Harbin also testified that Sims had average grades in school, although he had testified earlier that Sims had an IQ of 77 and "falls into the range just above retarded, which would be borderline." (ST Vol II, pp 273, 276).

Not seeking to impeach Ms. Strickland and Ms. Krch could be viewed as a sound and reasonable strategy. It is certainly within the bounds of an objective standard of reasonableness.

Bell has also failed to show how he was prejudiced. The evidence shows that it was Bell who told Chad Williams to bring his brother's BB gun. It was Bell who wanted to steal a car to leave town because he had violated his probation. (T Vol XVIII, pp. 3368-69). It was Bell who selected Mrs. Kennedy's Cadillac to steal. It was Bell who told the others to follow him to Mrs. Kennedy's house. (T Vol XVIII, pp. 3370-72). It was Bell who directed Sims where to go as Sims drove the car. (T Vol XVIII, p. 3378). It was Bell who set the car on fire knowing that Mrs. Kennedy was locked in the trunk. (T Vol XXI, pp. 3436-77).

Furthermore, it was Bell who was found to be "quite bright" (ST Vol III, pp. 389, 396) and who used his intelligence to manipulate his parents, his friends, and others (ST Vol III, pp. 390, 410, Vol IV, p 498). Whereas the evidence for co-defendant Sims was that he had an IQ of 77, borderline retarded range (ST Vol II, pp. 273, 275-76), and that he was easily confused (ST Vol II, p. 292). Based on the evidence presented, there is not a reasonable probability that absent counsel's decision to not attempt to impeach Sims' mother and Ms. Krch, the sentencing outcome would have been different. Bell has failed to establish either prong of the Strickland test. This claim is without merit and is DENIED.

CLAIM VII

BELL ALLEGEDLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO REQUEST A RECESS AND PRESENT FURTHER EVIDENCE FROM BELL'S MOTHER.

During the testimony of Bell's mother, Patricia Holmes, Bell interrupted, saying: "I know this ain't going to go too far." (ST Vol IV, p 515). Mrs. Holmes continued with her

testimony and began to get emotional. (ST Vol IV, p 515). Bell conferred with Mr. Alford, his counsel. Bell than stated, "I don't want to see her cry. Don't ask any more questions." Mr. Alford declined a recess and Mrs. Holmes continued stating:

> I love Chris with all my heart. There's nothing in the world that I wouldn't have done for Christopher. I want you all to know that when this child was born my son, Bryan Christopher Bell, I took care of that baby. I worked two jobs, sixteen hours a day. He had no dad, no. But I was the mom. I was the dad. I provided for him. I gave him everything. He didn't have-- He lacked for nothing. He had clothes, shoes to match. Everything. Everything a little boy could want I gave it to him. I gave it to him not the dad. I asked nothing from the dad. I had no help for nothing.

(ST Vol IV, pp 515-516). At this point Bell again conferred with his attorney. As Mrs. Holmes continued to testify, Bell interrupted again stating, "I know I love you, too, but still I don't want you to see you cry up there." (Id.) It appears from the abrupt end to the questioning after consultation with counsel that Bell would not allow his trial counsel to proceed with further questioning of his mother.

Post-conviction counsel argues that trial counsel should have taken a recess, allowed Mrs. Holmes to calm down, then presented her testimony which would have added weight to some of the mitigating circumstances presented or presented other witnesses.

To establish this claim of ineffective assistance of counsel, Bell must show that counsel's performance was deficient, that his counsel "was not functioning as the counsel guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687, 104 S. Ct. at 693, 80 L. Ed. 2d at 693; accord Braswell, 312 N.C. at 562, 324 S.E.2d at 248. However, mere allegations surrounding matters of trial tactics, without more, are not sufficient to meet the test set forth in Strickland and its progeny. See Piche, 102 N.C. App. at 638, 403 S.E.2d at 564. Clearly presenting further testimony from Mrs. Holmes, accompanied by outbursts

from Bell, would not have helped Bell's case. In this instance, trial counsel's conduct was not objectively unreasonable.

Bell has also failed to show that he was prejudiced by counsel's alleged deficient performance. See Strickland, 466 U.S. at 687, 104 S. Ct. at 693, 80 L. Ed. 2d at 693; State v. Braswell, 312 N.C. at 562, 324 S.E.2d at 248. Where a defendant interferes with counsel's efforts to present mitigating evidence from a witness at a sentencing court, this hindrance prevents any showing of prejudice. Schriro v. Landrigan, 550 U.S. 465, 475-78, 127 S. Ct. 1933, 1940-42, 167 L. Ed. 2d 836, 845-46 (2007) (Landrigan "refused to allow his counsel to present the testimony of his ex-wife and birth mother as mitigating evidence at his sentencing hearing for a felony-murder conviction" and "could not establish prejudice based on his counsel's failure to present the evidence he now wishes to offer."); see also Marcrum v. Luebbers, 509 F.3d 489, 502 (8th Cir. 2007) ("[T]he reasonableness of counsel's actions may depend on his client's wishes and statements."), cert. denied, 555 U.S. 1068, 129 S. Ct. 754 , 172 L. Ed. 2d 725 (2008); Taylor v. Horn, 504 F.3d 416, 455 (3d Cir. 2007) (where the court "agree[d] with Taylor that he was not belligerent and obstructive in court like the defendant in Landrigan, [550 U.S. at 481,] 127 S. Ct. at 1944, [167 L. Ed. 2d at 848,] but the record shows that his determination not to present mitigating evidence was just as strong," the court held that Taylor "was . . . not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence"), cert. denied, 555 U.S. 846, 129 S. Ct. 92, 172 L. Ed. 2d 78 (2008).

Additionally, the sentencing jury was quite familiar with Bell's background. They knew, from the evidence presented through other witnesses, that Bell's home life with his mother and stepfather was unstable and that he lacked parental supervision. There was

evidence that his mother worked long hours, but Bell wanted her time and love, not the things she was able to buy him. (ST Vol III, pp 389, 390, 405, 407; Vol IV, pp 485, 488). The jury also heard about Bell taking care of his little brother Alex while his mother worked. (ST Vol II, p 246). Indeed, most of the proffered testimony from Mrs. Holmes was already before the jury. Most of the mitigating evidence that her testimony might have produced was incorporated into the mitigating circumstances that the jury had before them. (Bell MAR Exhibit No. 4). See State v. Nicholson, 355 N.C. 1, 53, 558 S.E.2d 109, 144 (2002) ("When the circumstance requested is subsumed in other statutory or non-statutory mitigating circumstances already submitted, however, the trial court may deny the defendant's request."); State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996) (the Court found it harmless error where a proposed non-statutory mitigating circumstance was subsumed within another non-statutory mitigating circumstance), cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997); State v. Frye, 341 N.C. 470, 504, 461 S.E.2d 664, 682 (1995) (the Court held that trial courts may combine redundant mitigating circumstances), cert. denied, 517 U.S. 1123, 116 S. Ct. 1359, 134 L. Ed. 2d 526 (1996). Additional evidence on these points would have been cumulative, offering little benefit, if any at all. See Wong v. Belmontes, 130 S. Ct. at 388, 175 L. Ed. 2d at 335.

Any "weight" to be given to Mrs. Holmes' proffered testimony is relevant only after the jury has found the mitigating circumstance and weighs it, and any other mitigating circumstances found, against the aggravating circumstances found. See N.C.G.S. § 15A-2000(c)(3); State v. Walters, 357 N.C. at 92-93, 588 S.E.2d at 358-59. Her testimony would not have increased the value of mitigating circumstances which the jury had already determined to have mitigating value.

Even if Bell had presented Mrs. Holmes' testimony to the jury at sentencing and established an entitlement to the additional mitigator that Bell loved and took care of his baby brother and supporting other mitigating factors that were presented, he still has not demonstrated a reasonable probability that they would have outweighed all of the aggravating circumstances supporting the jury's death sentence. Viewing the record as a whole, Bell has failed to demonstrate that there is a "reasonable probability" that Mrs. Holmes' testimony would have changed the result of his sentencing. Bell was not prejudiced by the alleged deficiency of trial counsel. This claim is without merit and is DENIED.

CLAIM VIII

ALLEGED COMBINED ERRORS OF TRIAL COUNSEL VIOLATED BELL'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In this claim Bell contends that the errors alleged in his Claims II - VII, taken cumulatively, show that there is a strong likelihood that a jury would find him not guilty. This claim must fail, for Bell has failed to establish that any of his claims of ineffective assistance of trial counsel have merit. For all of the same reasons and authorities set forth above in response to Bell's Claims I - VII, which are incorporated herein by reference, this Court concludes Claim VIII is without substantive merit and is DENIED.

CLAIM IX

BELL WAS ALLEGEDLY DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

As to both trial counsel and appellate counsel ineffectiveness claims, the North Carolina Supreme Court has relied extensively on federal decisions from both the Fourth

Circuit and the United States Supreme Court. See State v. Dodson, 337 N.C. 464, 446 S.E.2d 14 (1994) (use of Anders on scope of appellate requirements in a no-error setting); see also State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987); State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985).

In applying the Strickland test, as articulated above, to appellate counsel, Bell must show that counsel unreasonably failed to pursue nonfrivolous issues. See Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) (a petitioner must show that "counsel was objectively unreasonable" in failing to file a merits brief addressing a nonfrivolous issue and that there is "a reasonable probability that but for his counsel's unreasonable failure . . . , he would have prevailed on his appeal"). Bell maintains that appellant counsel was ineffective because:

A. Appellate counsel did not argue that the joinder of Bell's sentencing hearing with that of his co-defendant violated his right to be free from cruel and unusual punishment.

Appellate counsel presented a total of twenty-five assignments of error for review on direct appeal. Included among those was assignment of error number two, that Bell's right to a fair trial and due process was violated by the joinder of his trial with that of his co-defendant Sims. Bell's right to counsel on direct appeal does not require his attorney to present all issues that may have merit on appeal. See Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000), cert. denied, 534 U.S. 830, 122 S. Ct. 74, 151 L. Ed. 2d 39 (2001). In the preparation of an appeal, it is equally as important that an attorney "examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987, 994 (1983).

Focusing on an issue that has a better chance of winning and eliminating the

weaker argument is an indication of an effective attorney. See Smith v. Murray, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). That a different attorney feels appellate counsel should have added an additional argument about the joining of Bell's sentencing hearing with that of his co-defendant does not amount to ineffective assistance of counsel. Both Bell and his co-defendant Sims, were each charged with the offenses of First-Degree Murder, First-Degree Kidnapping, Assault with a Deadly Weapon Inflicting Serious Injury, and Burning Personal Property against the same victim, and with the same additional co-defendant (Chad Williams).

Where defendants are convicted of "capital crimes at a joint trial, [they] can be joined for sentencing if each defendant receives individualized sentencing consideration." State v. Golphin, 352 N.C. 364, 461, 533 S.E.2d 168, 231 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305, and cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 (2001). The sentencing hearing must allow consideration of individual defendants' character and record as well as the circumstances of the particular offense. Lockett v. Ohio, 438 U.S. 586, 601, 98 S. Ct. 2954, 2963, 57 L. Ed. 2d 973, 988 (1978). In this case, Bell and Sims each received individualized sentencing consideration. Each defendant submitted as a mitigating circumstance that they had a reduced role in the murder of Elleze Kennedy. (R p 181, ST Vol VII, pp 1027).

The jurors were well aware of the need to consider each defendant separately. Counsel for Sims asked the jurors about their ability to treat the defendants and their charges separately. (T Vol II, p 449) Counsel for Sims reminded the jury of this at the sentencing phase argument. (T Vol VII, p 1061) Counsel for Bell reminded the jury of the need to "only consider the acts of Chris" at sentencing. (ST Vol VIII, p 1107).

In his charge to the jury, the trial judge instructed that although the defendants were joined for the sentencing hearing, the jury was to determine the sentence of each defendant individually. They were also instructed that in their "sentence recommendation, you must focus on each individual defendant, his crimes, personal culpability and mitigation." (ST Vol VIII, p 1121).

Contrary to Bell's assertion the fact that co-defendant Sims received a sentence of life is not evidence of prejudice to Bell. But rather, "it is an illustration that a joint sentencing hearing does not preclude individualized consideration of the appropriateness of the death penalty in each case." See State v. Oliver, 309 N.C. 326, 307 S.E.2d 304(1983). The evidence demonstrated that it was Bell that wanted the car and who directed his co-defendants from the perpetration of the crimes to the burning of Mrs. Kennedy's car, with her in the trunk.

The jurors clearly considered the aggravating and mitigating evidence against Bell and Sims individually and separately, reaching different conclusions as to the appropriate sentence for each of them. "[W]e often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other." State v. Barnes, 345 N.C. 184, 220, 481 S.E.2d 44, 64 (quoting State v. Paige, 316 N.C. 630, 643, 343 S.E.2d 848, 857 (1986)). Here the jury did just that in determining, based on the evidence, that Sims should receive a life sentence and Bell should receive a sentence of death.

Bell's constitutional right to individualized sentencing was not violated. Appellate counsel was not deficient for failing to present a baseless claim, nor has Bell established that he was prejudiced by this alleged deficiency. This claim is without merit and is

DENIED.

B. Appellate counsel did not allege plain error in the admission of Chad Williams' statement at the guilt-innocence phase of trial.

As this Court has stated in findings in claim III of this Order, Chad Williams' previous statements are generally consistent with his testimony on direct and cross-examination. Any small variations did not render his statements inadmissible, but rather "affect [only] the credibility of the statement." State v. Martin, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). The evidence in this case establishes that the BB gun and any differing claims of ownership, along with the allegations of threats against Williams and who may have made them was before the jury prior to Agent Tilley's testimony regarding Williams' statement.

Special Agent Tilley's trial testimony, regarding statements made by Williams was consistent with Williams' testimony during his direct and cross-examinations. His testimony was properly admitted as corroborative evidence. Any claim of error presented on appeal by Bell based on the admission of this corroborative evidence, in all probability, would have been rejected. Appellant counsel was not objectively unreasonable in not presenting this issue on appeal and there is not a reasonable probability that but for his counsel's alleged deficiency Bell would have prevailed on his appeal. See, Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 766, 145 L. Ed. 2d 756 (2000)("appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.") This claim is without merit is DENIED.

C. Appellate counsel did not assign error to the jury's consideration of both first-degree murder and first-degree kidnapping on the basis of a double jeopardy violation.

As previously stated by this Court in findings in claim IV of this Order, herein incorporated by reference, a review of the record establishes that the trial court's instructions made it clear that the serious injury in the kidnapping instruction was to be based on the assaults with a BB gun or with fists, not the murder of Mrs. Kennedy. Proof of the murder was not made an essential element of first-degree kidnapping. Consequently there was no double jeopardy. "Jurors are presumed to follow the trial court's instructions." Gregory, 340 N.C. at 408, 459 S.E.2d at 663.

The victim's death was the result of carbon monoxide poisoning from inhalation of smoke and soot. The assaults with a BB gun or with fists would not have caused Mrs. Kennedy's death. (T Vol XV, p 2795). The claim is baseless. Appellant counsel's performance was not deficient performance where he fails to present a frivolous claim on appeal. Thus, Bell has failed to establish a reasonable probability that, but for the alleged unreasonable misconduct of appellant counsel, the result of the proceeding would have been different.

Second, even if the murder of Mrs. Kennedy was an element of first-degree kidnapping, Bell still could not prevail. There is no double jeopardy because first-degree kidnapping and first-degree murder each require proof of an additional fact which is not required for the other. See State v. Parks, 324 N.C. 94, 376 S.E.2d 4 (1989). Unlike first-degree kidnapping, murder in the first degree does not require proving that Bell confined, restrained or removed Mrs. Kenndey without her consent. Bell was not subjected to double jeopardy, therefore, appellate counsel's performance was not deficient in this instance nor was Bell prejudiced by this alleged deficiency. This claim is without merit and is DENIED.

CLAIM X

BELL'S ALLEGATION THAT THE STATE'S PEREMPTORY CHALLENGE OF PROSPECTIVE JUROR VIOLA MORROW DURING JURY SELECTION VIOLATED BELL'S RIGHT TO EQUAL PROTECTION.

Bell maintains that the state's peremptory challenge of Viola Morrow was based solely on her gender in violation of his equal protection afforded to him by the United States Constitution and the North Carolina Constitution.

Although defendant objected to the prosecutor's peremptory challenge of Ms. Morrow based on race, pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), there was never an objection alleging gender discrimination. The defense never raised gender discrimination as an issue with the prosecutor's use of a peremptory challenge at trial or on direct appeal. Since defendant was in a position to adequately raise this claim on direct appeal but failed to do so, this claim is procedurally barred from review pursuant to N.C.G.S. § 15A-1419 (a)(3). Alternatively, this claim is without merit for the reasons herein stated.

The Supreme Court held in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." Id, at 131, 114 S. Ct. at 1422, 128 L. Ed. 2d at 97. Although potential jurors may not be stricken "solely on the basis of gender" parties may still exercise their peremptory challenges to "remove jurors who they feel might be less acceptable than others on the panel". Id, at 143, 114 S. Ct. at 1429, 128 L. Ed. 2d at 106.

When considering a claim of race or gender based discrimination in jury selection, the process is the same under the Constitution of the United States and the North Carolina

Constitution. State v. Maness, 363 N.C. 261, 271, 677 S.E.2d 796, 803, cert. denied, 130 S. Ct. 2349, 176 L. Ed. 2d 568 (2010). The type of factors that are appropriate in determining if there is a Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69(1986) violation are also relevant in resolving whether a prima facie showing of intentional gender discrimination is established. State v. Call, 349 N.C. 382, 403, 508 S.E.2d 496, 510 (1998).

As with race-based Batson claims, to determine whether a gender-based peremptory strike was made, the court must perform a three-step analysis. First, the party objecting to the peremptory strikes must make a prima facie showing of intentional or purposeful discrimination. State v. Bates, 343 N.C. 564, 595-596, 473 S.E.2d 269, 286-287, cert. denied, 519 U.S. 1131, 117 S. Ct. 992, 136 L. Ed. 2d 873 (1997). Next, once this prima facie case is made, the burden then shifts to the State to offer a gender-neutral explanation for having peremptorily challenged those jurors. Id. The prosecutor need not provide "an explanation that is persuasive, or even plausible," so long as discriminatory intent is not inherent in the explanation. Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

Finally, once a gender-neutral explanation for the strike is given, the burden shifts back to the objecting party to prove the State's gender-neutral "explanations are merely a pretext," and that the State engaged in intentional discrimination. Bates, 343 N.C. at 595-596, 473 S.E.2d 269, 287. See also, Johnson v. California, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). Step three requires an examination of the persuasiveness of the State's explanation and whether the objecting party has carried his burden of proving purposeful discrimination. State v. Waring, 364 N.C. 443, 701 S.E.2d

615, (citing Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196, 213 (2005)), cert. denied, 132 S. Ct. 132, 181 L. Ed. 2d 53, (2011). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395, 406 (1991).

Although Bell objected to the prosecutor's peremptory challenge of Ms. Morrow based on her race pursuant to Batson, there was never an objection alleging gender discrimination. The only objection during voir dire based on gender discrimination was raised by the prosecutor and was based on defendant's numerous peremptory challenges of men. The defense peremptory challenged every man presented to them for questioning, except three.

What the defense provides as evidence that Ms. Morrow was excused solely because of her gender is an affidavit provided by Assistant District Attorney Gregory Butler. In it Mr. Butler expresses his concern about the jury not being representative of the community because of the defense's action. When Ms. Morrow was questioned there were ten seated jurors, which were all female. Irrespective of Mr. Butler's concerns, it is clear that gender was not the controlling reasons for peremptory challenging Ms. Morrow. During the voir dire of Ms Morrow, the following exchange took place:

> JUROR NO.9 [Ms. Morrow] : With rheumatoid arthritis, I don't know what my day is going to be when I get up. I've been diagnosed with this since 1993. Over the years, it's gotten worse. There are some days I get sick to my stomach. I don't know which day it's going to be.
>
> MR. BUTLER: Is it to the point that it incapacitates you to the point you have to stay home and everything?
>
> JUROR NO.9: Uh-huh.

MR. BUTLER: Is that something that you have a warning? You said you just wake up in the morning, and you may be that way?

JUROR NO.9: No, sir.

MR. BUTLER: No warning whatsoever?

JUROR NO.9: No, sir.

MR. BUTLER: Does it onset in the mornings when you wake up or could it happen during the day?

JUROR NO.9: Even when I get up in the mornings, I don't know how I'm going to feel as far as pain. I could get sick in the middle of the day; sometimes I don't.

MR. BUTLER: How often does this occur to you that you get to the point of having serious pain that you aren't able to deal with your medication?

JUROR NO.9: That causes flare-ups and sometimes it could be twice a week. Sometimes it might be once a week. It could be twice in one day.

MR. BUTLER: Does stress affect it?

JUROR NO.9: Yes, sir.

MR. BUTLER: Do you understand sitting in a trial of this type, three or four weeks long, of course, you will have to listen to all of the evidence and see pictures--it's been mentioned previous times that you'll have to look at pictures that are very graphic and all. Do you feel like that would cause to have an affect on your medical condition sitting through this trial?

JUROR NO.9: I don't know. It could. I don't know.

MR. BUTLER: But you're basically saying you don't know. Today you could be fine and tomorrow you could be having a spell. Does it get so bad that you couldn't sit and listen to the evidence?

JUROR NO.9: The last two weeks -- I was in bed for two weeks.

(T. Vol IX, pp 1629-1631).

The State may disprove a charge of discrimination against women by showing that the State accepted female jurors and, had not used all of its peremptory challenges. State v. Smith, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991). "The composition of the jury may be considered as part of the total relevant circumstances upon which a determination of discrimination in jury selection is made, but it is not dispositive of that issue." United States v. Joe, 928 F.2d 99, 103, cert. denied, 502 U.S. 816, 112 S. Ct. 71, 116 L. Ed. 2d 45 (1991). While the gender composition of the jury is not dispostive of a gender discrimination claim it may be considered.

Whether the State used all of its peremptory challenges and the ultimate racial makeup of the jury are factors that can be relevant in ascertaining whether a defendant has established a prima facie showing of purposeful discrimination. State v. Gaines, 345 N.C. 647, 670-671, 483 S.E.2d 396, 410, cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

A determination of discriminatory intent is based on the totality of the relevant facts. Batson, 476 U.S. at 94, 106 S. Ct. at 1721, 90 L. Ed. 2d at 86. In State v. Nicholson, 355 N.C. 1, 24, 558 S.E.2d 109, 126 (2002), the court stated that "[i]n weighing an allegation of intentional discrimination, the reviewing court may consider the state's acceptance rate of African-American prospective jurors." The Nicholson court held that a fifty percent dismissal rate of African Americans on the jury tends to disprove a prima facie showing of discrimination. Id. See also, State v. Gregory, 340 N.C. 365, 397-99, 459 S.E.2d 638,

656-57 (1995) (concluding defendant failed to make a prima facie showing when minority acceptance rate was 37.5%), cert. denied, 517 U.S. 1108, 116 S. Ct. 1327, 134 L. Ed. 2d 478 (1996); State v. Abbott, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369-70 (1987) (40% acceptance rate of African-American jurors--two out of five tendered--failed to establish prima facie showing of discrimination)

In this case there were in fact fewer prospective male jurors. The record reveals that 69 of 125 potential jurors were female (about 54 percent). Yet of the 16 jurors seated only three were men. Women accounted for more than 74 percent of seated jurors and alternate jurors. When Ms. Morrow was questioned and excused by the state, seventeen women had been passed on by the prosecutor. Ten of them were seated on the jury. At this point the state had only used 12 of its 28 peremptory challenge. After Ms. Morrow was challenged by the state three more women were passed by the state and seated as alternate jurors. There were a total of four alternate jurors. At this time the state had nine peremptory challenges left. The numbers do not show a systematic attempt by the prosecution to keep women from being seated on the jury and do not support Bell's claim that the prosecutor exercised his peremptory challenges in a discriminatory manner.

Even assuming a prima facie showing of gender discrimination had been made, the record makes clear that Ms. Morrow was not excused because she was a woman. Ms. Morrow was the sixtieth prospective juror and the thirty-third female juror examined on voir dire. When Ms. Morrow was questioned, ten jurors already accepted by the State, were seated on the jury. They were all female. There was never an objection by the defense based on gender, to the state's challenge of Ms. Morrow. The defense did not perceive that to be an issue.

However, Bell did raise a Batson objection in response to the State's exercise of a peremptory challenge to Ms. Morrow. (T. Vol IX, pp 1632) Although the trial court found that the defense had not made a prima facie case of discrimination, the court requested that the State give its reasons for excusing Ms. Morrow. The prosecutor indicated that it was Ms. Morrow's medical situation that prompted his peremptory challenge. (T. Vol IX, p 1631). Additionally, he offered the fact that she has rheumatoid arthritis and gets ill on regular occasions. She could not predict when it would happen, and she would not be able to come to court when it did. Additionally, the trial court recalled that Ms. Morrow stated that she would get an upset stomach and be out for days and weeks at a time. Id.

Based on Ms. Morrow's responses, the prosecutor felt that because of her medical problems Ms. Morrow would have a difficult time sitting on a jury and chose to use a peremptory challenge. The prosecutor's questioning of Ms. Morrow on voir dire and the non-discriminatory race and gender neutral reason articulated for the exercise of his peremptory challenge refute defendant's inference of discrimination. State v. Robbins, 319 N.C. at 489, 356 S.E.2d at 293 .

The trial court found that the state had "given for the record non-racial neutral explanations for the use of their peremptory challenges" of Ms. Morrow. The defendant's Batson motion was denied by the court. (T Vol IX, p 1733). The explanation provided by the prosecution is supported by Ms. Morrow's testimony. It is not only race neutral, it is also gender neutral. Defendant has failed to make a showing of intentional discrimination under the "totality of the relevant facts" in the case. Waring, 364 N.C. 443, 474, 701 S.E.2d 615, 636.

The United State's Supreme Court has stated that "[w]hile the reason offered by the

prosecutor for a peremptory strike need not rise to the level of a challenge for cause, Batson, 476 U.S. at 97, [90 L. Ed. 2d at 86, 106 S. Ct. at 1721] the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." Hernandez, 500 U.S. at 362-363, 111 S. Ct. at 1868, 114 L. Ed. 2d. at 407-08. Here, the prosecutor's concern about Ms. Morrow's medical issue rises to a level of a valid for cause challenge, similar to the challenge for cause which resulted in prospective jurors, Larry Boatwright and Johnnie Burris being excused from the jury.

Mr. Boatwright was excused for medical reasons. He stated he had a car accident about two years earlier and as a result he experiences pain when sitting for long periods of time. He had medication for the pain, which he could take about every eight hours. He also indicated that he had trouble remembering certain things but was able to remember things he wants to and that are important to him. However, he felt that because of the pain and the medication he takes he would not be able to perform his duties as a juror. (T. Vol III, pp 408-12) The court found that Mr. Boatwright's inability to concentrate, his pain and effects of his medication was cause to excuse him. (T. Vol III, p 413).

Johnnie Burris was also excused for medical reasons. Mr. Burris had open heart surgery about a year earlier. He was taking medication regularly for the pain in his chest. On the advice of his doctor, he was to avoid stressful situations. He thought the trial would be hazardous to his health and he would not be able to provide his full attention. He was excused for cause for health reasons. (T. Vol I, pp 39-40; Vol X, pp 1940-44)

Burris and Boatwright, both men, were dismissed for cause based upon similar reasons articulated by the prosecutor with his peremptory challenge of Ms. Morrow. Ms. Morrow stated that she was diagnosed with rheumatoid arthritis in 1993. She indicated

that she has gotten worse over the years. She takes medication for the pain, which can flare up at anytime. There are days she is sick to her stomach. She stated that for two weeks prior to voir dire she was in bed because of her illness. She indicated on her questionnaire that she felt the pain would keep her from being able to give her full attention to the trial. It is clear from Ms. Morrow's testimony that her medical issue/concerns correspond to a valid for-cause challenge, demonstrating further, the gender-neutral character of the prosecutor's peremptory challenge. (T. Vol XI, pp. 1629-31).

Once the state offers a legitimate gender-neutral explanation for the use of a peremptory strikes, the defense has the burden of showing that state's explanation was only a pretext and the real reason for the challenge was gender. United States v. McMillon, 14 F.3d 948, 953 (4th Cir. 1994). The federal courts have stated that in evaluating whether an explanation is pretextual, the reviewing court may determine there was a dual motivation involved in the state's use of a peremptory challenge. Thereby, based upon the facts of the case, conclude that the state would have exercised the strikes in the absence of any discriminatory motivation. See, Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995) ("If the court concludes, or the party admits, that the strike has been exercised in part for a discriminatory purpose, the court must consider whether the party whose conduct is being challenged has demonstrated by a preponderance of the evidence that the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike."); United States v. Tokars, 95 F.3d 1520, 1533-34(11th Cir., 1996)("In making a finding of no pretext, the district court in effect made the appropriate findings necessary for dual motivation analysis. Applying dual motivation, we conclude that the government would have exercised the strikes in the absence of any discriminatory

motivation."), cert. denied, 520 U.S. 1132, 117 S. Ct. 1282, 137 L. Ed. 2d 357(1997); Wallace v. Morrison, 87 F.3d 1271 (11th Cir. 1996) (applying dual motivation where prosecutor stated that race was one factor he considered in the exercise of peremptory strikes); United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) (applying dual motivation where prosecutor struck on basis of youth, inexperience, and alleged young black female tendency to show sympathy for individuals involved with narcotics), cert. denied, 517 U.S. 1149,116 S. Ct. 1449, 134 L. Ed. 2d 569 (1996); Howard v. Senkowski, 986 F.2d 24 (2d Cir. 1993) (applying dual motivation analysis to prosecutor's pre-Batson statements).

In the present case, the state has shown that other legitimate, gender-neutral reasons existed to justify striking the juror. The record makes clear that the prosecution was not attempting to eliminate women from the jury. It is also clear from the record that the prosecutor struck Ms. Morrow based on her medical conditions and concerns. In fact, her medical condition rose to the level justifying a challenge for cause. Peremptorily challenging Ms. Morrow was not discriminatory and did not violate her Fourteenth Amendment right to equal protection of the law.

Bell has not proven that intentional discrimination was a substantial or motivating factor in the decision to exercise the strike of Ms. Morrow. This claim is without merit and DENIED.

EVIDENTIARY HEARING

Bell requests a hearing on the issues raised in his Motion for Appropriate Relief (MAR); however, N.C.G.S. § 15A-1420(c)(3) provides: "The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law." A hearing is not required either when the motion

presents assertions of fact that will not entitle a defendant to relief or when the motion presents only questions of law. State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (1998). Bell's MAR raises questions of fact that do not entitle him to relief and questions of law that should be resolved in favor of the State without an evidentiary hearing.

That this order does not address any issues or contentions raised in his amendment to the motion for appropriate relief filed on August 30, 2012 by the defendant with regards to the Racial Justice Act. Those claims are still open and unaddressed by this order.

WHEREFORE, based upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims presented in Bell's Motion for Appropriate Relief and Amendment to the Motion for Appropriate dated April 13, 2012, for the reasons herein stated, are without merit and DENIED. The State's Motion for Summary Denial of Bell's claims is GRANTED as to the original motion and the April 13, 2012 amendment.

The Clerk of Superior Court of Onslow County is hereby directed to mail a copy of this Order to the following persons:

a. Sandra Wallace-Smith
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602

b. Mr. Michael R. Ramos
Attorney at Law
Post Office Box 2019
Shallotte, NC 28459-2019

c. Ms. Dionne R. Gonder-Stanley
Attorney at Law
NCCU School of Law
Clinic Office #48
640 Nelson Street
Durham, NC 27707

This the thirteenth day of December, 2012.

Superior Court Judge

IN THE SUPREME COURT OF NORTH CAROLINA

No. 86A02

FILED: 7 OCTOBER 2004

STATE OF NORTH CAROLINA

v.

BRYAN CHRISTOPHER BELL

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jay D. Hockenbury on 24 August 2001 in Superior Court, Onslow County, upon a jury verdict finding defendant guilty of first-degree murder. On 27 September 2004, 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 May 2004. Additional issues raised in defendant's supplemental brief determined without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Roy Cooper, Attorney General, by Gail E. Dawson, Special Deputy Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

LAKE, Chief Justice.

On 2 October 2000, defendant was indicted for the first-degree murder of Elleze Thornton Kennedy. On 27 November 2000, defendant was indicted on additional charges of first-degree kidnapping and burning of personal property. He was tried capitally to a jury at the 9 July 2001 Special Criminal Session of Superior Court, Onslow County, the Honorable Jay D. Hockenbury

presiding. The jury found defendant guilty of first-degree murder based on malice, premeditation, and deliberation as well as felony murder and, following a capital sentencing proceeding, recommended that defendant be sentenced to death. Judge Hockenbury sentenced defendant accordingly. The jury also found defendant guilty of first-degree kidnapping and burning of personal property. Judge Hockenbury sentenced defendant to consecutive prison terms of 133 months to 169 months for the kidnapping conviction and 11 to 14 months for the burning of personal property conviction. Defendant appeals his conviction and death sentence for first-degree murder to this Court.

The evidence at trial tended to show that on 3 January 2000, defendant met two friends, Antwaun Sims and Chad Williams, at a game room in Newton Grove. At defendant's request, Williams brought a BB gun with him to Newton Grove and gave it to defendant upon arrival at the game room. After spending some time at the game room, defendant, Sims, and Williams left for the Newton Grove traffic circle where they "hung out," smoked marijuana, and drank brandy. Defendant told Sims and Williams that he wanted to steal a car so that he could leave town, and Sims said he was "down for whatever." At that point, defendant spotted Elleze Kennedy leaving Hardee's, and he said, "I want to rob the lady for her Cadillac."

The evidence further showed that defendant, Sims, and Williams followed Kennedy to her nearby home and watched as she exited her car and turned to lock the door. Defendant then ran up to Kennedy, pointed the BB gun at her and said, "Give me your

keys." Kennedy threw her keys into the yard and began to scream, at which time, defendant hit her with the gun, knocking her to the ground.

Sims and Williams found the car keys and then put Kennedy into the car. Kennedy bit Williams as he grabbed her, and Williams punched her in the jaw to make her release his hand. Defendant sat in the back seat with Kennedy. Sims drove the car, and Williams sat in the front passenger seat. At one point, Kennedy asked defendant why he was so mean and where he was taking her. He responded by hitting Kennedy in the face with the BB gun. Kennedy, bleeding badly at that point due to repeated beatings, laid her head against the door and did not say anything else.

Defendant instructed Sims to drive to the Bentonville Battleground and, upon arrival, defendant, Sims, and Williams pulled Kennedy from the car and placed her in the trunk. They got back in the car and drove toward Benson. Kennedy was unconscious when placed in the trunk, but she later awoke and began moving around in the trunk. Defendant told Sims to turn up the radio so that he did not have to listen to Kennedy in the trunk.

The three men then went to the trailer of Mark Snead, Williams' cousin. They went inside and smoked marijuana with Snead. The men told Snead that the car was rented and that the three were traveling to Florida. Soon thereafter, the three left Snead's trailer and went to the trailer of two individuals referred to as Pop and Giovonni Surles, where Sims used Pop's

phone to call his girlfriend, and then the three left. Before leaving the trailer park, Williams got out of the car and walked back to Snead's trailer because, as he testified at trial, he did not wish to go anywhere with Kennedy in the trunk of the car. Defendant and Sims returned a short time later and told Williams that they had released Kennedy, after which Williams left with them.

Defendant, Sims, and Williams made one more stop in Benson to clean the blood from the backseat of the car. They then drove towards Fayetteville on Interstate 95. Sims stopped for gas at a truck stop, and defendant looked through Kennedy's purse and found four dollars to use towards gas. While at the gas station, Williams heard movement in the trunk of the car and realized Kennedy was still trapped in the trunk. Williams confronted defendant with his suspicions, and defendant told Williams he was "tripping." Defendant disposed of the BB gun and Kennedy's credit cards by throwing them out of the window along Interstate 95. Once in Fayetteville, Sims stopped the car, and he and defendant went to the trunk. According to Williams' trial testimony, Sims slammed the trunk repeatedly on Kennedy as she was trying to get out.

Defendant then decided that the group needed to return to Kennedy's house in Newton Grove to look for the scope to the BB gun. Defendant did not find the gun scope, but he did find one of Kennedy's shoes. He picked it up and put it in the car. As they were leaving the house, Williams again asked defendant

and Sims to release Kennedy. Defendant told Williams they would release Kennedy, but they had to go somewhere else to do so.

The trio left Kennedy's house a second time and drove the car down a path into a field, parking on a hill at the edge of the clearing. Sims turned off the headlights and opened the trunk. Williams testified at trial that he could hear Kennedy moaning. Williams asked defendant what he was going to do. Defendant responded, "Man, I ain't trying to leave no witness. This lady done seen my face. I ain't trying to leave no witness." With that, defendant shut the trunk on Kennedy. Defendant then got a lighter from Sims and set his coat on fire, threw the burning coat into the car, and shut the door.

The next morning, defendant sent Sims to check on the car. Sims rode his bicycle down to the car and found that the windows were covered in smoke and Kennedy was dead. Sims reported back to defendant, who then called a friend, Ryan Simmons, to come and pick them up. Before leaving the area, defendant had Simmons drive them down to the car. Defendant and Sims got out to wipe fingerprints from the car. Williams stayed in the car with Simmons and admitted to him that the car was stolen. He did not give the details of the prior evening. Simmons took defendant and Williams to their respective houses to get some personal items and then dropped all three at Sims' brother's home, where they stayed for the next few days.

Kennedy's car was discovered by Joe Godwin on 4 January 2000. The car was parked close to Godwin's property line, and when he went to investigate, he found that all of the windows

were covered over. At Godwin's request, his wife called the sheriff's department, and a detective discovered Kennedy's body upon examination of the car. An autopsy report concluded that Kennedy suffered several blunt force trauma injuries to the head but ultimately died from carbon monoxide poisoning, a direct result of the fire set by defendant inside of the car. Defendant, Sims, and Williams were ultimately linked to the crime. Williams gave several statements to police and eventually pled guilty to murder, kidnapping, and theft. Williams testified against defendant and Sims in exchange for acknowledgment of his assistance by the prosecution during his own sentencing proceeding.

Defendant asserts several assignments of error in his trial. He additionally argues that the sentence of death imposed upon him is disproportionate to the crime. For the reasons that follow, we find no prejudicial error in defendant's trial and capital sentencing proceeding, nor do we find defendant's death sentence disproportionate.

In his first assignment of error, defendant contends that the trial court violated defendant's constitutional right to a jury of his peers by allowing the State to dismiss jurors on the basis of their race. The State exercised nine peremptory challenges to exclude African-American prospective jurors from the jury in this case. Defendant argues that the State's conduct constituted a pattern of racial discrimination in violation of defendant's constitutional rights.

The United States Supreme Court addressed this issue in *Batson v. Kentucky* and set forth a three-part test to determine whether the State has impermissibly excluded jurors on the basis of their race in a given case. 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The first step requires the defendant to establish a *prima facie* case of discrimination. *Id.* at 94, 90 L. Ed. 2d at 86-87. If the trial court determines that such a *prima facie* case has been made, the State is then required to offer a facially valid and race-neutral reason for the peremptory challenges. *Id.* at 97, 90 L. Ed. 2d at 88. Finally, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.* at 98, 90 L. Ed. 2d at 88-89.

Generally, when a trial court rules that the defendant has failed to establish a *prima facie* case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect. *State v. Barden*, 356 N.C. 316, 343, 572 S.E.2d 108, 127 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). However, "'[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.'" *State v. Lemons*, 348 N.C. 335, 361, 501 S.E.2d 309, 325 (1998) (quoting *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991)), *judgment vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999). Since the State, in the instant case, did offer race-neutral explanations for each challenge, and

the trial court ultimately accepted the State's reasons as valid for the exercise of peremptory challenges, "the only issue for us to determine is whether the trial court correctly concluded that the prosecutor had not intentionally discriminated." *Id.* As this Court has held in this regard, the trial court maintains the unique ability to assess, first-hand, all the circumstances relating to the prosecutor's credibility in each case, and we will not overturn its determination absent clear error.

This Court has held that the State may use several general factors to rebut charges of discrimination in the jury selection process, including evidence that the State accepted some jurors of the challenged minority race and that the State did not use all of its peremptory challenges. *See State v. Smith*, 328 N.C. 99, 120-21, 400 S.E.2d 712, 724 (1991). Eighteen African-American prospective jurors were examined in this case. The State exercised peremptory challenges against nine of those. Two African-American prospective jurors were passed by the State, and the State only used twenty-four of its thirty-two available peremptory challenges.

The State also enumerated specific reasons for exercising peremptory challenges against dismissed jurors each time defendant lodged an objection based on *Batson*. The trial court found the State's reasons to be reasonable and valid, and we agree. Defendant's first *Batson* challenges came when the State used peremptory challenges to dismiss two African-American prospective jurors and one white prospective juror. The State

offered valid, race-neutral reasons for the peremptory challenges of both African-American prospective jurors.

Prospective juror Milford Hayes was excused by the State because he was strongly opposed to the death penalty. Mr. Hayes made his opposition clear from the beginning of the jury selection process and continued to state his opinions during jury *voir dire*. He said, in response to a question, that he would be unable to impose a death sentence upon anyone, even Jeffrey Dahmer. Such a strong and absolute opposition to the death penalty is certainly a valid, race-neutral reason for the State to exercise a peremptory challenge.

Prospective juror Mary Shird-Malone was excused by the State because her foster child was seeking psychiatric treatment due to relationship problems with his natural parents. The State expected defendant to put on evidence of problems similar to those of Ms. Shird-Malone's child, and the prosecutor was concerned that Ms. Shird-Malone's personal family situation might make her overly sympathetic to defendant. Concern for undue sympathy towards defendant is a valid and race-neutral reason to exercise a peremptory challenge. Defendant contends that similarly situated jurors were treated differently based upon a difference in race. Defendant asserts that Connie Phillips, a juror of a different race, was similarly situated because she was in a business where she worked with and around psychologists on a daily basis. However, Ms. Phillips stated that her opinion of psychiatrists and psychologists depended upon the individual, and she was not seeking treatment or counseling of any kind.

Furthermore, there were factors weighing in favor of Ms. Phillips that were not applicable to Ms. Shird-Malone. Ms. Phillips was married to a twenty-six-year law-enforcement veteran, and she had no objections to the death penalty. All of these factors go to show that Ms. Shird-Malone and Ms. Phillips were not, in fact, similarly situated individuals. Likewise, there were other prospective jurors who had minor connections to the psychiatric field, but none were such that they would cause the same concerns expressed by the State regarding Ms. Shird-Malone. No other prospective juror was in a similar situation that would create the same concern as that expressed by the State regarding Ms. Shird-Malone. The State's concerns were valid, race-neutral, and specific to Ms. Shird-Malone.

The State later exercised a peremptory challenge to excuse prospective juror La Star Williams, and defendant again objected based on *Batson*. The State offered several race-neutral reasons for exercising a peremptory challenge to excuse Ms. Williams. Ms. Williams was pregnant, and although she was starting to feel better, she had been very sick. The State felt that Ms. Williams may find it difficult to vote for the death penalty when she was carrying a life of her own. Additionally, Ms. Williams seemed unhappy to be there and inattentive at times. She also had a brother who had recently been prosecuted for stealing by the same district attorney's office prosecuting defendant's case. All of these factors, taken together, serve as valid, race-neutral reasons for dismissing Ms. Williams. Defendant again contends that similarly situated prospective

jurors were treated differently based only on their race. One prospective juror's father had been convicted of "price fixing" years before. Another prospective juror's stepson, with whom he had no relationship, was charged with first-degree rape. Defendant claims that because these two prospective jurors had family members with legal troubles, they too should have been dismissed but were not because of their race. However, these two jurors had only one factor in common with Ms. Williams. There were a number of reasons why the State chose to exercise a peremptory challenge against Ms. Williams. While each of the factors may or may not have been sufficient individually, it was the combination that led the State to act as it did. Defendant has failed to establish disparate treatment because the same combination of factors was not present in the other two prospective jurors.

The State also exercised a peremptory challenge to excuse prospective juror Yvonne Midgette. Ms. Midgette was dismissed by the State for several reasons. First, Ms. Midgette ran a prison ministry and dealt with violent criminals on a regular basis. The State was concerned that Ms. Midgette might find it difficult to sentence a man to death considering her prison ministry work. Other factors leading the State to excuse Ms. Midgette included her position as chairperson of Alcoholics Anonymous and the personal problems she was having with her daughter. The State felt that these factors might cause Ms. Midgette to be unduly sympathetic to defendant during the sentencing phase. The State's reasons for exercising a

peremptory challenge to excuse Ms. Midgette were valid and race-neutral.

Defendant next made a *Batson* objection to the State's peremptory challenge of prospective juror Viola Denise Morrow. Ms. Morrow suffers from rheumatoid arthritis. The State was concerned about having Ms. Morrow serve as a juror because she could, on any given day, suffer so much pain that she would be unable to participate in the proceedings. This was a valid and race-neutral reason to excuse Ms. Morrow.

The State exercised a peremptory challenge to excuse prospective juror Diana Roach over defendant's *Batson* objection. The State exercised a peremptory challenge against Ms. Roach because she did not believe in the death penalty. Ms. Roach testified that she was adverse to the death penalty and had been so opposed for her entire life. The State's reason was valid and race-neutral.

The State exercised a peremptory challenge to excuse prospective juror June Leaks based on similar reasoning. The State was concerned about Ms. Leaks' ability to recommend death because as soon as the State brought up the subject, Ms. Leaks began darting her eyes, twisting in her chair, and hesitating in her answers. Defendant contends that a similarly situated juror was passed by the State and that the only difference between the two was their race. Defendant claims that prospective juror Merilyn Thomasson was passed by the State even though she, like Ms. Leaks, seemed uncomfortable with the death penalty. However, Ms. Thomasson testified during *voir dire* that she was sure she

could consider the death penalty and recommend it, if proper. She also had previously served on a criminal jury. These factors distinguish Ms. Leaks from Ms. Thomasson, and the State's reason for excusing Ms. Leaks is valid and race-neutral.

The State used a peremptory challenge to excuse prospective juror Mary Adams, over defendant's *Batson* objection. The State explained that Ms. Adams was excused based on several factors. Ms. Adams was a homemaker with a child with special needs. The State was concerned that Ms. Adams might be more lenient or sympathetic towards defendant for these reasons. Further, Ms. Adams had been charged with failure to pay state sales tax in 1998. While the charge was ultimately dropped, the crime was one of fraud or dishonesty which caused the State some concern. Defendant contends that similarly situated jurors were treated differently based upon their race. As support for this contention, defendant points to two other jurors with previous experiences in the criminal justice system who were passed by the State. While there were other jurors who had earlier encounters with the criminal justice system, no juror had experienced all of the circumstances that caused the State to dismiss Ms. Adams. The State did not engage in disparate treatment, and the reasons for the State's peremptory challenge of Ms. Adams were valid and race-neutral.

The State exercised a ninth peremptory challenge to excuse prospective juror Donald Morgan. Mr. Morgan, like Ms. Adams, had a criminal record. He also had a child with substance abuse issues, and he worked in the mental health field. The

factors leading the State to exercise a peremptory challenge against Mr. Morgan were valid and race-neutral.

The State provided valid and race-neutral reasons for exercising each peremptory challenge objected to on the basis of *Batson*. The trial court properly determined, after each *Batson* objection, that the State did not discriminate against African-American prospective jurors on the basis of their race. Defendant's assignment of error is without merit.

In his second assignment of error, defendant contends that the trial court violated defendant's right to a fair trial and due process of law by joining the trials of defendant and codefendant Antwaun Sims. Prior to trial, the State made a motion to join defendant and codefendant's cases for trial. Defendant objected to joinder, but the trial court granted the State's motion. Several months later, and still before trial, defendant made a motion to sever his case from that of his codefendant. The trial court, finding no change in circumstances making it necessary to sever the cases, denied defendant's motion. Defendant renewed his motion several more times throughout the trial, and the trial court repeatedly denied it. Defendant contends that the trial court erred by denying defendant's motions to sever and that, as a result, he received an unfair trial. We disagree.

Joinder is appropriate when (1) each defendant is charged with accountability for each offense; or (2) the offenses charged were (a) part of a common scheme, (b) part of the same transaction, or (c) so closely connected in time, place, and

occasion that it would be difficult to separate proof of one charge from proof of the others. N.C.G.S. § 15A-926(b)(2) (2003). "'The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge.'" *State v. Golphin*, 352 N.C. 364, 399, 533 S.E.2d 168, 195 (2000) (quoting *State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). The trial court's decision to consolidate cases for trial will not be disturbed on appeal absent a showing that joinder resulted in defendant receiving an unfair trial. *Id.*

Here, defendant and codefendant Sims were each charged with accountability for first-degree murder, first-degree kidnapping, and burning of personal property. Additionally, these charges arose from the same series of events involving the same victim and witnesses, and the evidence tended to indicate a common scheme. There was ample reason for the trial court to decide to join the cases for trial.

Defendant contends that he received an unfair trial as a result of the joinder because inflammatory evidence was admitted against codefendant Sims which likely prejudiced defendant's case. At trial, the State introduced evidence that a cloth containing semen was discovered in the victim's car. The State's DNA evidence connected the cloth to codefendant Sims. Both defendant and codefendant Sims argued that this evidence was prejudicial because the jury could use the evidence to infer a sexual assault. The trial court allowed the evidence and

instructed the jury that it could consider the evidence for purposes of identification and corroboration, but it could not consider the evidence as proof of a sexual assault on the victim. Defendant contends that, despite the trial court's instruction, the evidence could have inflamed the jury, thereby prejudicing defendant's case. However, the State's main witness, Chad Williams, testified that no sexual assault occurred, and the medical examiner testified that there was no evidence of a sexual assault. This testimony, coupled with the trial court's limiting instruction, was sufficient to safeguard against the jury's misuse of the State's evidence against defendant.

Defendant additionally contends that he received an unfair trial as a result of joinder because codefendant Sims exercised a peremptory challenge against a prospective juror defendant would have chosen. The trial court conducted jury selection by having one defendant question all jurors passed by the State and exercise all of his peremptory challenges before the other defendant examined the jurors. Codefendant Sims was given the first opportunity to question the prospective jurors and, despite defendant's vocal approval of a particular juror, codefendant Sims exercised a peremptory challenge to excuse that prospective juror from the panel.

The trial court's method of jury selection in this joint trial did not prejudice defendant. The very nature of a joint trial requires that each defendant be entitled to exercise his peremptory challenges separate and independent of his codefendant. Regardless of the method, each defendant would have

the opportunity to question and excuse jurors from service. If elimination of a desirable juror were a reason for severance, joinder would never occur. Codefendant Sims' exercise of a peremptory challenge during jury selection to excuse a prospective juror defendant wanted did not result in an unfair trial for defendant and did not require severance.

Defendant further contends that codefendant Sims' alibi evidence and jury arguments prejudiced defendant, requiring severance and separate trials. Sims offered witness testimony that he was not present when Ms. Kennedy was kidnapped or assaulted. Codefendant Sims argued to the jury that defendant and Chad Williams were the true culprits in this crime. Defendant argues that Sims' trial tactics prejudiced him and required severance and separate trials. However, there was ample evidence presented at trial to implicate both defendant and codefendant Sims in the murder of Ms. Kennedy. Codefendant Sims' witnesses did nothing to further incriminate defendant. In fact, defendant used some of codefendant Sims' witnesses to advance his own case. The jury apparently did not find codefendant Sims' evidence persuasive, because he was convicted of the charges against him as well. The jury was picked fairly, and a solid case was presented against both defendant and codefendant Sims. Joinder in this case was proper and did not cause defendant an unfair trial. This assignment of error is overruled.

Defendant's third assignment of error is that the trial court erred by placing certain prospective jurors in specific jury panels, thus violating the requirement for random jury

selection. Section 15A-1214 of the North Carolina General Statutes states in part that "[t]he clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." N.C.G.S. § 15A-1214(a) (2003). Here, the clerk randomly called prospective jurors to be assigned to eight different panels. However, three prospective jurors were left unassigned to panels. Defendant contends that the trial court violated the randomness requirement of N.C.G.S. § 15A-1214 by assigning those three remaining prospective jurors to the last jury panel, thus requiring a new trial. We hold that defendant failed to properly preserve this issue for our review.

A defendant's challenge to a jury panel must be made in accordance with the requirements of N.C.G.S. § 15A-1211(c), which states that a challenge to a jury panel:

> (1) May be made only on the ground that the jurors were not selected or drawn according to law.
>
> (2) Must be in writing.
>
> (3) Must specify the facts constituting the ground of challenge.
>
> (4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c) (2003). Here, defendant never made a challenge to the jury selection process. In fact, defendant requested that two of the three remaining jurors, about whom he now objects, be assigned to the last panel. At the conclusion of jury selection, defendant was asked if he approved of the jury

panel. Defendant answered affirmatively, again without objection to the jury selection process. Because defendant failed to challenge the jury selection process in accordance with N.C.G.S. § 15A-1211(c), he now cannot request appellate review. *See e.g.*, *State v. Jones*, 358 N.C. 330, 337-38, 595 S.E.2d 124, 130 (2004); *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001); *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). Defendant's assignment of error is overruled.

Defendant's fourth assignment of error is that the trial court erred by allowing the prosecutor to make certain characterizations of defendant during the State's closing argument. The prosecutor began his guilt-phase closing argument by saying:

> He who hunts with the pack is responsible for the kill. Each of you [has] seen those nature shows: Discovery Channel, Animal Planet. You've seen where a pack of wild dogs or hyenas in a group attack a herd of wildebeests, and they do it as a group.
>
> When they take that wildebeest, one of them might be the one that chases after it and grabs the leg of the wildebeest, slows them down. Another one might be out fending off the wildebeests that are coming and making their counterattacks. You have another that will be the one that actually grasps its jaws about the throat of the wildebeest, ultimately, crushing the throat and taking the very life out of that animal.
>
> He who hunts with the pack is responsible for the kill. Each and every one of those animals are responsible for that kill. Each and every one of those animals will feast on the spoils of that kill. He

> who hunts with the pack is responsible for the kill.
>
> Just like the predators of the African plane [sic], Chad Williams, Antwaun Sims, and Christopher Bell stalked their prey. They chased after their pray [sic]. They attacked their prey. Ultimately, they fell [sic] their prey.

Defendant contends that the prosecutor's characterizations were abusive and improper, in violation of N.C.G.S. § 15A-1230(a). We disagree.

"Counsel are afforded wide latitude in arguing hotly contested cases, and the scope of this latitude lies within the sound discretion of the trial court." *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). A prosecutor's arguments are not to be reviewed in isolation; rather, consideration must be given to the context of the remarks and to the overall factual circumstances. *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).

Looking at the prosecutor's statements in context, it is clear that the prosecutor employed the use of an analogy to aid in explaining a complex legal theory. Defendant and codefendant Sims were prosecuted on the theory that they "acted in concert" with Chad Williams to steal the victim's car, kidnap the victim, and eventually murder the victim. The statement, "he who hunts with the pack is responsible for the kill" is a passage that serves to illustrate for juries the theory of acting in

concert. *See State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970).

Here, the prosecutor built upon the basic premise that "he who hunts with the pack is responsible for the kill." The prosecutor created a clear representation of the "pack mentality" for the jury by describing how animals hunt their prey. Reading the text of the prosecutor's argument in its entirety, it is clear that the prosecutor was using an analogy to explain the theory of acting in concert for the jury. The prosecution even went so far as to directly link the analogy to the legal principle, stating, "[h]e who hunts with the pack is responsible for the kill. It's called acting in concert. That's a legal term." Given that the prosecution clearly linked its analogy to the legal theory it was meant to represent, we cannot now say that the trial court erred by allowing the prosecution to make its argument.

The prosecutor also stated during closing arguments, "[i]f you are going to try the devil, you have to go to hell to get your witnesses." Defendant contends that this also was an improper and inflammatory characterization. Again, we disagree.

The prosecutor made this statement in response to a direct attack by defendant on the credibility of the State's star witness, Chad Williams. The prosecution defended Williams' credibility to the extent that one can defend the credibility of a participant in the crime:

> I want to talk to you a little bit about Chad Williams. One of the things you may wonder--they made a big deal about was why did you put Chad on? Why call Chad as a

> witness? Think about it. Our job and what we attempted to do is to put on all the evidence before you to give you what happened that night, put it all on. That includes to put on what happened that night.
>
> Now, if the physical evidence tells you things--we wanted to flesh out what happened that night, flesh out the details. The physical evidence doesn't talk and Ms. Kennedy can't tell us. We don't have her to call up here and say, Ms. Kennedy, what did these boys do to you? What did they do to you? She is just standing there in the yard, getting out of her car, and these young men come up and attack her. We don't have her to tell the story.
>
> What we do have is Chad Williams. We put him on, and the defense attorneys, How dare you call someone like that. How dare you call somebody who is a liar, who is a convicted murderer who says all these things. How dare you do that.
>
> Well, I can tell you if there would have been a Baptist or Methodist preacher that was riding with these guys that night and could tell you what happened that night and live to tell it, I would be the first one to call him. I would put him up here. We don't have that luxury.

Over defendant's objection, the prosecutor went on to say, "[i]f you are going to try the devil, you have to go to hell to get your witnesses."

We have previously considered and approved use of the phrase to which defendant objects. *State v. Willis*, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992). In *Willis*, the State used the phrase to illustrate the type of witnesses available to the State. *Id.* Here, just as in *Willis*, the prosecutor's statement was meant merely to illustrate the type of witness available in this case. Chad Williams was a participant in the crime, not an innocent person. In this case, Williams' credibility is not

based on his character. It is based upon his participation in the events to which he testified.

After reviewing each of the prosecutor's statements in context, we conclude that neither statement amounted to improper characterization or name calling. The prosecution, in its zealous representation of the State, simply used vivid analogies to illustrate points for the jury. The trial court did not err in allowing the prosecution's statements. This assignment of error is overruled.

Defendant's fifth assignment of error is that the trial court erred by telling the jury that its decision would be reviewed by an appellate court. Defendant contends that the trial court's statements to the jury insinuated that any error the jury made would be corrected by a higher court, thereby reducing the jury's feeling of responsibility for its decision. Defendant did not object to the trial court's jury charge at the time.

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2). Because defendant did not object to the trial court's statements at the time they were made, we are

now limited to conducting a plain error review. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

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

Id. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (internal citations omitted). "The adoption of the 'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the 'plain error' rule." *Id.* (citing *United States v. Ostendorff*, 371 F.2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982, 18 L. Ed. 2d 229 (1967)). "[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.'" *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must

examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citing *United States v. Jackson*, 569 F. 2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)).

Here, the statements made by the trial court cannot even be considered instructions to the jury. The trial court made three statements of which defendant now complains. The first statement was made upon first meeting with the jurors. Upon review of Judge Hockenbury's opening statements in context, it is clear that the trial court's statements were merely introductory in nature and were not meant to influence or instruct the jury in any way. Judge Hockenbury introduced himself to the jury and then proceeded to introduce court personnel who would be in the courtroom during jury selection and the trial. In making its introductions, the trial court said the following:

> Let me introduce some of the court personnel that you will see up here who will be working during this term of court. The Clerk of Superior Court here in Onslow County is The Honorable Ed Cole, and the courtroom clerk here to my right is Lisa Edwards. She will be the clerk during your jury selection process during this term. It's a pleasure to have her here with us. She will, of course, assist the Court with all the administrative matters that the Court has to do when they hold superior court.
>
> The court reporter here to my left is Briana Nesbit. Her job is to take down and transcribe everything that is said here in the courtroom. As you could see when we had the conference here at the bench, Mrs. Nesbit came over with her machine and transcribed everything that was said here. This is very

> important because this court is the highest level trial court of the State of North Carolina. The decisions in this court get appealed to the North Carolina Court of Appeals or the North Carolina Supreme Court, as the case may be. Everything needs to get transcribed for that purpose.

Defendant now objects to the portion of Judge Hockenbury's statement referencing appeal of decisions to the North Carolina Court of Appeals and to this Court. However, reviewing this statement in context, it is clear that he merely wished to explain the function of the court reporter to the jury. We do not view this statement as a jury instruction, and therefore, it does not fall within the purview of plain error.

The second statement to which defendant now objects was made during the jury selection process. The trial court was asking a prospective juror questions about her ability to consider the death penalty as a punishment. The prospective juror responded by nodding her head, and the trial court informed the juror that she should speak audibly because the court reporter was recording responses "for appellate purposes." The trial court's statement did not constitute a jury instruction and thus does not fall within the purview of plain error.

The third statement to which defendant now objects occurred during a break in trial proceedings when the trial court took a moment to recognize "National Court Reporter Day." The trial court took the opportunity to explain the importance of court reporters in honor of the special day:

> Also, this was a day today for a ceremony for Briana Nesbit. It's National Court Reporter Day, August 3, 2001. We had a ceremony honoring her for the good job that

> she does for the superior court. There wouldn't be any Supreme Court, because this is the highest level trial court, unless we had a court reporter transcribing. That's how integral they are to the judicial process.

Again, the trial court's statements did not constitute jury instructions and thus do not fall within the purview of plain error. Because none of the trial court's statements regarding appellate review were made for the purpose of instructing the jury as to its role in deciding defendant's case, we decline to consider the merits of defendant's argument. This assignment of error is overruled.

Defendant's sixth assignment of error is that the trial court erred by failing to dismiss the first-degree kidnapping charge against defendant. Defendant contends that the State presented insufficient evidence to convict defendant of first-degree kidnapping under any of the theories submitted, and therefore, the trial court should have dismissed the charge. We disagree.

When ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented "substantial evidence of each essential element of the crime." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). "'Substantial evidence is that amount of "relevant evidence that a reasonable mind might accept as adequate to support a conclusion."'" *State v. Williams*, 355 N.C. 501, 579, 565 S.E.2d 609, 654 (2002) (quoting *State v. Armstrong,* 345 N.C. 161, 165, 478 S.E.2d 194, 196 (1996)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003) (internal citation omitted). In making its decision, the

trial court must view the evidence in the light most favorable to the State. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Kidnapping is the unlawful confinement, restraint, or removal of a person from one place to another for the purpose of: (1) holding that person for a ransom or as a hostage, (2) facilitating the commission of a felony or facilitating flight of any person following the commission of a felony, (3) doing serious bodily harm to or terrorizing the person, or (4) holding that person in involuntary servitude. N.C.G.S. § 14-39(a) (2003). Kidnapping is considered to be in the first-degree when the kidnapped person is not released in a safe place or is seriously injured or sexually assaulted during the commission of the kidnapping. N.C.G.S. § 14-39(b).

Defendant was indicted for first-degree kidnapping on the basis that he confined, restrained, or removed the victim to facilitate felonious larceny of a motor vehicle, burning of personal property, and assault with a deadly weapon,[1] resulting in serious injury to the victim. Defendant was also indicted for first-degree kidnapping on the basis that he confined, restrained, or removed the victim for the purpose of doing serious bodily harm to or terrorizing the victim, resulting in serious injury to the victim. The State presented sufficient

[1] First-degree murder was also included as an underlying felony in the first-degree kidnapping indictment. The State did not pursue this theory, and the jury was not instructed to consider it.

evidence at trial of each of these alternative theories of first-degree kidnapping in order to survive a motion to dismiss.

Substantial evidence was presented by the State that defendant intended to steal the victim's car and that he kidnapped the victim to facilitate the theft. Chad Williams testified that defendant stated he wanted to steal a car so that he could leave town. Williams also testified that when defendant spotted the victim getting into her car, defendant said, "I want to rob the lady for her Cadillac." Williams testified that the three approached the victim in her driveway, and defendant pointed a gun at her and demanded the keys to the vehicle. The victim threw the keys and began to scream. At that point, defendant hit the victim with the gun and ordered Williams and Sims to place the victim in the car. Defendant's action in confining the victim was clearly meant to facilitate the larceny of the car. The victim was screaming, and defendant acted so as to prevent the victim from calling attention to the crime.

Substantial evidence also was presented that defendant continued to confine the victim in order to facilitate his repeated assaults upon her with a deadly weapon. The evidence presented at trial indicated that defendant got in the backseat with the victim upon initially stealing the car. According to testimony, defendant repeatedly hit the victim in her face with the gun until she quit struggling and lay back quietly against the door. Defendant then had Sims stop the car, and the three confined the victim to the trunk of her car. The State's evidence at trial indicated that defendant continued to confine

the victim in the back seat and in the trunk in order to facilitate the larceny of her vehicle and defendant's continued assaults upon the victim.

In addition, substantial evidence was presented that defendant confined the victim in order to facilitate the burning of her personal property. The three eventually drove the car to a secluded area and opened the trunk to check on the victim. Upon noticing that the victim was still alive, defendant closed the trunk, set fire to his coat, and threw it in the car. Defendant's actions in continuing to confine the victim facilitated the burning of the car.

While it may have been unnecessary to confine, restrain, or remove the victim in order to accomplish any of the defendant's crimes, substantial evidence was presented that defendant did, in fact, make the decision to confine, restrain, and remove the victim in order to facilitate larceny of a motor vehicle, assault with a deadly weapon, and burning of personal property. Substantial evidence also was presented that defendant's actions were meant to terrorize the victim. Defendant beat the victim, yelled at her, and confined her to the trunk of her car for hours. Defendant's actions resulted in serious injury, and ultimately death, to the victim. Therefore, each element of first-degree kidnapping was established. The evidence presented by the State was sufficient to submit each of these alternative theories of first-degree kidnapping to the jury. This assignment of error is overruled.

Defendant's seventh assignment of error is that the trial court erred in allowing a prior statement of witness Chad Williams into evidence for the purpose of corroborating his trial testimony. Defendant contends that the prior statement was different from Williams' trial testimony and, therefore, not corroborative. However, defendant failed to object at trial or properly preserve this issue for appellate review.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1). In this case, defendant did not object to the testimony of Agent Jay Tilley regarding various prior statements made by the State's witness, Chad Williams. Codefendant Sims made an objection to the testimony, arguing that it was repetitive and noncorroborative. Defendant never separately objected or joined in codefendant Sims' objection, thereby waiving his right to appellate review.

Defendant has further waived his opportunity for plain error review of this issue. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure requires that an assignment of error be "specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). Defendant failed to specifically assert plain error. He therefore failed to properly

preserve this issue for appellate review. This assignment of error is overruled.

Defendant's eighth assignment of error is that the trial court erred in submitting the charges of first-degree murder and first-degree kidnapping based on the victim having been seriously injured because the two charges together violate double jeopardy principles. Defendant failed to object to submission of these charges at trial, and he has therefore failed to properly preserve this issue for appellate review.

"It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Here, not only did defendant fail to raise the issue at trial, he failed to properly raise double jeopardy in his assignments of error. Defendant refers to the following assignment of error as the basis for his double-jeopardy argument:

> 34. The trial court committed reversible or, in the alternative, plain error in overruling defendant's objection to an instruction on kidnapping for the purpose of committing an assault with a deadly weapon inflicting serious injury, as this instruction was not supported by the evidence and the applicable legal authorities, thereby denying defendant his federal and state constitutional rights to a fair trial, due process of law, equal protection of the law, and freedom from cruel and unusual punishment.

This assignment of error makes no reference to double jeopardy or submission of a first-degree murder charge. The transcript pages

cited, likewise, do not reference double jeopardy. "Our scope of appellate review is limited to those issues set out in the record on appeal." *State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000). Given that defendant failed to raise double jeopardy at trial, and his assignment of error makes no reference to the issue, he has not properly preserved the issue for our review. This assignment of error is overruled.

Defendant's ninth assignment of error is that the trial court erred in instructing the jury and submitting a verdict form which did not require the jury to be unanimous as to the purpose for which the victim was kidnapped. We note at the outset that it is unclear whether defendant objected to the kidnapping instruction at the trial level on this particular basis as required by Rule 10(b)(1). However, even if defendant properly preserved this issue for appellate review, we conclude there was no error.

The trial court instructed the jury as to first-degree kidnapping, in accord with the pattern jury instructions, as follows:

> The elements of first-degree kidnapping under the theory of facilitating a felony or inflicting serious injury are:
>
> First, that the defendant, or someone with whom he was acting in concert, unlawfully confined a person, Elleze Kennedy, that is, imprisoned her within a given area or restrained a person, that is, restricted her freedom of movement, or removed a person from one place to another.

> Second, that the person, Elleze Kennedy, did not consent to this confinement or restraint or removal.
>
> Third, that the defendant, or someone with whom he was acting in concert, confined or restrained or removed that person for the purpose of facilitating the defendant's commission, or the commission by someone with whom he was acting in concert, of felonious larceny of a vehicle, or burning of personal property, or assault with a deadly weapon inflicting serious injury, or for the purpose of doing serious bodily injury to that person.

Similar instructions were given when the trial court instructed the jury on kidnapping as an underlying felony to support a conviction for felony murder. Defendant contends that the trial court's disjunctive instructions were fatally ambiguous because the jury could have convicted defendant without a unanimous decision that defendant confined, restrained, or removed the victim for the purpose of committing a specific crime. We disagree.

Two lines of cases have developed regarding the use of disjunctive jury instructions. *State v. Diaz* stands for the proposition that

> a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (citing *Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). In such cases, the focus is on the conduct of the defendant. *Id.* at 307, 412 S.E.2d at 314.

In contrast, this Court has recognized a second line of cases standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *Lyons*, 330 N.C. at 302-03, 412 S.E.2d at 312 (citing *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990)). In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

The present case falls into the *Hartness* line of cases. N.C.G.S. § 14-39(a) provides that a defendant is guilty of kidnapping if he

> shall unlawfully confine, restrain, or remove from one place to another, any other person . . . without the consent of such person . . . 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.

N.C.G.S. § 14-39(a). This statute provides numerous routes by which a defendant may be convicted of first-degree kidnapping. Ultimately, however, a defendant can only be found guilty and punished once. It is not necessary for the State to prove, nor

for the jury to find, that a defendant committed a particular act other than that of confining, restraining, or removing the victim. Beyond that, a defendant's intent or purpose is the focus, thus placing the case *sub judice* squarely within the *Hartness* line of cases. The trial court's instructions and the verdict form were proper. This assignment of error is overruled.

Defendant's tenth assignment of error is that the trial court erred in submitting the (e)(6) aggravating circumstance that the murder was committed for pecuniary gain because the evidence did not show that defendant killed the victim to obtain money.

At the beginning of the sentencing proceeding charge conference, the State requested submission of the pecuniary gain aggravating circumstance, as well as several other aggravating circumstances for consideration during the sentencing for defendant's first-degree murder conviction. Defendant objected solely on the basis of double counting and argued that the jurors should not be permitted to use larceny of a car to support two different aggravating circumstances: (1) that the murder was committed while the defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5), and (2) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). In response to defendant's concerns of double counting, the trial court limited the evidence supporting the aggravating circumstance that defendant murdered the victim for pecuniary gain to evidence that money was taken from the victim's purse. The trial court also limited the evidence to support the

aggravating circumstance that the murder was committed during the course of the kidnapping to evidence that defendant kidnapped the victim to facilitate the larceny of the car. Defendant approved the instructions after these changes were made.

Further, during argument on how to instruct the jury regarding the aggravating circumstances, defendant actually supplied the trial court with the language it used to instruct the jury for the pecuniary gain circumstance. At no time did defendant object or argue that the evidence was insufficient to submit the pecuniary gain aggravating circumstance. The only objection defendant made was that the same evidence was being used to support more than one aggravating circumstance. These concerns were alleviated when the trial court limited the evidence for the aggravating circumstances and defendant agreed to the changes.

"Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988); *see also State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996); *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

Defendant did not object to the sufficiency of the evidence to support the pecuniary gain aggravating circumstance at trial and has not preserved this issue for appellate review. N.C. R. App. P. 10(b)(1). In fact, defendant expressly approved the action of the trial court to which he now objects. Because

defendant did not properly preserve this issue for our review, this assignment of error should be overruled.

Even if defendant had properly preserved this issue for appeal, he has failed to demonstrate that the trial court erred in submitting the aggravating circumstance that the murder was committed for pecuniary gain, specifically to obtain money. "'In determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom.'" *State v. Anthony*, 354 N.C. 372, 434, 555 S.E.2d 557, 596 (2001) (quoting *State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). In order to submit the pecuniary gain aggravating circumstance, there must be evidence that defendant was motivated to kill, at least in part, for money or something of value. *State v. White*, 355 N.C. 696, 710, 565 S.E.2d 55, 64 (2002), *cert. denied*, 537 U.S. 1163, 154 L. Ed. 2d 900 (2003). However, financial gain need not be defendant's primary motivation. *State v. Davis*, 353 N.C. 1, 36, 539 S.E.2d 243, 266 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001).

The evidence at trial showed that defendant wished to leave Newton Grove but had no car and no job. Therefore, in order to leave town, defendant needed a means of transportation and money to finance his trip. It is reasonable to infer, based on the evidence, that defendant acted for his own pecuniary gain

when he kidnapped the victim, stole her car, looked through her purse, and took her money. While obtaining a car may have been defendant's primary motivation, it may be reasonably inferred from the evidence that he was also motivated by the need for money.

The fact that defendant killed the victim after he had obtained the money from her purse is irrelevant. This Court addressed the issue in *State v. Oliver* and determined that the hope of pecuniary gain and the murder itself were "inextricably intertwined." 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981). The hope of pecuniary gain motivated the murder which was ultimately committed in an effort to enjoy the fruits of the crime. *Id.* The evidence here showed that defendant unequivocally told his codefendants that he had no intention of leaving a witness. It is reasonable to infer from the evidence that defendant, motivated by the hope for pecuniary gain, kidnapped the victim, stole her car and her money, and then killed her in an attempt to elude the authorities. Considering the evidence in the light most favorable to the State, we hold that there was sufficient evidence to support submission of the pecuniary gain aggravating circumstance based on defendant's theft of money from the victim's purse. This assignment of error is overruled.

On 7 May 2004, this Court allowed defendant's motion to amend the record on appeal and motion to file a supplemental brief addressing two additional assignments of error. In one of defendant's additional assignments of error, he contends that the trial court improperly and unconstitutionally instructed the jury

on the pecuniary gain aggravating circumstance. Defendant failed to object to this jury instruction, and this Court is limited to a plain error review. *See Odom*, 307 N.C. at 659, 300 S.E.2d at 378. However, a review of the record shows that not only did defendant fail to object to the trial court's jury instruction regarding pecuniary gain, he actually supplied the trial court with the language that it used in instructing the jury on this aggravating circumstance.

This Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests. In *State v. Basden*, the defendant requested a jury instruction on a mitigating circumstance and expressed his satisfaction with the proposed jury instruction when read by the trial court. 339 N.C. 288, 302, 451 S.E.2d 238, 246 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995). The trial court instructed the jury in accordance with the defendant's request, and the defendant voiced no objection. *Id.* On appeal, the defendant challenged the language used in the instruction. *Id.* This Court rejected the defendant's contention and stated: "Having invited the error, defendant cannot now claim on appeal that he was prejudiced by the instruction." *Id.* at 303, 451 S.E.2d at 246; *see also* N.C.G.S. § 15A-1443(c) (2003); *State v. Harris*, 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995); *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991).

Here, the evidence shows that the trial court and the State agreed with defendant's request to limit the instruction on

the pecuniary gain aggravating circumstance to the money taken from Ms. Kennedy's purse. The trial court and the State further agreed to limit the instruction on the aggravating circumstance that the murder was committed during the commission of a first-degree kidnapping to evidence that the victim was kidnapped to facilitate the larceny of the car. The record shows that these instructions were so modified in response to defendant's concerns.

Furthermore, reading the jury instruction as a whole, we cannot say as a matter of law that the error, if any, rose to the level of plain error such that there is a reasonable probability that the result would have been different had the error not occurred. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). This assignment of error is overruled.

In defendant's other additional assignment of error set forth in his supplemental brief, he contends that the trial court erred by overruling his objection to the admission of a testimonial statement made by a witness who was not found to be unavailable and had never been subjected to cross-examination by defendant. During the sentencing phase of defendant's trial, one of the aggravating circumstances upon which the State relied was defendant's commission of a prior crime of violence. *See* N.C.G.S. § 15A-2000(e)(3) (2003). To prove this aggravating circumstance, the State introduced an indictment and judgment against defendant for a prior common-law robbery. The State also called Officer John Conerly to testify regarding the incident because he had investigated the robbery and taken a statement

from the victim at the time of the crime. The prosecutor explained, "[T]he victim is not available. The victim was a Hispanic and has left, we tracked, pulled the record, he's left the state and possibly the country." The State offered no other evidence to prove the victim's unavailability, and the trial court made no findings of fact or conclusions of law regarding unavailability.

Officer Conerly testified that he was the Chief of Police in Newton Grove in 1998 when he received a call about a robbery. Officer Conerly stated that he investigated the crime and took a statement from Jose Gasca, the victim, regarding the robbery. The statement provided:

> He [Gasca] stated that he was in West Hunting and Fishing. That he had seven hundred dollars, I believe he was sending back to his sister in Mexico. That someone ran up behind him and pushed and shoved him, grabbed his money. That he chased them outside. That they jumped into a vehicle and had taken off, and that he was struggling with the fella who was getting in the vehicle. That he cut him with what he thought was a knife.

In *Crawford v. Washington*, ___ U.S. ___, 158 L. Ed. 2d 177 (2004), the United States Supreme Court overruled *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), and held the Confrontation Clause bars out-of-court testimony by a witness unless the witness was unavailable and the defendant had a prior opportunity to cross-examine him, regardless of whether the trial court deems the statements reliable. In *Crawford*, the Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to

> the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at ___, 158 L. Ed. 2d at 199.

Here, the State presented Gasca's statement relating details of the robbery through the testimony of Officer Conerly. The only evidence of Gasca's unavailability was the State's assertion. The State presented no evidence of the efforts it took to procure Gasca beyond stating that it had "pulled the record" and found that Gasca had left the state. "[O]nce the [S]tate decides to present the testimony of a witness to a capital sentencing jury, the Confrontation Clause requires the [S]tate to undertake good-faith efforts to secure the 'better evidence' of live testimony before resorting to the 'weaker substitute' of former testimony." *State v. Nobles*, 357 N.C. 433, 441, 584 S.E.2d 765, 771 (2003) (quoting *United States v. Inadi*, 475 U.S. 387, 394-95, 89 L. Ed. 2d 390, 398 (1986)). The evidence presented by the State of its efforts to find Gasca does not amount to the "good-faith efforts" required by *Nobles*.

Further, the admission of Gasca's statement by Officer Conerly violates the cross-examination requirements of *Crawford*. "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, ___ U.S. at ___,

158 L. Ed. 2d at 203. In *Crawford*, the Supreme Court failed to spell out a comprehensive definition of "testimonial" but stated, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The Court also declined to define "police interrogation" and stated in footnote four: "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." *Id.* at ___ n.4, 158 L. Ed. 2d at 194 n.4. A witness's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.*

Here, the statement made by Gasca was in response to structured police questioning by Officer Conerly regarding the details of the robbery committed by defendant. There can be no doubt that this statement was made to further Officer Conerly's investigation of the crime. Gasca's statement contributed to defendant's arrest and conviction of common-law robbery. Therefore, Gasca's statement is testimonial in nature, triggering the requirement of cross-examination set forth by *Crawford*.

The record is devoid of evidence that defendant had a prior opportunity to cross-examine Gasca at any point before Gasca's statement was introduced into evidence through the testimony of Officer Conerly. Therefore, the trial court erred in allowing the State to introduce Gasca's statement through Officer Conerly.

We now turn our attention to whether the trial court's error prejudiced defendant. Because this error is one with constitutional implications, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). One way the State may meet its burden is by showing that there is overwhelming evidence of defendant's guilt. *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

At trial, Officer Conerly first read defendant's statement admitting to committing the robbery against Gasca. Officer Conerly then proceeded to read into evidence Gasca's statement that he was robbed and cut by defendant. The substance of Gasca's statement was already in evidence, based on defendant's own statement and Officer Conerly's observations. Defendant's cross-examination of Officer Conerly further confirmed that not only did defendant confess to committing the crime, but that defendant thereafter pled guilty to common-law robbery. Defendant contends that he was prejudiced because Gasca's statement was the only evidence that the robbery was violent and that without this statement the jury may have rejected this aggravating circumstance. We disagree.

The aggravating circumstance of committing a prior crime of violence can be found if the defendant has been previously convicted of a felony involving the use or threat of violence to a person, not just the use of violence. Here, the indictment and judgment presented into evidence show that defendant pled guilty to common-law robbery. The elements of

common-law robbery are "'" the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).'" *State v. Moss*, 332 N.C. 65, 72, 418 S.E.2d 213, 217 (1992) (quoting *State v. Herring*, 322 N.C. 733, 739-40, 370 S.E.2d 363, 368 (1988)). Therefore, defendant's guilty plea to common- law robbery was an admission of the commission of a felony involving the use or threat of violence even without the erroneous admission of Gasca's statement that defendant robbed him and cut him with a knife. Since defendant's plea of guilty to common-law robbery sufficiently established the aggravating circumstance in and of itself, the trial court's erroneous admission of Gasca's statement is harmless error beyond a reasonable doubt. This assignment of error is overruled.

Defendant's eleventh assignment of error is that the trial court erred in overruling defendant's objection to the submission of the (f)(1) statutory mitigating circumstance that he had no significant prior criminal history.

During the charge conference portion of the sentencing proceeding, the trial court stated its intention to submit the (f)(1) mitigating circumstance for the jury's consideration. Defendant objected and requested that the jury be instructed that defendant objected to the submission of this mitigating circumstance and that the submission was required by law. The trial court granted defendant's request. At sentencing, the trial court instructed the jury on the mitigating circumstance

and made it clear that defendant had not requested it. The trial court listed defendant's prior crimes, which included felony possession of stolen goods, felony common-law robbery, misdemeanor possession of stolen goods, misdemeanor larceny, misdemeanor communicating a threat, use of alcohol while under age, and use of illegal drugs. Defendant also informed the jury that he had not requested the instruction and that it was required by law.

Defendant argues that because he specifically objected to the submission of the mitigating circumstance and because no rational jury could have found it from the evidence presented at trial, the trial court erred in submitting it to the jury. We disagree.

> "The test governing the decision to submit the (f)(1) mitigator is 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant."

State v. White, 343 N.C. 378, 394-95, 471 S.E.2d 593, 602-03 (quoting *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996)), *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996) (internal citations omitted). The circumstance under consideration here is after all a statutory mitigating circumstance which, if found, must be taken as having value to defendant. Any reasonable doubt regarding whether to submit a mitigating circumstance must be resolved in favor of a defendant. *State v. Smith*, 347 N.C. 453,

469, 496 S.E.2d 357, 366-67, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998). The trial court should focus on "'whether the criminal activity is such as to influence the jury's sentencing recommendation'" in determining if a defendant's history is "significant." *State v. Blakeney*, 352 N.C. 287, 319, 531 S.E.2d 799, 821 (2000) (quoting *State v. Greene*, 351 N.C. 562, 569, 528 S.E.2d 575, 580, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000)), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). The nature and age of a defendant's criminal activities are important to the trial court's analysis of whether a rational juror could reasonably find the "no significant history of prior activity" mitigating circumstance. *State v. Jones*, 346 N.C. 704, 716, 487 S.E.2d 714, 721 (1997). However, "'the mere number of criminal activities is not dispositive.'" *Id.* (quoting *State v. Geddie*, 345 N.C. 73, 102, 478 S.E.2d 146, 161 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997)).

Here, the trial court properly submitted the (f)(1) mitigating circumstance because a rational jury could have found from the evidence submitted that defendant had no *significant* history of prior criminal activity. Most of defendant's prior convictions were crimes against property. Defendant had been convicted of common-law robbery but had not repeatedly engaged in threatening or violent behavior beyond that one conviction. Defendant's convictions for use of drugs and alcohol, while prior convictions, were not significant enough to keep this mitigating circumstance from the jury. These same convictions were used to support two other mitigating circumstances. Defendant received

no active prison time for any of his prior convictions, and although defendant's history was fairly recent, numerous mitigating circumstances based on his age and family history were presented for the jury to consider when viewing his criminal history. In light of these circumstances, the trial court did not err in determining that a rational juror could have reasonably found the mitigating circumstance that defendant had no significant history of prior criminal activity.

Even assuming *arguendo* that the trial court erred in submitting the (f)(1) mitigating circumstance to the jury, this Court has held that "'[a]bsent extraordinary facts . . . , the erroneous submission of a mitigating circumstance is harmless.'" *State v. Bone*, 354 N.C. 1, 16, 550 S.E.2d 482, 492, (2001) (quoting *Walker*, 343 N.C. at 223, 469 S.E.2d at 923), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

Defendant contends that extraordinary facts are presented when the trial court submits the (f)(1) (no significant history of criminal activity) mitigating circumstance and the State also relies on the (e)(3) aggravating circumstance (a prior conviction for a crime involving violence to another person). "This Court has repeatedly upheld submission of the (f)(1) mitigating circumstance in cases where the (e)(3) aggravating circumstance was submitted to the jury." *Blakeney*, 352 N.C. at 319, 531 S.E.2d at 821; *see also State v. Ball*, 344 N.C. 290, 310-11, 313, 474 S.E.2d 345, 357, 359 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997); *Walker*, 343 N.C. at 224-26, 469 S.E.2d at 923-24; *State v. Brown*, 315 N.C. 40, 61-63, 337

S.E.2d 808, 824-25 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Defendant also contends that because the prosecutor argued to the jury that it should reject the (f)(1) mitigating circumstance, the mitigating circumstance was effectively turned into an aggravating circumstance. We disagree.

In *Walker*, this Court examined the issue of a prosecutor's conduct in addressing the jury regarding the (f)(1) mitigating circumstance when defendant had specifically objected to its submission. The Court stated that:

> [P]rosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance, when the defendant has in fact objected to the submission of that particular mitigating circumstance. Additionally, the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

Walker, 343 N.C. at 223-24, 469 S.E.2d at 923. Here, the prosecutor never argued to the jury that defendant had requested the (f)(1) mitigating circumstance. All the prosecutor did was explain to the jury why it should reject the mitigating circumstance. Further, the trial court specifically instructed the jury that defendant did not request the mitigating

circumstance and that the trial court was required by law to give the instruction. Defendant also explained to the jury that he had not requested the mitigating circumstance.

Defendant has failed to show that the trial court erred in submitting the (f)(1) mitigating circumstance to the jury or that the prosecutor's actions in addressing the jury regarding the mitigating circumstance were error. But, even if the trial court had erred in submitting the mitigating circumstance to the jury, defendant has failed to show that extraordinary circumstances exist which would cause the error to be prejudicial to defendant. This assignment of error is overruled.

Defendant's twelfth assignment of error is that the trial court erred in denying defendant's request to instruct the jury, throughout its sentencing instructions to the jury, that "life imprisonment" meant "life in prison without parole."

During the charge conference, defendant's codefendant requested that the trial court continuously define the term "life imprisonment" as meaning "life without parole." Defendant joined in this request. The trial court denied the request and relied on the pattern jury instructions. Defendant also requested that the trial court modify the verdict sheet to reflect "life without parole." This request was denied as well.

Section 15A-2002 of the General Statutes states: "The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (2003). This Court has held that when a trial court instructs

the jury pursuant to N.C.G.S. § 15A-2002, the trial court has no duty to inform the jury "that a life sentence means life without parole every time [it] mention[s] a life sentence." *State v. Bonnett*, 348 N.C. 417, 448-49, 502 S.E.2d 563, 584 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999); *see also Davis*, 353 N.C. at 40-41, 539 S.E.2d at 269 ("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.").

Here, the jurors twice heard the term "life without parole" as one of the two sentencing alternatives in the trial court's preliminary instructions during jury *voir dire*. The jurors were questioned during *voir dire* with the term "life without parole" used numerous times as one of the sentencing alternatives. One juror even demonstrated an understanding of what the term meant under questioning by defendant as to what life imprisonment meant by stating, "I meant life in prison without any chance of getting out." Further, during closing arguments, the State and defense counsel frequently referred to "life without parole."

The trial court began sentencing phase instructions by saying:

> Members of the Jury, having found the defendants Antwaun Kyral Sims and Bryan Christopher Bell guilty of murder in the first degree, it is now your duty to recommend to the Court whether each defendant should be sentenced to death or life imprisonment. *A sentence of life imprisonment means a sentence of life without parole.* The Court has allowed the defendants' cases to be joined for this

> sentencing hearing. Even though the defendants are joined for this sentencing hearing, you must determine the sentence of each defendant individually.

(Emphasis added.) After this instruction, the trial court used the term "life imprisonment." Based on this instruction, the trial court instructed the jury in accordance with N.C.G.S. § 15A-2002 and with corresponding case law that a "sentence of life imprisonment means a sentence of life without parole." This instruction, in conjunction with the jury *voir dire* and the closing arguments of the parties in which the term "life without parole" was used numerous times, makes it clear that the jurors had no reasonable basis for misunderstanding the meaning of the term "life imprisonment."

Defendant also contends that the trial court erred by submitting the "Issues and Recommendation as to Punishment" form to the jury with sentencing alternatives of "death" or "life imprisonment" instead of "death" or "life imprisonment without parole." We disagree.

This Court has previously held that the "Issues and Recommendation as to Punishment" form need not describe the punishment as "life imprisonment without parole" when the trial court instructs the jury that life imprisonment means life without parole. *State v. Gainey*, 355 N.C. 73, 110-11, 558 S.E.2d 463, 487, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). The trial court's instructions regarding life imprisonment were in accordance with N.C.G.S. § 15A-2002, and the jurors were informed numerous times as to the meaning of "life imprisonment." Defendant's assignment of error on this issue is overruled.

Defendant's thirteenth assignment of error is that the trial court erred by failing to intervene and censor the prosecutor's sentencing proceeding closing argument when each juror was called upon by name to impose a sentence of death. Defendant argues that the prosecutor improperly appealed to the emotions of the jurors. Defendant concedes that he failed to object to this argument and therefore this Court is limited to reviewing this issue to determine whether the conduct was so grossly improper that the trial court erred in failing to intervene *ex mero motu* to correct the error. *State v. Sexton*, 336 N.C. 321, 348-49, 444 S.E.2d 879, 894-95, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

This Court has previously considered this issue and ruled against defendant's position. *See State v. Wynne*, 329 N.C. 507, 524-25, 406 S.E.2d 812, 821 (1991). Just as in those cases, the prosecutor here did not improperly appeal to the jurors' emotions when asking them to impose the death penalty. Rather, the prosecutor was reminding the jurors that they had earlier averred that they could and would follow the law if the State proved what was required to impose the death penalty. "[T]he 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." *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). Here, the prosecutor did nothing more than argue to the jurors that the State had proven its case and that the jurors should now impose the death penalty.

This argument is of a different nature than a defendant's emotional appeal to each individual juror to spare his life. *See State v. Holden*, 321 N.C. 125, 163, 362 S.E.2d 513, 536-37 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). A defendant's argument to each juror individually to spare his life is not based on the evidence presented at trial or the reasonable inferences that could be taken from it. *Id.* Defendant has failed to show that the prosecutor's sentencing arguments were grossly improper and that the trial court abused its discretion in failing to intervene *ex mero motu*. This assignment of error is overruled.

Defendant's fourteenth assignment of error is that the trial court erred in submitting the death penalty to the jury as a potential punishment because the death penalty violates provisions of the International Covenant on Civil and Political Rights, which this country ratified on 8 September 1992. We first note that defendant failed to make this objection before the trial court and has not properly preserved this issue for appellate review. Beyond that, this Court has previously considered, and affirmed, the constitutionality of our death penalty against the backdrop of the International Covenant on Civil and Political Rights. *See Williams*, 355 N.C. at 586, 565

S.E.2d at 658; *State v. Smith*, 352 N.C. 531, 566, 532 S.E.2d 773, 795 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). We see no reason to depart from our previous holdings in this regard. This assignment of error is overruled.

Defendant's fifteenth assignment of error is that the trial court erred in submitting the aggravating circumstance that this murder was especially heinous, atrocious, or cruel. Defendant first argues that N.C.G.S. § 15A-2000(e)(9) is unconstitutionally vague. However, we have previously considered and rejected this argument. *See e.g., State v. Garcia*, 358 N.C. 382, 424, 597 S.E.2d 724, 753 (2004); *State v. Roache*, 358 N.C. 243, 327, 595 S.E.2d 381, 434 (2004); *State v. Miller*, 357 N.C. 583, 601, 588 S.E.2d 857, 869 (2003), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d ___, 72 U.S.L.W. 3768 (2004); *State v. Haselden*, 357 N.C. 1, 26, 577 S.E.2d 594, 610, *cert. denied*, ___ U.S. ___, 157 L. Ed. 2d 382 (2003). We see no reason to depart from our previous holdings as to this issue.

Defendant additionally argues that the trial court erred in submitting the (e)(9) aggravating circumstance because it was unsupported by the evidence. We disagree.

We have previously identified three types of murders which warrant submission of the (e)(9) aggravating circumstance. *See 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). One type includes those killings that are physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *judgment vacated on other grounds*,

488 U.S. 807, 102 L. Ed. 2d 18 (1988). Another type includes those killings involving psychological torture where the victim is left to 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). The final type includes those killings that "demonstrate[] 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.

When determining whether it is proper to submit the (e)(9) aggravating circumstance, evidence must be considered in the light most favorable to the State and every reasonable inference must be drawn in its favor. *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).

In the present case, the victim, an eighty-nine year old woman, was kidnapped from her own home, repeatedly beaten, and placed in the trunk of her own car to await most certain death. The victim fought to free herself from the trunk of her car, only to have the trunk lid repeatedly slammed down upon her. The victim was trapped in her car for hours, helpless and obviously in fear for her life. She struggled and fought for her life, ultimately losing the fight and dying alone in the trunk of her own car, which defendant had set on fire.

After reviewing the evidence presented at trial, in the light most favorable to the State, we conclude that there was substantial evidence for the jury to conclude that the victim was subjected to both physical and psychological torture beyond that

present in most first-degree murders. Therefore, the trial court did not err in submitting the (e)(9) aggravating circumstance. This assignment of error is overruled.

Defendant's sixteenth assignment of error is that the trial court erred in failing to dismiss defendant's murder indictment because the indictment failed to specifically allege each element of first-degree murder. This Court has repeatedly held contrary to defendant's position. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). We have considered defendant's argument on this issue and find no reason to depart from our previous holdings. This assignment of error is overruled.

Defendant's seventeenth assignment of error is that the trial court committed plain error by instructing the jury, according to the pattern jury instructions, that unanimity was required for any answer to Issues I, III, and IV on the "Issues and Recommendation as to Punishment" form. As to Issue I, the trial court instructed the jury that it must be unanimous in its findings regarding the existence of aggravating circumstances. As to Issue III, the trial court instructed the jury that it must be unanimous in its decision as to whether the mitigating circumstances found were insufficient to outweigh the aggravating circumstances found by the jury. Finally, as to Issue IV, the

trial court instructed the jury that if it unanimously determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, it must then be unanimous in its decision as to whether the aggravating circumstances were sufficient to impose the death penalty. This Court has previously considered arguments regarding these jury instructions and has held contrary to defendant's position. *See State v. DeCastro*, 342 N.C. 667, 467 S.E.2d 653, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996); *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996); *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). We have considered defendant's argument on this issue and find no reason to depart from our previous holdings. This assignment of error is overruled.

Defendant's eighteenth assignment of error is that the trial court erred by instructing the jury, according to the pattern jury instructions, that it had a duty to recommend a death sentence if it determined that mitigating circumstances were insufficient to outweigh aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant the death penalty. This Court has previously held the pattern jury instruction at issue to be constitutional. *See State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995); *State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 323-24, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). We have considered

defendant's argument and see no reason to depart from our previous holdings. This assignment of error is overruled.

Defendant's nineteenth assignment of error is that the trial court erred by instructing the jury regarding defendant's burden of proof on mitigating circumstances and argues that the instruction was unconstitutionally vague due to the use of the term "satisfy." This Court has previously considered this argument and held contrary to defendant's position. *See State v. Payne*, 337 N.C. 505, 532-33, 448 S.E.2d 93, 109 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995); *Skipper*, 337 N.C. at 58, 446 S.E.2d at 284. We have considered defendant's argument and see no reason to depart from our prior holdings. This assignment of error is overruled.

Defendant's twentieth assignment of error is that the trial court erred by instructing the jury that it was to determine whether factually proven nonstatutory mitigating circumstances had actual mitigating value. Defendant contends that such an instruction allows the jury to refuse to consider mitigating evidence in violation of the constitutional requirement that a sentencer consider and give effect to all mitigating evidence. However, nonstatutory mitigating circumstances, in and of themselves, do not have mitigating value as a matter of law. *State v. Lee*, 335 N.C. 244, 292, 439 S.E.2d 547, 572, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). This Court has previously held that such an instruction to the jury does not violate the Constitution. *See State v. Robinson*, 336 N.C. 78, 117-18, 443 S.E.2d 306, 325 (1994), *cert. denied*,

513 U.S. 1089, 130 L. Ed. 2d 650 (1995); *State v. Hill*, 331 N.C. 387, 417-18, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). We have considered defendant's argument on this issue and see no reason to depart from our earlier holdings. This assignment of error is overruled.

Defendant's twenty-first assignment of error is that the trial court erred by instructing the jury, according to the pattern jury instructions, on a definition of aggravation that was unconstitutionally broad. This Court has previously considered this issue and ruled against defendant's position. *See Lee*, 335 N.C. at 288-89, 439 S.E.2d at 570-71; *State v. Hutchins*, 303 N.C. 321, 350-51, 279 S.E.2d 788, 806-07 (1981). We have considered defendant's argument and see no reason to depart from our earlier holdings. This assignment of error is overruled.

Defendant's twenty-second assignment of error is that the trial court erred in instructing the jury as to Issues III and IV on the "Issues and Recommendation as to Punishment" form that each juror "may" consider mitigating circumstances found to exist in Issue II. Defendant argues that these instructions made consideration of proven mitigation discretionary rather than mandatory. This Court has previously ruled that such instructions are not erroneous. *See Gregory*, 340 N.C. at 418-19, 459 S.E.2d at 668-69; *Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569-70. We have considered defendant's arguments and see no reason to depart from our prior holdings. This assignment of error is overruled.

Defendant's twenty-third assignment of error is that the trial court erred by instructing the jury that each juror could only consider at Issues III and IV the mitigating circumstances which that particular juror had found at Issue II. Defendant argues that this instruction unconstitutionally precluded the full and free consideration of mitigating evidence. This Court has previously considered this argument and ruled against defendant's position. *See Robinson*, 336 N.C. at 120-21, 443 S.E.2d at 326-27; *Lee*, 335 N.C. at 287, 439 S.E.2d at 569-70. We have considered defendant's arguments and see no reason to depart from our prior holdings. This assignment of error is overruled.

Defendant's twenty-fourth assignment of error is that the North Carolina death penalty statute is vague and overly broad, unconstitutionally applied, and cruel and unusual punishment. This Court has consistently held that North Carolina's capital sentencing statute, N.C.G.S. § 15A-2000, is constitutional on its face and as applied. *See State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We have reviewed defendant's arguments and find no reason to depart from our prior holdings. This assignment of error is overruled.

Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury and upon

which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2003).

After a thorough review of the record on appeal, briefs, and oral arguments of counsel, we conclude that the evidence fully supports the aggravating circumstances 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 factor. We therefore turn to our final statutory duty of proportionality review.

We conduct a proportionality review "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. In doing so, we must look at both the defendant and the crime. *State v. Watts*, 357 N.C. 366, 379, 584 S.E.2d 740, 750 (2003), *cert. denied*, ___ U.S. ___, 158 L. Ed. 2d 370 (2004). In the present case, defendant was found guilty of first-degree murder, first-degree kidnapping, and burning of personal property. Following a capital sentencing proceeding, the jury found the existence of five aggravating circumstances: (1) defendant had been previously convicted of a felony involving the use or threat of violence, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); (3) the murder was committed while

defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); (4) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (5) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted five statutory mitigating circumstances to the jury, including the "catchall" statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). However, the jury found only two statutory mitigating circumstances to exist: that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7). The trial court additionally submitted ten nonstatutory mitigating circumstances, of which the jury found six to exist: (1) a lack of adequate role modeling during defendant's formative years contributed to defendant's acceptance of peer pressure in forming his opinions and shaping his behavior; (2) defendant was intoxicated, reducing his ability to make appropriate judgments; (3) defendant has a desire to correct his deficiencies and make a positive contribution to society in the future; (4) defendant was negatively affected as a young teen by the family trauma caused by his father; (5) defendant had a chaotic and unstable home life lacking in parental guidance; and (6) defendant changed and began acting tough when his father entered into his life.

We begin our proportionality review by comparing this case to the eight cases where this Court has determined the

sentence of death to be disproportionate. *See State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *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 *Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). After careful review, we conclude that this case is not substantially similar to any case in which this Court has previously found the death penalty disproportionate.

In conducting a proportionality review, we must also compare this case with prior cases where this Court has found the death penalty to be proportionate. *Haselden*, 357 N.C. at 31, 577 S.E.2d at 613. First, defendant was convicted on the basis of malice, premeditation and deliberation and under the felony murder rule. "'The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.'" *Id.* at 30, 577 S.E.2d at 612 (quoting *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). This Court has repeatedly noted that "'a finding of first-degree murder based on theories of premeditation and deliberation and of felony murder is significant.'" *State v. Carroll*, 356 N.C. 526, 554-55, 573

S.E.2d 899, 917 (2002) (quoting *Bone*, 354 N.C. at 22, 550 S.E.2d at 495), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003).

Further, defendant was convicted of two additional crimes against the victim: first-degree kidnapping and burning of personal property. The jury found five aggravating circumstances in this case, including that the murder was committed during the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). This Court has previously determined that the (e)(5) and (e)(9) aggravating circumstances are sufficient, standing alone, to sustain a death sentence. *See Haselden*, 357 N.C. at 30, 577 S.E.2d at 612; *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).

Upon comparison of the present case with those in which we have previously conducted a proportionality review, we conclude that this case is more similar to cases in which this Court has found the sentence of death proportionate than to those in which this Court has found the sentence of death disproportionate.

The inquiry into proportionality does not, however, end here. The similarities between this case and prior cases in which a sentence of death was found proportionate "merely serves as an initial point of inquiry." *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). The final decision of whether a death

sentence is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. Therefore, having thoroughly reviewed the entire record in this matter, and based upon the characteristics of defendant and his crime, we cannot conclude as a matter of law that the sentence of death in this case is disproportionate or excessive.

Accordingly, we hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ANTWAUN KYRAL SIMS

NO. COA02-1262

Filed: 18 November 2003

1. Evidence--rag with victim's blood and defendant's semen--knowledge--active participant in crime

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning personal property case by admitting into evidence a rag found in the back seat area of the victim's Cadillac and the scientific analysis of that rag which concluded that the rag contained the victim's blood as well as traces of defendant's semen, because: (1) the evidence was not duplicative of the other evidence placing defendant in the Cadillac when it was used to show that defendant used the rag to wipe down the backseat of the car to wipe away the victim's blood, that defendant had knowledge of the kidnapping and helped cover it up, and that defendant was an active participant in the series of events; and (2) the evidence was not unfairly prejudicial when the trial court instructed the jury that the rag was not to be used as evidence of a sexual assault when there was no evidence of sexual assault.

2. Criminal Law--prosecutor's argument--rag contained victim's blood and traces of defendant's semen

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning personal property case by failing to sustain defendant's objection to the State's reference during its opening and closing arguments to evidence of a rag found in the back seat area of the victim's Cadillac and the scientific analysis of that rag which concluded that the rag contained the victim's blood as well as traces of defendant's semen, because: (1) the State used the evidence only to argue that defendant knew the victim had been kidnapped and that he participated in the events; (2) the trial court instructed the jury not to consider the evidence of the presence of semen on the rag as evidence of sexual assault; and (3) the State referred to the rag merely in a factual manner during opening statements.

3. Criminal Law--prosecutor's argument--comparing defendant to an animal--acting in concert theory

Although the trial court erred in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State during closing arguments to improperly compare defendant to a hyena and an animal of the African plain and to state that "he who hunts with the pack is responsible for the kill" when the reference went beyond a simple analogy to help explain the theory of acting in concert, the improper statements did not deny defendant due process and entitled him to a new trial because: (1) the State did not misstate the evidence or the law in making its argument; (2) the trial court instructed the jury that closing arguments are not evidence; and (3) there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged.

4. Criminal Law--prosecutor's argument--defendant a devil

The trial court did not commit prejudical error in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State to contend during closing arguments that "if you are going to try the devil, you have to go to hell to get your witnesses," because: (1) the Court of Appeals and our Supreme Court have already concluded that almost exactly this same statement was not reversible error; and (2) although in some contexts such a

statement by the prosecutor may be inappropriate, defendant is not entitled to a new trial given the overwhelming evidence of defendant's guilt.

Judge WYNN concurring.

Appeal by defendant from judgments entered 24 August 2001 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Court of Appeals 19 August 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Mary March Exum for defendant-appellant.

McGEE, Judge.

Antwaun Kyral Sims (defendant) was convicted of first-degree murder, first-degree kidnapping, and burning personal property on 24 August 2001. The trial court found defendant to have a prior record level II for the latter two offenses. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, to a minimum term of 100 months and a maximum term of 129 months imprisonment for first-degree kidnapping, and to a minimum term of eight months and a maximum term of ten months imprisonment for burning of personal property. Defendant appeals.

The State's evidence at trial tended to show that defendant was with Chad Williams (Williams) and Chris Bell (Bell) at the traffic circle in Newton Grove, North Carolina on 3 January 2000, when Bell said that the group needed to rob someone to get a car so Bell could leave the state to avoid a probation violation hearing. Defendant agreed to assist Bell. Defendant, Bell, and Williams observed Elleze Kennedy (Ms. Kennedy), an eighty-nine-year old

woman, leaving the Hardee's restaurant across from the traffic circle around 7:00 p.m. Ms. Kennedy got into her Cadillac and drove to her home a few blocks away. Defendant, Bell, and Williams ran after Ms. Kennedy's car, cutting across several yards until they reached Ms. Kennedy's home. Bell approached Ms. Kennedy in her driveway with a BB pistol and demanded Ms. Kennedy's keys. Ms. Kennedy began yelling and Bell hit her in the face with the pistol, knocking her to the ground. Bell told defendant and Williams to help him find the keys to Ms. Kennedy's Cadillac. After rifling through Ms. Kennedy's pockets, Williams found the keys on the carport and handed them to defendant who agreed to drive.

Bell told defendant and Williams to move Ms. Kennedy to the back seat of the Cadillac. When defendant and Williams attempted to do so, Ms. Kennedy bit Williams on the hand. Williams hit Ms. Kennedy in the jaw, and with defendant's help, put her in the back seat. Ms. Kennedy kept asking Bell where he was taking her. Bell responded by telling her to shut up and striking her in the face several times with the pistol. Ms. Kennedy, who was now bleeding steadily, ceased struggling.

After driving to Bentonville Battleground, defendant, Bell, and Williams put Ms. Kennedy, who was unconscious at the time, in the trunk of the Cadillac. While driving around, Bell told defendant to turn up the radio so they could not hear Ms. Kennedy in the trunk. Defendant, Bell, and Williams drove to the Chicopee Trailer Park in Benson, North Carolina, arriving at Mark Snead's (Snead) trailer around 8:30 p.m. Defendant, Bell, and Williams told Snead that the Cadillac was a rental car and that the three of

them were driving to Florida. Defendant, Bell, and Williams went inside Snead's trailer and all smoked marijuana. Defendant, Bell, and Williams later drove to the other side of the trailer park to visit Pop and Giovanni Surles, also telling them that the Cadillac was a rental car.

While at the Chicopee Trailer Park, Williams told defendant and Bell that he was not going to travel in a stolen car to Florida with an abducted woman in the trunk. Williams got out of the Cadillac and began to walk back to Snead's trailer. Defendant and Bell drove away but later returned to Snead's trailer with the music in the Cadillac turned up very loud. Defendant and Bell told Williams that they had let Ms. Kennedy out of the trunk at a McDonald's and that Ms. Kennedy was now talking to the police. Williams then got back in the Cadillac and the three drove to defendant's brother's house. Defendant stated that he wanted to wipe up Ms. Kennedy's blood from the back seat of the Cadillac. Defendant went into his brother's house and returned with a damp rag, which he used to wipe down the backseat and backdoor where Ms. Kennedy had originally been held before she was placed in the trunk.

Defendant drove Williams and Bell to a nearby truck stop where Bell took four dollars from Ms. Kennedy's pocketbook, which he gave to defendant to buy gasoline for the Cadillac. Bell told defendant to leave the car running. Nevertheless, defendant turned the car off. While the car was turned off, Williams heard scuffling in the trunk and confronted defendant and Bell about Ms. Kennedy; however, defendant and Bell laughed, again saying they had dropped Ms.

Kennedy off at McDonald's.

As they drove to Fayetteville, Bell threw the BB pistol and Ms. Kennedy's credit cards out of the window of the Cadillac. Defendant, Bell, and Kennedy parked at a motel and were opening the trunk to let Ms. Kennedy out when a police car drove by. They closed the trunk, got back in the Cadillac, and drove to a nearby housing project where defendant and Bell reopened the trunk. Williams testified that it appeared Ms. Kennedy attempted to get out of the trunk but that defendant slammed the trunk back down.

Defendant, Bell, and Williams decided to return to Newton Grove to find the scope from the BB pistol which was lost during the abduction of Ms. Kennedy. Upon arriving at Ms. Kennedy's home, Williams observed blood on the concrete slab, as well as a pair of glasses and a woman's shoe. Bell searched Ms. Kennedy's yard for the scope but did not find it; he picked up the woman's shoe and put it in the Cadillac.

While discussing what to do with Ms. Kennedy, Bell told Williams that he knew a place to put her, but that defendant knew of an even better place. Defendant, Bell, and Williams drove to a field with some trees, located near defendant's brother's house. The three opened the trunk and Williams saw Ms. Kennedy moving around in the trunk and moaning. Williams asked if they could let her go, but Bell replied, "Man, I ain't trying to leave no witnesses. This lady done seen my face. I ain't trying to leave no witnesses." Bell asked defendant for a lighter to burn Bell's blood-covered jacket. Defendant gave Bell his lighter and Bell set the jacket on fire and threw it into the Cadillac. Bell stayed to

watch the fire, but defendant and Williams walked back to defendant's brother's house to watch television. When Bell returned to the house, he first joked that he had let Ms. Kennedy out of the car and that she had driven the Cadillac away; however, he informed defendant and Williams that he had actually just stayed to watch the jacket burn. The three slept at defendant's brother's house. The next morning Bell told defendant to go back to the car and confirm that Ms. Kennedy was dead, and that if she was not, defendant should finish burning the Cadillac. Defendant returned and told Bell and Williams that Ms. Kennedy was dead and that all of the windows in the Cadillac were smoked. Bell did not believe defendant and called Ryan Simmons (Simmons) to come and drive them to the Cadillac. Defendant and Bell wiped the car down to remove any fingerprints, and Williams, responding to an inquiry from Simmons, confirmed the Cadillac was indeed stolen.

Simmons drove defendant, Bell, and Williams to Bell's house for a change of clothes and a few video games, and then drove the three back to defendant's brother's house. Simmons came back to pick up Bell and Williams a couple of days later; however, before leaving, Bell told Williams and defendant to lie if the police questioned them about the murder.

Ms. Kennedy's Cadillac was found by law enforcement the morning after her abduction. Investigators discovered Ms. Kennedy's body in the trunk. They made castings of footprints found in the area of the abandoned Cadillac. The castings were later compared to, and matched, shoes taken from defendant. Investigators identified fibers consistent with Ms. Kennedy's

clothing on clothes seized from Williams, and identified Ms. Kennedy's blood on clothes worn by Williams and Bell and on Bell's burned jacket. Investigators recovered a red cloth from the backseat floorboard, which was later identified as the one defendant had used to wipe down the back seat of the Cadillac. Tests of the cloth showed traces of defendant's semen and Ms. Kennedy's blood. Police found two hairs in the backseat area of the Cadillac, one of which was later determined to be defendant's and the other Bell's. Police also matched latent fingerprints found on the Cadillac with prints taken from defendant and Bell.

The police concluded that the fire was set intentionally and burned the rear of the front seats and the armrest before it extinguished from a lack of oxygen, leaving soot inside the passenger compartment as well as in the trunk.

Upon investigating the area outside Ms. Kennedy's residence, investigators discovered a large puddle of blood in the driveway, a pair of eyeglasses, a dental partial, a blue button, a walking cane, a partial shoe impression, and blood smear marks on the driveway consistent with a dragging motion.

Forensic pathologist Dr. Falpy Carl Barr (Dr. Barr) testified that he conducted Ms. Kennedy's autopsy on 5 January 2000. Dr. Barr noted blunt force injuries to Ms. Kennedy's face, including an injury to the bridge of her nose, fractures of the small bones on either side of her nose, as well as abrasions above each eyebrow, bruises to her face, neck, and chest area, and injuries to her hands. Dr. Barr testified that Ms. Kennedy was struck multiple times with a weapon, leaving marks consistent with a pellet gun,

and that the other bruising to her torso could have been the result of having been kicked. Dr. Barr also testified that Ms. Kennedy's dental bridge was missing and that several teeth were loose. Dr. Barr testified that there was no evidence of sexual assault of Ms. Kennedy. Dr. Barr testified that because of the extent of soot in her trachea and lungs he believed that she was alive and breathing at the time the fire took place in the vehicle; however, because of Ms. Kennedy's elevated carbon monoxide level, Dr. Barr came to the conclusion that Ms. Kennedy died as a result of carbon monoxide poisoning from a fire in the Cadillac.

Williams lied to the police about his involvement, and he claimed that defendant was not present at the initial attack on Ms. Kennedy; however, Williams ultimately confessed to his involvement and inculpated defendant and Bell. Williams pled guilty to first-degree murder, first-degree kidnapping, and assault with a deadly weapon inflicting serious injury. Williams testified at defendant's trial and was awaiting a capital sentencing hearing at the time.

Defendant presented testimony from several alibi witnesses who said defendant was at the Chicopee Trailer Park all day until dark on 3 January 2000. Dwayne Ricks testified that he gave defendant a ride to the Chicopee Trailer Park on the morning of 3 January 2000. Giovanni Surles testified that he spent the day with defendant at the Chicopee Trailer Park. Bessie Surles testified she saw defendant with Giovanni Surles at the trailer park into the evening. Brenda Surles testified that she saw her son, Giovanni Surles, walking with defendant in the early afternoon and again in

the early evening. Yolanda Peacock testified that she left the Chicopee Trailer Park at dark to go to the store to buy cigars for defendant, but that when she returned around 7:00 p.m. defendant was no longer there. Latisha Williams testified she saw defendant at the Chicopee Trailer Park in the afternoon, but that defendant left as it was getting dark. Latisha Williams further testified that Bell and Williams arrived in a Cadillac looking for defendant, and that when she saw the Cadillac again, defendant was in the Cadillac with Bell and Williams. Several of these alibi witnesses also testified that Bell and Williams arrived at the trailer park later in the evening driving a Cadillac and that defendant left with Bell and Williams in the Cadillac. Brenda Surles also testified that it takes about twenty-five to thirty minutes to drive from the Chicopee Trailer Park to the Newton Grove traffic circle.

Defendant also presented testimony of Antowean Darden (Darden) that Bell had approached Darden about renting a car, but Darden denied that he had seen defendant, Bell, or Williams at the Newton Grove traffic circle on the night of 3 January 2000. On cross-examination, Darden admitted that he named defendant, Bell, and Williams as possible suspects in the murder at a law enforcement roadblock on 4 January 2000. Defendant's girlfriend, Krystal Elliot, testified that Williams had called her from jail to tell her that defendant was not with Williams and Bell when they abducted Ms. Kennedy from her home.

Defendant has failed to put forth an argument in support of assignments of error one through six and twelve through twenty-two;

pursuant to N.C.R. App. P. 28(b)(6) we deem those assignments of error to be abandoned.

I.

[1] Defendant challenges the admission into evidence of a rag found in the back seat area of the Cadillac and the scientific analysis of this rag, which concluded that the rag contained Ms. Kennedy's blood as well as traces of defendant's semen. Defendant also contends that reference in the State's opening and closing arguments to the rag and to the traces of defendant's semen on the rag was error.

Defendant objected at trial to the admission of the rag and its scientific analysis, arguing that under N.C. Gen. Stat. § 8C-1, Rule 403, the probative value of the evidence was substantially outweighed by its prejudicial effect, by its possibility to mislead the jury, and by the cumulativeness of the evidence. Whether to exclude relevant evidence under N.C.G.S. § 8C-1, Rule 403 is in the trial court's discretion; we review the trial court's decision for an abuse of that discretion. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

Defendant argues that the rag and the analysis indicating the presence of defendant's semen and Ms. Kennedy's blood on the rag were duplicative evidence of defendant's presence in the Cadillac. Defendant contends the probative value of the evidence was minimal

because there was testimony by Williams that defendant was in the Cadillac, as well as physical evidence of defendant's fingerprints on the outside of the Cadillac, a head hair from defendant found in the Cadillac, and castings of defendant's footprints found around the Cadillac. We disagree.

Defendant's theory at trial was that although he was in the Cadillac, he joined Bell and Williams only after Ms. Kennedy had been kidnapped, that he was unaware of her kidnapping, and that he simply went along for the ride. Defendant's hair and fingerprints were found in the Cadillac and he stipulated that he was in the vehicle. This evidence is consistent with both defendant's theory that he just went along for the ride and with the State's theory that defendant actively participated. However, Williams' testimony indicated that defendant was an active participant in the events. Defendant attempted to discredit Williams' testimony. Williams testified that defendant went into defendant's brother's house and returned with a damp rag to wipe down the back seat because Ms. Kennedy's blood was on the seat. The fact that a rag, covered with Ms. Kennedy's blood, was found in the Cadillac is evidence that the seat was indeed wiped down with a rag. The traces of defendant's semen on the rag further corroborate Williams' testimony, because defendant's DNA in his semen tends to identify defendant as the person who obtained and used the rag to wipe away Ms. Kennedy's blood. Defendant's use of the rag to wipe down the backseat also tends to show defendant had knowledge of the kidnapping and, by helping to cover up the kidnapping, he was an active participant in the series of events. Thus we find there was indeed probative

value to the evidence, and that it was not simply duplicative of the other evidence placing defendant in the Cadillac.

Defendant also argues that despite any probative value the evidence may have had, it was substantially outweighed by the prejudice it created because of the inference that a sexual assault of Ms. Kennedy may have occurred due to the presence of semen on the rag. However, as the trial court stated several times, there was no evidence of sexual assault in the record, and the trial court instructed the jury that the rag was not to be used as evidence of a sexual assault given the fact that there was no other evidence that any such sexual assault occurred. Despite the fact that the State, out of the presence of the jury, contested the trial court's admonishment not to argue that the rag was evidence of a sexual assault, the State never made any such argument to the jury. We find that in the present case the probative value of the rag and the scientific analysis of the rag was not substantially outweighed by the danger of undue prejudice or misleading the jury. The trial court did not err in exercising its discretion in admitting the rag and the scientific analysis of the rag, which indicated the presence of defendant's semen.

[2] Defendant also cites as error the trial court's failure to sustain defendant's objection to the State's use of, in its closing argument, the evidence of the rag and the scientific analysis of the rag revealing the presence of defendant's semen and Ms. Kennedy's blood. "The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain

the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). In order to show an abuse of discretion, defendant must show that the trial court's failure to sustain defendant's objection "'could not have been the result of a reasoned decision.'" *Id.* (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (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), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d. 775 (2001) (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)).

As discussed above, the rag and the scientific analysis of the rag were properly admitted into evidence. The State used this evidence in its closing argument to argue only that defendant knew Ms. Kennedy had been kidnapped and that he participated in the events. Additionally, as discussed above, the trial court instructed the jury not to consider the evidence of the presence of semen on the rag as evidence of sexual assault. The trial court did not abuse its discretion by allowing the State in its closing argument to comment on the rag and the scientific analysis of the rag, including the presence of defendant's semen.

Defendant also challenges the trial court's failure to sustain defendant's objection to the mention of the semen in the State's opening statement. The district attorney, in the pertinent portion of the State's opening statement, said as follows:

> The evidence will show, members of the jury, that at least five types of evidence will

> prove that [defendant] and Bell were, in fact, in Ms. Kennedy's car. Number one, you will have fingerprints; two, foot tracks; three, hair; four, you will have blood evidence; five, semen.

Defendant objected to this statement and the trial court overruled the objection. The district attorney continued, "DNA evidence will prove the red washcloth – found in the backseat of Ms. Kennedy's car had [defendant's] semen on it," to which defendant objected and was overruled.

Defendant has not shown how it was error to allow the State to make these statements concerning the rag and the semen found on the rag in its opening statement. Defendant argues that the State promised not to mention the rag in its opening statement; however, the transcript reveals this contention to be incorrect. The State simply stated that as to the rag, the State would refer to it as a factual matter, not in an argumentative fashion, in its opening statement. Since the evidence of the rag and the scientific analysis of the rag was properly admitted by the trial court, it was not improper for the State to refer to the rag in a factual manner as it did during its opening statement. The trial court did not err in overruling defendant's objections to the mention of the rag in the State's opening statement. We overrule defendant's first argument.

II.

[3] Defendant assigns error to the following portion of the State's closing argument:

> He who hunts with the pack is responsible for the kill. Each of you have seen those nature shows: Discovery Channel, Animal Planet. You've seen where a pack of wild dogs

> or hyenas in a group attack a herd of wildebeests, and they do it as a group.
>
> When they take that wildebeest, one of them might be the one that chases after it and grabs the leg of the wildebeest, slows them down. Another one might be out fending off the wildebeests that are coming and making their counterattacks. You have another that will be the one that actually grasps its jaws about the throat of the wildebeest, ultimately, crushing the throat and taking the very life out of that animal.
>
> He who hunts with the pack is responsible for the kill. Each and every one of those animals are responsible for that kill. Each and every one of those animals will feast on the spoils of that kill. He who hunts with the pack is responsible for the kill.
>
> Just like the predators of the African plane [sic], Chad Williams, [defendant], and Christopher Bell stalked their prey. They chased after their prey. They attacked their prey. Ultimately, they fell their prey.
>
> Just like the predators of the African --

At that point in the State's closing argument defendant objected and asked to approach the bench. After discussion outside the presence of the jury, the trial court overruled defendant's objection that the State was referring to defendant as a hyena and an animal of the African plain; however, the trial court admonished the State to be very careful not to refer to defendant as an animal or to make any such inference. The State then continued its closing argument:

> Just like the animals in the African plane [sic], after having felled their victim, they dragged their victim away; and, finally, they killed their victim.
>
> . . .
>
> You know, in the wild kingdom, there is always an animal, just like human beings -

> think about it. You get a group of people together; there is always one person that makes the decision. We're going to go to this place. This is the one that decides what to do. You have the leader. . . .
>
> The same way in the animal world. Its called the alpha male, the dominant male. You all know that. You've seen that.
>
> Chad Williams was not the alpha male. Chad Williams was not and is not the dominant male. Do you know what? It doesn't matter. When you run with the pack, you are responsible for the kill.
>
> [Defendant] ran with the pack. He acted in concert with Christopher Bell and Chad Williams; and as a result, he . . . is guilty of these crimes.

The State argues that the use of the phrase, "he who hunts with the pack is responsible for the kill," is a long accepted explanation of the theory of acting in concert. The State cites *State v. Knotts*, 168 N.C. 173, 187, 83 S.E. 972, 979 (1914), where our Supreme Court used the phrase to help illustrate just such a legal theory. Then, in *State v. Lee*, our Supreme Court again addressed the use of this phraseology stating,

> [t]he isolated phraseology "[h]e who hunts with the pack is responsible for the kill," objected to by defendant, was intended as an illustrative statement of the law of conspiracy. It is highly unlikely that the statement was considered by the jury as anything other than an illustration of the law. When considered in the context in which it was used it had no prejudicial effect on the result of the trial and was therefore harmless.

Lee, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970).

In *State v. Cogdell*, 74 N.C. App. 647, 652, 329 S.E.2d 675, 678-79 (1985), this Court confronted the same language in the context of jury instructions. This Court held, basing our decision

on *Lee*, 277 N.C. 205, 176 S.E.2d 765, that the defendant's counsel in that case did not act in an incompetent manner by failing to object to the phrase included in the jury instructions; and further held, with little discussion, that it was not reversible error for the trial court to give such an instruction. *Cogdell*, 74 N.C. App. at 652, 329 S.E.2d at 678-79.

As discussed above, in isolation the statement, "he who hunts with the pack is responsible for the kill," has been held not to be reversible error. Further, in at least one case, our Supreme Court has used almost identical language as an explanation for the theory of acting in concert. *Knotts*, 168 N.C. at 187, 83 S.E. at 979. However, the district attorney in the present case went beyond simply making an isolated statement using the "he who hunts with the pack" analogy. In the present case, although the district attorney did not specifically call defendant, Williams, and Bell "wild dogs or hyenas" hunting on the "African plain," the association was sufficiently close to lead to such an inference. This is especially true, given the fact that defendant is African-American, and in light of multiple references to hunting on the "African plain," even after the trial court warned the district attorney to be careful in his references. The district attorney's further references to Bell as the "alpha male" and his references to defendant and Williams as followers in the pack, continued this close association with the animal kingdom, moving beyond a simple analogy to help explain the theory of acting in concert.

In the present case, we find these arguments by the district attorney to be improper. However, in order for defendant to be

entitled to a new trial, the district attorney's statements must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. McCollum*, 334 N.C. 208, 223-24, 433 S.E.2d 144, 152 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)). In *McCollum*, our Supreme Court found that improper statements made during the State's closing arguments did not deny the defendant due process, stating:

> The prosecutor's arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant . . . submitted to the jury was heavy . . . . All of these factors reduced the likelihood that the jury's decision was influenced by these portions of the prosecutor's closing argument. Therefore, the prosecutor's closing argument did not deny the defendant due process.

McCollum, 334 N.C. at 224-25, 433 S.E.2d at 152-53. This analysis is similarly applicable to the present case. The State did not misstate the evidence or the law in making its argument. The trial court similarly instructed the jury that closing arguments are not evidence. In addition, there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged. We find that, although improper, the district attorney's comments did not deny defendant due process entitling him to a new trial. This assignment of error is overruled.

III.

[4] Defendant also assigns error to the district attorney's statement during closing argument that, "If you are going to try the devil, you have to go to hell to get your witnesses." This assignment of error is without merit. Our Supreme Court, as well as this Court, have held that practically the same exact statement made during the State's closing argument was not reversible error. *See State v. Sidden*, 347 N.C. 218, 229, 491 S.E.2d 225, 230 (1997), *cert. denied*, 523 U.S. 1097, 140 L. Ed. 2d 797 (1998) (noting that, even though the prosecutor in effect said the defendant qualified as the devil, because of the context of the statement, "the jury could [not] have thought the prosecutor believed the defendant was the devil" but that he was simply a "bad man"); *State v.* Willis, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992) (noting that "the district attorney was [not] characterizing [the defendant] as the devil," but merely "used this phrase to illustrate the type of witnesses which were available in a case such as this one"); *State v. Hudson*, 295 N.C. 427, 435-37, 245 S.E.2d 686, 692 (1978) (noting the prosecutor's argument which included a similar statement, was "within the recognized bounds of propriety"); *State v. Joyce*, 104 N.C. App. 558, 573-74, 410 S.E.2d 516, 525 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992) (noting this phraseology has been held not to constitute prejudicial error); *State v. Rozier*, 69 N.C. App. 38, 58, 316 S.E.2d 893, 906, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984) ("Taken in context, the prosecutor's metaphor falls short of the direct name-calling, or vituperative hyperbole, which has been found to be reversible error in other cases.") (citations omitted). Despite the fact that in some contexts such

a statement by a district attorney may be inappropriate, given the overwhelming evidence of defendant's guilt, defendant has not shown how the district attorney's statement constituted prejudicial error meriting a new trial. This assignment of error is overruled.

No error in part; no prejudicial error in part.

Judge HUDSON concurs.

Judge WYNN concurs with a separate opinion.

WYNN, Judge concurring.

I agree with the majority's holding that no prejudicial error occurred in the proceedings below; however, I write separately because I believe the trial court abused its discretion in admitting evidence regarding the presence of semen on a rag.

Under N.C. Gen. Stat. § 8C-1, Rule 403, Defendant objected to the admittance of any evidence regarding the semen and its DNA analysis and to the mentioning of said evidence in the opening and closing statements. Rule 403 allows discretionary exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendant contends the probative value of the rag and the analysis indicating the presence of Defendant's semen was minimal, was substantially outweighed by unfair prejudice, and constituted duplicative evidence of his presence in the car. The majority opinion holds that even though Defendant stipulated to his presence in the vehicle, the presence of semen on the rag tended to indicate

that Defendant was the person who used the rag to wipe down the backseat and was therefore an active participant in the kidnapping and murder. Therefore, according to the majority, the admittance of this evidence was not an abuse of discretion. I respectfully disagree.

The pertinent facts indicate Christopher Bell, Chad Williams, and Defendant kidnapped Ms. Kennedy, stole her car, drove the car to a place designated by Bell, caused Ms. Kennedy to bleed by pistol-whipping her, and placed her in the trunk. Sometime thereafter, the State's evidence also tended to show Defendant drove to his brother's home, obtained a rag, and wiped Ms. Kennedy's blood from the back seat.

Scientific analysis revealed the rag contained Ms. Kennedy's blood and semen belonging to either Defendant or Defendant's brother, who was not a party to this crime. The tests did not indicate how long the semen had been present on the rag. No evidence of semen was located on Ms. Kennedy's clothing or her person and there was no evidence of a sexual assault.

The State argued that the presence of Defendant's semen on the rag indicated Defendant wiped up the blood and was therefore an active participant in the kidnapping and murder. However, under these facts, the presentation of any semen evidence was unnecessary as there was more than sufficient evidence of Defendant's presence and active participation in this crime. Indeed, Defendant stipulated to his presence in the car. Moreover, other evidence indicates that Defendant drove the car, chose the abandonment location near his brother's home, obtained the rag used to wipe up

the blood, and returned to the scene of the crime in order to cover up his fingerprints. The evidence also indicates the three men spent the night of the kidnapping and murder and several days thereafter at Defendant's brother's home. The day after the murder, the three men returned to the abandoned car in order to cover up any evidence of their crime. Under the facts of this case, the probative value of the semen evidence was minimal.

On the other hand, the prejudicial effect of the semen evidence was significant. The presence of semen on the rag indicates sexual activity occurred at some point. However, when such activity, by whom such activity, and with whom such activity occurred is uncertain. No semen was found on Ms. Kennedy's person or clothing and there was no other evidence of sexual assault. The rag belonged to Defendant's brother and was obtained from Defendant's brother's home. The DNA analysis could not exclude Defendant's brother as the source of the semen and the analysis could not indicate how long the semen had been present on the rag. Nevertheless, the State argued several times to the Court that the jury should be allowed to infer the men kidnapped Ms. Kennedy for the purpose of sexual gratification. In the absence of any evidence of sexual assault and given the overwhelming evidence of Defendant's presence in the car and active participation in this crime, the probative value of the semen evidence was substantially outweighed by unfair prejudice and constituted duplicative evidence. Accordingly, I conclude the trial court abused its discretion in admitting the semen evidence and allowing the State to mention said evidence in its opening and closing arguments.

However, the overwhelming evidence of Defendant's presence in the car and active participation in the crime renders the trial court's abuse of discretion non-prejudicial. *See State v. Patterson,* 103 N.C. App. 195, 205-06, 405 S.E.2d 200, 207 (1991)(stating that "under G.S. 15A-1443(a) a defendant must demonstrate that there is a reasonable possibility that had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises). Moreover, the trial court gave a curative instruction limiting jury consideration of the evidence to that of identification of the perpetrator and corroboration of the State's evidence and specifically prohibited the use of such evidence as proof of sexual assault of the victim. Accordingly, I would hold the trial court committed non-prejudicial error.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-45

Filed: 7 August 2018

Onslow County, Nos. 01 CRS 2993–95

STATE OF NORTH CAROLINA

v.

ANTWAUN SIMS

Appeal by defendant from order entered 21 March 2014 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 17 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

BRYANT, Judge.

Where the trial court complied with the statutory requirements in determining that life imprisonment without parole was warranted for defendant, we hold the sentence is not in violation of the Eighth Amendment. Where the trial court properly made ultimate findings of fact on each of the *Miller* factors as set forth in section 15A-1340.19B(c), we hold that the trial court did not abuse its discretion in weighing those factors and concluding that life imprisonment without parole was appropriate in defendant's case.

In the instant case, the trial court incorporated the facts as articulated by this Court in *State v. Sims*, 161 N.C. App. 183, 184–189, 588 S.E.2d 55, 57–60 (2003), into its order from which defendant appeals.[1] The facts are as follows:

> [D]efendant [Antwaun Sims, who was seventeen at the time of the offense,] was with Chad Williams . . . and Chris Bell . . . in Newton Grove, North Carolina on 3 January 2000, when Bell said that the group needed to rob someone to get a car so Bell could leave the state to avoid a probation violation hearing. Defendant agreed to assist Bell. Defendant, Bell, and Williams observed Elleze Kennedy (Ms. Kennedy), an eighty-nine-year old woman, leaving the Hardee's restaurant . . . around 7:00 p.m. Ms. Kennedy got into her Cadillac and drove to her home a few blocks away. Defendant, Bell, and Williams ran after Ms. Kennedy's car . . . until they reached [her] home. Bell approached Ms. Kennedy in her driveway with a BB pistol and demanded Ms. Kennedy's keys. Ms. Kennedy began yelling and Bell hit her in the face with the pistol, knocking her to the ground. Bell told defendant and Williams to help him find the keys to Ms. Kennedy's Cadillac. After rifling through Ms. Kennedy's pockets, Williams found the keys on the carport and handed them to defendant who agreed to drive.
>
> Bell told defendant and Williams to move Ms. Kennedy to the back seat of the Cadillac. . . . Ms. Kennedy kept asking Bell where he was taking her. Bell responded by telling her to shut up and striking her in the face several times with the pistol. . . .
>
> After driving, . . . defendant, Bell, and Williams put Ms. Kennedy, who was unconscious at the time, in the trunk of the Cadillac. . . .
>
> . . . .
>
> [Later], Williams told defendant and Bell that he was not going to travel in a stolen car to Florida with an

[1] This Court has previously summarized the facts of this case for defendant's direct appeal in *State v. Sims*, 161 N.C. App. 183, 184–189, 588 S.E.2d 55, 57–60 (2003).

abducted woman in the trunk. . . .

. . . .

Williams asked if they could let her go, but Bell replied, "Man, I ain't trying to leave no witnesses. This lady done seen my face. I ain't trying to leave no witnesses." Bell asked defendant for a lighter to burn Bell's blood-covered jacket. Defendant gave Bell his lighter and Bell set the jacket on fire and threw it into the Cadillac. Bell stayed to watch the fire, but defendant and Williams walked . . . to defendant's brother's house to watch television. . . . The next morning Bell told defendant to go back to the car and confirm that Ms. Kennedy was dead, and that if she was not, defendant should finish burning the Cadillac. Defendant returned and told Bell and Williams that Ms. Kennedy was dead and that all of the windows in the Cadillac were smoked. . . .

. . . .

Ms. Kennedy's Cadillac was found by law enforcement the morning after her abduction. Investigators discovered Ms. Kennedy's body in the trunk. They made castings of footprints found in the area of the abandoned Cadillac. The castings were later compared to, and matched, shoes taken from defendant. . . . Investigators recovered a red cloth from the backseat floorboard, which was later identified as the one defendant had used to wipe down the backseat of the Cadillac. Tests of the cloth showed traces of defendant's semen and Ms. Kennedy's blood. Police found two hairs in the backseat area of the Cadillac, one of which was later determined to be defendant's and the other Bell's. Police also matched latent fingerprints found on the Cadillac with prints taken from defendant and Bell.

. . . .

Forensic pathologist Dr. Falpy Carl Barr (Dr. Barr)

> testified that he conducted Ms. Kennedy's autopsy on 5 January 2000. . . . Dr. Barr testified that Ms. Kennedy was struck multiple times with a weapon, leaving marks consistent with a pellet gun . . . . Dr. Barr testified that because of the extent of the soot in her trachea and lungs he believed that she was alive and breathing at the time the fire took place in the vehicle; however, because of Ms. Kennedy's elevated carbon monoxide level, Dr. Barr came to the conclusion that Ms. Kennedy died as a result of carbon monoxide poisoning from a fire in the Cadillac.

Id.

Defendant was arrested and later indicted for first-degree murder, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and burning personal property. On 14 August 2001, defendant was tried capitally in the Criminal Session of Onslow County Superior Court, the Honorable Jay Hockenbury, Judge presiding.[2] Defendant was convicted of first-degree murder, first-degree kidnapping, and burning of personal property. At his sentencing hearing, the jury unanimously recommended that defendant be sentenced to life imprisonment without parole, as opposed to death, and the trial court entered judgment. Defendant appealed to this Court, which found no error in defendant's conviction.

On 4 April 2013, defendant filed a motion for appropriate relief requesting a new sentencing hearing in light of the United States Supreme Court's decision in

[2] Defendant was tried with Bell and Williams as co-defendants. Williams entered a guilty plea to first-degree murder, first-degree kidnapping, burning personal property, and assault with a deadly weapon inflicting serious injury for his role in Ms. Kennedy's death and testified at trial against defendant and Bell. Williams and defendant were sentenced to life without parole. Bell was sentenced to death upon the jury's recommendation.

Miller v. Alabama, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), which held that mandatory life without parole for juvenile offenders violates the Eighth Amendment's prohibition of cruel and unusual punishment. By order entered 2 July 2013, the trial court granted defendant's motion for appropriate relief and ordered a rehearing pursuant to *Miller* as well as our North Carolina General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19B, 2012 N.C. Sess. Laws 2012-148, § 1, eff. July 12, 2012 (stating that a defendant who is less than eighteen years of age who is convicted of first-degree murder pursuant to premeditation and deliberation shall have a hearing to determine whether the defendant should be sentenced to life imprisonment without parole or life imprisonment with parole).

On 20 February 2014, the Honorable Jack Jenkins, Special Superior Court Judge, conducted a hearing and ordered that "defendant's sentence is to remain life without parole." Defendant appealed. On 28 September 2016, this Court issued a writ of certiorari for the purpose of reviewing the resentencing order.

On appeal, defendant contends the trial court (I) violated his Eighth Amendment constitutional protection against cruel and unusual punishment by imposing a sentence of life without parole; and (II) erred by imposing a sentence of life without parole because the trial court failed to make findings on the presence or

absence of *Miller* factors and the findings it did make do not support the conclusion that the sentence was warranted.

I

Defendant first argues the trial court violated his constitutional protections against cruel and unusual punishment by imposing a sentence of life without parole. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). The prohibition of cruel and unusual punishment under the Eighth Amendment forbids entering sentences "that are grossly disproportionate to the crime." *State v. Thomsen*, 242 N.C. App. 475, 487, 776 S.E.2d 41, 49 (2015), *aff'd,* 369 N.C. 22, 789 S.E.2d 639 (2016) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 959, 115 L. Ed. 2d 836 (1991). The jurisprudence of the Eighth Amendment as it applies to juveniles recognizes that juvenile offenders are categorically distinguishable from adult offenders because of their "diminished culpability and greater prospects for reform." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418. Nevertheless, courts continue to balance their interests in enforcing suitable punishments for juveniles proportionate to the crime while also maintaining fairness to juvenile offenders.

Miller v. Alabama "drew a line between children whose crimes reflect[ed] transient immaturity and those rare children whose crimes reflect[ed] irreparable

corruption." *Montgomery v. Louisiana*, 577 U.S. ___, ____, 193 L. Ed. 2d 599, 620 (2016), (*as revised* Jan. 27, 2016). The United States Supreme Court ruled that imposing a *mandatory* life sentence without the possibility of parole for juvenile offenders violates the Eighth Amendment and "a judge or jury must have the opportunity to consider mitigating circumstances." *Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430; *also see id.* at 476, 183 L. Ed. 2d at 422 ("Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.")

In response to *Miller* (but prior to the U.S. Supreme Court's decision in *Montgomery* in 2016), our General Assembly enacted N.C. Gen. Stat. §§ 15A-1476 *et seq*.—now codified as 15A-1340.19 *et seq*. Section 15A-1340.19B(a)(1) provides that if a defendant is convicted of first-degree murder solely on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C.G.S. § 15A-1340.19B(a)(1) (2017). If a defendant is not sentenced pursuant to subsection (a)(1), "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C.G.S. § 15A-1340.19B(a)(2) (2017). Section 15A-1340.19C requires the sentencing court to consider mitigating factors in determining whether a defendant will be sentenced to life without the possibility of parole or life with the possibility of parole and to include in its order "findings on the

absence or presence of any mitigating factors . . . ." N.C.G.S. § 15A-1340.19C(a) (2017). Therefore, the statutory scheme does not allow for mandatory sentences of life without parole for juvenile offenders and, thus, on its face, is not in violation of the Eighth Amendment per *Miller*.[3]

Nevertheless, defendant contends the evidence establishes that he is not one of the rare juveniles who is "permanent[ly] incorrigib[le]" or "irreparabl[y] corrupt[]" and warrants a life sentence without parole as noted in *Montgomery*. Instead, defendant insists that the evidence indicates that at the time of the murder, his intellectual difficulties, developmental challenges, susceptibility to peer pressure, and potential for rehabilitation support a sentence of life in prison with the possibility of parole. Based on the foregoing reasons, and the analysis which follows, we overrule defendant's Eighth Amendment argument. We review the trial court's balancing of the *Miller* factors in Issue II.

II

Defendant next argues the trial court erred by imposing a sentence of life without parole because the trial court failed to make findings on the presence or

[3] We note our Supreme Court's recent opinion in *State v. James* held that "the relevant statutory language [in N.C.G.S. § 15A-1340.19C(a)] treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options [to be made based on analyzing] all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*." *State v. James*, ___ N.C. ___, ___, 813 S.E.2d 195, 204 (2018), *aff'd*, ___ N.C. App. ___, 786 S.E.2d 73 (2016), *disc. review allowed*, 369 N.C. 537, 796 S.E.2d 789 (2017). *But see id.* at ___, 813 S.E.2d at 212 (Beasley, J., dissenting) ("A presumptive sentence of life without parole for juveniles sentenced under this statute contradicts *Miller.*").

absence of *Miller* factors and the findings it did make were either contradicted by the evidence or did not support the conclusion that the sentence was warranted. Specifically, defendant challenges six out of the court's nine findings of fact alleging flawed reasoning, and further argues that the trial court failed to establish which factors were mitigating. We disagree.

When an order entered pursuant to N.C.G.S. § 15A-1340.19A *et seq*. is appealed, this Court reviews "each challenged finding of fact to see if it is supported by competent evidence and, if so, such findings of fact are 'conclusive on appeal.' " *State v. Lovette*, 233 N.C. App. 706, 717, 758 S.E.2d 399, 407 (2014). The trial court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion. *State v. Antone,* 240 N.C. App. 408, 410, 770 S.E.2d 128, 129 (2015). "It is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Lovette*, 233 N.C. App. at 721, 758 S.E.2d at 410.

Our General Statutes, section 15A-1340.19B(c) sets forth factors a defendant may submit in consideration for a lesser sentence of life with parole. Those factors include: "1) age at the time of offense, 2) immaturity, 3) ability to appreciate the risks and consequences of the conduct, 4) intellectual capacity, 5) prior record, 6) mental health, 7) familial or peer pressure exerted upon the defendant, 8) likelihood that the defendant would benefit from rehabilitation in confinement, and 9) any other

mitigating factor or circumstance." N.C.G.S. § 15A-1340.19B(c). We refer to these as the *Miller* factors.

Here, defendant argues the trial court did not establish which factors were mitigating and imposed a sentence that was not supported by the evidence. The State, on the other hand, asserts the trial court made evidentiary findings on the presence or absence of *Miller* factors, and made explicit (or ultimate findings) on whether it found the factors to be mitigating. The trial court's evidentiary findings of fact (which defendant does not challenge and are therefore binding on appeal, *see In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008)) are, in relevant part, as follows:

> 1. The Court finds as the facts of the murder the facts as stated in *State v. Sims*, 161 N.C. App. 183[, 588 S.E.2d 55] (2003).
>
> 2. The Court finds that the murder in this case was a brutal murder. The Court finds instructive the trial/sentencing jury's finding beyond a reasonable doubt that the murder was "especially heinous, atrocious, or cruel" pursuant to N.C.G.S. 15A-2000(e)(9). According to the trial testimony from Dr. Carl Barr, Ms. Kennedy had blunt force trauma all over her body. . . . Soot had penetrated deep into her lungs, meaning that she was alive when her car was set on fire with her in it, and she therefore died from suffocation from carbon monoxide poisoning.
>
> 3. The Court finds that the defendant has not been a model prisoner while in prison. His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison.

4. The Court finds that the defendant, although expressing remorse during the hearing, has not demonstrated remorse based on his actions and statements. During a meeting with a prison psychiatrist on January 20, 2009, the defendant complained that he was in prison and should not be. . . .

5. The Court finds that Dr. Tom Harbin testified that the defendant knew right from wrong. Further, Dr. Harbin testified that the defendant would have known that the acts constituting the kidnapping [and the] murder were clearly wrong.

6. The Court finds that Dr. Harbin testified that the defendant was a follower, and was easily influenced. Dr. Harbin testified that the defendant may not see himself as responsible for an act if he himself did not actually perform the act even if he helped in the performance of the act. Further, Dr. Harbin testified that the defendant has a harder time paying attention than others and a harder time restraining himself than others. Dr. Harbin testified that the defendant had poor social skills, very poor judgment, would be easily distracted and would be less focused than others. Further, the defendant has a hard time interacting with others and finds it harder to engage others and predict what others might do.

7. The Court finds that while this evidence was presented by the defendant to try to mitigate his actions on the night Ms. Kennedy was murdered, that this evidence also demonstrates that the defendant is dangerous. Dr. Harbin acknowledge [sic] on cross-examination that all of the mental health issues he identified in the defendant, taken as a whole, could make him dangerous.

8. The Court finds that the defendant was an instrumental part of Ms. Kennedy's murder. She died from carbon monoxide poisoning from inhaling carbon monoxide while in the trunk of her car when her car was on fire. According to witness testimony at the trial, the defendant provided

> the lighter that Chris Bell used to light the jacket on fire that was thrown in Ms. Kennedy's car and eventually caused her death.
>
> 9. The Court finds that the evidence at trial clearly demonstrated that the defendant did numerous things to try to hide or destroy the evidence that would point to the defendant's guilt. The most obvious part is his participation in killing Ms. Kennedy, the ultimate piece of evidence against the defendants. Additionally, this defendant was the one who drove the car to its isolated last resting place in an attempt to hide it, even asking his co-defendants if he had hidden it well enough. Further, he personally went back to the car the morning after the night it was set on fire to make sure Ms. Kennedy was dead.
>
> 10. The Court finds that the physical evidence demonstrated not only his guilt, but specifically demonstrated the integral role the defendant played in Ms. Kennedy's death. Fingerprints, DNA, and footwear impressions at the scene where Ms. Kennedy was burned alive in her car all matched the defendant. Most notably, Ms. Kennedy died in the trunk of her car, and the palmprint on the trunk of the car, the only print found on the trunk, matched the defendant.

With regard to the trial court's ultimate findings of fact on each of the nine *Miller* factors, defendant challenges all but one (Finding of Fact No. 9) for either failing to establish which factors were mitigating, or as contradicted by the evidence or not supporting the conclusion that a sentence of life without parole was warranted. We address defendant's challenge to each ultimate finding in turn.

A. Finding of Fact No. 1—Age

> 1. Age. The Court finds that the defendant was 17 and ½ at the time of this murder, and therefore his age is less of

> a mitigating factor that [sic] it would be were he not so close to the age of criminal responsibility. Further, considering *Miller v. Alabama* to be instructive as to this factor, the Court notes that the two defendants in Miller, Jackson and Miller, were 14 at the time that each committed the murder for which he was convicted. Defendant Jackson was convicted solely on a felony murder theory and his initial role in the murder was as a getaway driver, and he was not the one who shot the victim. Defendant Miller had a very troubled childhood which included time in foster care and multiple suicide attempts. Miller killed a drug dealer that apparently provided drugs to Miller's mother and the killing occurred after a physical altercation with the victim. *The Court finds that the defendant's age is not a considerable mitigating factor in this case*.

(emphasis added).

Defendant challenges Finding of Fact No. 1 based on the assertion that "despite his chronological age, [defendant] was actually much younger in other respects on the offense date for this case."

First, it is undisputed that defendant was seventeen-and-a-half years old when he and his two codefendants murdered Ms. Kennedy. Second, there is no indication that the legislature, in enacting N.C.G.S. § 15A-1340.19C(a), intended for the trial court to consider anything other than a defendant's chronological age with regard to this factor. Indeed, the trial court is to consider whether a defendant's age is a mitigating circumstance in light of all the circumstances of the offense and the particular circumstances of the defendant. *See id.* In the instant case, the trial court made a point of drawing a comparison between the ages of the defendants in *Miller*,

who were fourteen years old at the time of their crimes, and defendant in this case, who was six months away from reaching the age of majority. In so doing, the trial court properly found that age was not a considerable mitigating factor in this case.

B. Finding of Fact No. 2—Immaturity

> 2. Immaturity. *The Court does not find this factor to be a significant mitigating factor in this case based on all the evidence presented*. The Court notes that any juvenile by definition is going to be immature, but that there was no evidence of any specific immaturity that mitigates the defendant's conduct in this case.

(emphasis added).

Defendant contends this finding is not supported by the evidence because the trial court ignored testimony from Dr. Harbin that defendant and his brother frequently had no adult supervision and raised themselves, defendant was "poorly developed," defendant's stress tolerance and coping skills were immature, and defendant had the psychological maturity of an eight to ten year old.

Contrary to defendant's assertions, the trial court made two evidentiary findings of fact—Nos. 6 and 7—which clearly show that it considered Dr. Harbin's testimony. As stated previously, defendant has not challenged the evidentiary findings of fact and so they are binding on appeal. *See In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. Instead of finding that any evidence of immaturity mitigated defendant's actions, the trial court weighed the evidence and found more compelling Dr. Harbin's acknowledgment that certain characteristics—defendant's

"poor social skills, very poor judgment," and difficulty "interacting with others and find[ing] it harder to engage others and predict what they might do"—"could make [defendant] dangerous." It is well within the trial court's discretion to "pass upon the credibility of [certain] evidence and to decide what[, or how much,] weight to assign to it." *State v. Villeda*, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004). Accordingly, defendant's argument that Finding of Fact No. 2 is not supported by the evidence is overruled.

C. Finding of Fact No. 3—Ability to appreciate the risks of the conduct

> 3. Ability to appreciate the risks of the conduct. Dr. Harbin, the defendant's psychologist, testified that in spite of the defendant's diagnoses and mental health issues, the defendant would have known that the acts he and his co-defendants committed while they stole Ms. Kennedy's car, kidnapped her, and ultimately murdered her were wrong.

Defendant contends the trial court misapprehended the nature of this finding under section 15A-1340.19B(c)(3) because the question of whether defendant knew an act was wrong is part of the test for the defense of insanity.

In the trial court's unchallenged evidentiary Findings of Fact Nos. 5 and 9, the trial court found that defendant knew right from wrong as evidenced by the fact that defendant did numerous acts to attempt to hide or destroy evidence which would inculpate him in the killing of Ms. Kennedy, including the act of her murder itself, driving the vehicle to its last resting place, asking his codefendants if he hid the vehicle well enough, and personally checking to confirm that Ms. Kennedy was dead.

By arguing that Dr. Harbin testified that defendant's intellectual abilities were deficient and that he had poor judgment, defendant essentially requests that this Court reweigh the evidence which the trial court was not required to find compelling. *See State v. Golphin*, 352 N.C. 364, 484, 533 S.E.2d 168, 245 (2000) ("The evidence presented by [the defendant's] mental health expert was not so manifestly credible that . . . [the fact finder] was required to find it convincing."). Accordingly, the trial court did not misapprehend the nature of the factor in section 15A-1340.19B(c)(3) on whether defendant had the ability to appreciate the risks or consequences of his conduct, and this argument is overruled.

D. Finding of Fact No. 4—Intellectual Capacity

> 4. Intellectual Capacity. The Court finds that the defendant's intellectual capacity was below normal. Nevertheless, the Court finds that at the time of Ms. Kennedy's murder, the defendant was able to drive a car, to work at Hardee's, to be sophisticated enough to try to hide evidence in multiple ways at multiple places, and to work with his co-defendants to hide evidence and to try to hide Ms. Kennedy's car so it would not be found.

Defendant challenges this finding as "violat[ing] the statutory mandate requiring findings of the absence or presence of mitigating factors." However, the trial court's use of the word "nevertheless" demonstrates that it did not consider this factor to be a mitigating one. In other words, Finding of Fact No. 4 can be read to say that while defendant's intellectual capacity was below normal, it was not a mitigating factor in light of other evidence (defendant's ability to drive a car, work at Hardee's,

etc.). As such, this finding does not "violate the statutory mandate," and this argument is overruled.

E. Finding of Fact No. 5—Prior Record

> 5. Prior Record. The defendant's formal criminal record as found on the defendant's prior record level worksheet was for possession of drug paraphernalia. However, the Court notes that because the defendant was 17 ½, he had only been an adult for criminal purposes in North Carolina courts for a short period of time. The Court considers the defendant's Armed Robbery juvenile situation in Florida and the defendant's removal from high school for stealing as probative evidence in this case, specifically because both occurrences occurred when the defendant was with others, and the defendant denied culpability in Ms. Kennedy's murder and the other two incidents. *The Court does not find this to be a compelling mitigating factor for the defendant*.

(emphasis added).

Defendant argues the trial court misapprehended this factor because it considered an armed robbery charge from Florida and defendant's expulsion from high school for stealing. He contends this mitigating factor only encompasses a defendant's formal criminal record, which showed a single conviction for possession of drug paraphernalia.

First, the statute at issue, N.C.G.S. § 15A-1340.19B, does not define the term "prior record." *See id.* § 15A-1340.19B(c). Second, in its unchallenged evidentiary Finding of Fact No. 4, the trial court found, in relevant part, as follows with regard to defendant's prior record:

> [T]he Court reviewed materials and heard evidence that as a juvenile in Florida, the defendant had been charged with armed robbery but denied any culpability in the case. Also, this Court heard and reviewed evidence that the defendant was removed from Hobbton High School in September 1998 in large part due to bad behavior. Specifically, the Court notes that the defendant was accused, along with two others, of stealing from the boy's locker room after school as a part of a group, but again denied doing anything wrong. The school specifically found that [defendant's] acts during this theft were not due to his learning disabilities. This Court notes in all three incidents, the Florida armed robbery, the Hobbton high school theft, and the murder of Ms. Kennedy, the defendant was with a group of people, and in the light most favorable to him, was at a minimum a criminally culpable member of the group but was unwilling to admit to any personal wrongdoing.

(footnote omitted). Further, in a footnote to unchallenged evidentiary Finding of Fact No. 4, the trial court stated as follows:

> According to the defendant's evidence, the defendant was charged in juvenile court in Florida and was placed on juvenile probation as a result of this incident. Further, the defendant's version of this incident is that after being placed on probation, the charges were eventually dismissed. This Court does not specifically consider the charge itself or the subsequent punishment itself as evidence against the defendant, but rather finds noteworthy the defendant's complete denial of any wrongdoing while involved in criminal activity as part of a group. The Court notes the similarity to that incident and this incident, in which the defendant, while part of a group, committed acts that a Court deemed worthy of punishment, but for which the defendant denied wrongdoing.

By making clear that it was not "specifically consider[ing] the charge itself,"

the trial court nevertheless did not misapprehend the nature of this mitigating factor as there is no prohibition, statutory or otherwise, on a trial court taking into consideration school records which indicate a defendant has previously engaged in criminal activity simply because such evidence is not a part of a defendant's "formal criminal record." Indeed, evidence of defendant's conviction for possession of drug paraphernalia, followed by theft, followed by the murder of Ms. Kennedy shows the escalation of defendant's criminal activity, which is an appropriate consideration for the trial court. *See Lovette*, 233 N.C. App. at 722, 758 S.E.2d at 410 (finding no error in the trial court's conclusion to sentence the defendant to life imprisonment without parole where, *inter alia*, the defendant's "criminal activity had continued to escalate"). Defendant's argument is overruled.

F. Finding of Fact No. 6—Mental Health

> 6. Mental Health. Dr. Harbin testified both at trial and at the February 20, 2014 evidentiary hearing that he diagnosed the defendant with ADHD and a Personality Disorder Not Otherwise Specified. The Court finds that although the defendant did have mental health issues around the time of the murder, *they do not rise to the level to provide much mitigation*. Many people have ADHD, and a non-specified personality disorder is not an unusual diagnosis. Many people function fine in society with these issues.

(emphasis added).

Defendant challenges this finding as failing to provide a clear indication of whether it was mitigating or not, depriving this Court of the ability to effectively

review the sentencing order. Contrary to defendant's assertion, the trial court clearly stated in Finding of Fact No. 6 that it found "that although the defendant did have mental health issues around the time of the murder, they do not rise to the level to provide much mitigation." In other words, the trial court did not find defendant's mental health at the time to be a mitigating factor. Defendant's argument is overruled.

G. Finding of Fact No. 7—Familiar or Peer Pressure exerted on the defendant

> 7. Familiar of Peer Pressure exerted on the defendant.
> A. The Court finds there was no familial pressure exerted on the defendant to commit this crime. In fact, the opposite is true. Sophia Strickland, [defendant's] mother, testified both at the trial and at the February 20, 2014 evidentiary hearing that she had warned [defendant] repeatedly to stay away from the co-defendant's [sic] in this case. Specifically, Ms. Strickland stated at the evidentiary hearing that if [defendant] continued to hang out with his co-defendants, something bad was going to happen. Further, [defendant's] sister, Tashia Strickland, also told [defendant] that she did not like the co-defendants, that the co-defendants were not welcome at her residence, and that [defendant] should not hang out with them. Also, Vicki Krch, [defendant's] Hardee's manager, who tried to help [defendant] when she could, sometimes gave [defendant] a free ride to work, bought [defendant] a coat, and fed [defendant's] younger brother for free, warned [defendant] not to hang out with the co-defendants, one of whom had worked for her and she knew well. The Court finds that the defendant refused to listen to his family members' warnings to stay away from the co-defendants.
> B. Peer Pressure. There was no evidence in this case that [defendant] was threatened or coerced to do any of the things he did during the kidnapping, assault, murder,

> and burning of Ms. Kennedy's car. At trial, co-defendant Chad Williams stated that when Chris Bell first brought up the idea of stealing the car, [defendant] stated "I'm down for whatever." The only evidence that may fit in this category is Dr. Harbin's testimony that the defendant could be easily influenced. Nevertheless, the defendant made a choice to be with his co-defendants during Ms. Kennedy's murder, and actively participated in it. The evidence demonstrated that the defendant was apparently only easily influenced by his friends, but not his family who consistently told him to avoid the co-defendants. This demonstrates that the defendant made choices as to whom he would listen.

(footnote omitted).

Defendant argues that both parts of this finding demonstrate that the trial court misapprehended the "peer pressure" mitigating factor. He contends there is no requirement that a defendant demonstrate actual threats or coercion to prove he was subject to peer pressure and that his refusal to listen to his mother after he started hanging out with his codefendant, Bell, was consistent with the existence of peer pressure.

Reading Finding of Fact No. 7 as a whole, it shows that the trial court found that there was little or no pressure exerted by defendant's codefendants to participate in these crimes. The trial court found that when Bell brought up the idea of stealing a vehicle, defendant stated, "I'm down for whatever." It further found that the only evidence that could possibly relate to defendant's susceptibility to familial or peer pressure was Dr. Harbin's testimony that defendant could be easily influenced.

However, the trial court nevertheless found that defendant made a deliberate choice to be with his codefendants and "actively participated" in the murder, even that he played an "integral role" in the crime. As for defendant's contention that his refusal to listen to his family members' warnings to stay away from his codefendants is evidence that he was subject to peer pressure, that contention is not supported by the trial court's findings. The trial court found, rather, that this was evidence that he was "apparently only easily influenced by his friends, but not his family . . . [which] demonstrates that [he] made choices as to whom he would listen." Defendant's argument is overruled.

H. Finding of Fact No. 8—Likelihood the defendant would benefit from rehabilitation in confinement

> 8. Likelihood the defendant would benefit from rehabilitation in confinement. The defendant's prison records demonstrate that the defendant has been charged and found responsible for well over 20 infractions while in prison. He consistently refused many efforts to obtain substance abuse treatment. While the defendant has in fact obtained his GED which the court finds is an important step towards rehabilitation, the Court notes that the defendant during the first ten years plus of his confinement often refused multiple case managers [sic] pleas to obtain his G.E.D. According to prison records submitted into evidence during the February 20, 2014 evidentiary hearing, the Court notes that during a 2009 meeting with a psychiatrist the defendant noted that he was depressed in part because he was in prison and should not be. The Court finds that throughout the defendant's life he did not adjust well to whatever environment he was in. The Court finds that in recent years, the defendant has seemed to do somewhat better in prison, which includes

> being moved to medium custody. Most importantly to this Court, the evidence demonstrates that in prison, the defendant is in a rigid, structured environment, which best serves to help him with his mental health issues, and serves to protect the public from the defendant, who on multiple occasions in non-structured environments committed unlawful acts when in the company of others.

(footnote omitted).

Defendant argues that in making Finding of Fact No. 8, the trial court improperly used his improvement while in prison against him. Contrary to defendant's assertion, Finding of Fact No. 8 indicates that defendant has not benefitted a great deal from rehabilitation during his confinement, which is supported by the trial court's unchallenged evidentiary Finding of Fact No. 3: "The Court finds that the defendant has not been a model prisoner . . . . His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison." While the trial court did note that defendant "seemed to do somewhat better in prison" in recent years, it also noted that defendant's own expert testified that his mental health issues made him dangerous and that he would do best in a rigid, structured environment like prison. Accordingly, the trial court's Finding of Fact No. 8 was supported by the evidence and not used improperly against defendant. This argument is overruled.

While *Miller* states that life without parole would be an uncommon punishment for juvenile offenders, the trial court has apparently determined that

defendant is one of those "rare juvenile offenders" for whom it is appropriate. *See Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424. The trial court's unchallenged evidentiary findings combined with its ultimate findings regarding the *Miller* factors demonstrate that the trial court's determination was the result of a reasoned decision.[4] Therefore, the trial court did not abuse its discretion in weighing the *Miller* factors to determine defendant's sentence.

NO ERROR.

Judge CALABRIA concurs.

Judge STROUD concurs in the result only by separate opinion.

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[4] Following the *Miller* ruling, many courts adopted their own interpretation of *Miller*'s application to current legislation and state practices, as it varies by jurisdictions. More recently, in *Malvo v. Mathena*, 893 F. 3d 265, 274 (4th Cir. 2018), *aff'd*, *Malvo v. Mathena*, 254 F. Supp. 3d 820 (E.D. Va. 2017), the Fourth Circuit's opinion defined *Miller* to prohibit "impos[ing] a discretionary life [] without [] parole sentence on a juvenile homicide offender *without first concluding* that the offender's 'crimes reflect permanent incorrigibility,' as distinct from the 'transient immaturity of youth.' " *Id.* (quoting *Montgomery*, 577 U.S. at ____, 193 L. Ed. 2d at 620) (emphasis added)).

We rely on our precedent–which *Montgomery* reiterates–that sentencing judges *may* consider Miller factors but are not *required by law* to issue an ultimate finding or conclusion. *See Lovette,* 233 N.C. App. at 719, 758 S.E.2d at 408 ("The findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of 'irreparable corruption' is not required."); *see also Montgomery*, 577 U.S. at ____, 193 L. Ed. 2d at 621 ("*Miller* [does] not require trial courts to make a finding of fact regarding a child's incorrigibility. . . this Court is careful [not] to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). We reject the contention that the trial court was erroneous because it did not issue a finding regarding permanent incorrigibility.

No. COA17-45 – *State v. Sims*

STROUD, Judge, concurring.

I concur in the result only, reluctantly, because prior precedent of this Court requires it.

Our trial courts and this Court have struggled with the proper application of the *Miller* factors in first degree murder convictions of defendants under 18 at the time of the crime. *See generally Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012). The application of the *Miller* factors is a discretionary ruling and has no hard and fast rules, nor should it. *See generally id.* But the United States Supreme Court's ruling in *Montgomery v. Louisiana* establishes that the trial court must be able to find that the defendant is "permanent[ly] incorrigibl[e]" or "irreparab[ly] corrupt[]" before sentencing him to life imprisonment without the possibility of parole. 577 U.S. ___, ___, 193 L. Ed. 2d 599, 611-20 (2016). "Permanent" means forever. "Irreparable" means beyond improvement. In other words, the trial court should be satisfied that in 25 years, in 35 years, in 55 years –- when the defendant may be in his seventies or eighties -- he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate. That is a very high standard, which is why the Supreme Court stated that life imprisonment without the possibility of parole should be "rare[.]" *Id.* at ___, 193 L.E. 2d at 611.

If our courts consistently interpret evidence of each factor as "not mitigating" no matter what the evidence is -- and they are free to do so, as I noted in my concurring opinion in *State v. May*, ___ N.C. App. ___, 804 S.E.2d 584 (2017) -- defense

attorneys will have no way of knowing what sort of evidence to present in mitigation. For example, a low IQ can be seen as mitigating, since it lessens the defendant's culpability; it can also be seen as not mitigating, because the defendant may be less able to take advantage of programs in prison which may improve him, such as obtaining a GED. Here, the trial court even noted in finding of fact seven that although defendant presented certain evidence intended as mitigating evidence, it found the evidence to be the opposite. Defense attorneys may damage a defendant's case when trying to help it, since any evidence they use can be turned against them. But the trial court's opinion addressed each factor as required by North Carolina General Statute § 15A-1340.19B, and though I agree with defendant that the trial court focused more on whether he is "dangerous" than permanently incorrigible or irreparably corrupt, under North Carolina's case law, that is within its discretion.

I therefore concur in result only.

STATE OF NORTH CAROLINA
ONSLOW COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01 CRS 2989 – 2991

STATE OF NORTH CAROLINA)
)
v.)
)
BRYAN CHRISTOPHER BELL)

AMENDMENT TO MOTION FOR APPROPRIATE RELIEF

NOW COMES the Defendant, Bryan Christopher Bell, pursuant to N.C. Gen. Stat. § 15A – 1415(g), and amends his motion for appropriate relief previously filed herein to assert the following claim in addition to those previously asserted in his motion for appropriate relief filed on or about May 12, 2006.

X. MR. BELL'S AND THE JURORS' RIGHT TO EQUAL PROTECTION OF THE LAWS WAS VIOLATED DURING JURY SELECTION IN HIS CAPITAL TRIAL IN THAT THE STATE PEREMPTORILY CHALLENGED AT LEAST ONE JUROR BASED ON GENDER IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDEMT OF THE UNITED STATES CONSTITUTION AND ARTICLE I § 19 OF THE NORTH CAROLINA CONSTITUTION

280. Mr. Bell's motion for appropriate relief was filed in Onslow County Superior Court on or about May 12, 2006.

281. That N.C. Gen. Stat. § 15A – 1415(g) allows a defendant to file amendments to the motion for appropriate relief at least 30 days prior to the commencement of a hearing on the merits of the claims asserted in the motion or at any time before the hearing has been set whichever is later. Neither of these events has taken place and, therefore, the filing of this amendment is timely and proper.

282. It has recently come to the attention of counsel by way of an affidavit by Gregory C. Butler, one of the Assistant District Attorneys who prosecuted the defendant and obtained a sentence of death against him, that at Mr. Bell's trial the State exercised at least one peremptory challenge based on an improper, unconstitutional motive; that is the gender of the juror.

283. This affidavit, upon information and belief, was prepared not in a response to defendant's motion for appropriate relief herein but in a response to a Racial Justice Act claim filed by Marcus Robinson in Cumberland County challenging his sentence of death. Upon information and belief, in response to Mr. Robinson's R.J.A. claim, various Assistant District Attorneys were asked to explain their use of peremptory challenges in a race neutral way in other death penalty cases. Mr. Butler's affidavit was admitted into evidence in the Robinson case.

284. In attempting to provide race neutral reasons for striking African-American jurors in this case, the State has admitted that the prosecutor exercised its peremptory challenges in a equally illegal manner. As stated in the affidavit of Mr. Butler, attached hereto as Exhibit A, the State exercised a peremptory challenge of Viola Morrow on the basis of her gender. As stated, under oath, in that affidavit, the State was looking for male jurors and a potential foreperson and was making "concerted" efforts to send male jurors to the defense.

285. *J.E.B. v. Alabama ex rel. T.B.* – 511 U.S. 127 (1994) held that Equal Protection Clause prohibits discrimination in jury selection on the basis of gender. "Intentional discrimination on the basis of gender by the State violates the Equal Protection Clause particularly ... where the discrimination serves to ratify perpetuating archaic overbroad stereotypes about the relative abilities of man and women." *Id.*

286. The State's "peremptory challenges cannot survive the heightened Equal Protection scrutiny that the Courts afford distinctions based on gender." *Id.* A review of Mr.

Butler's affidavit confirms that gender played a significant role in the jury selection process. As stated above, the State excused improperly Ms. Viola Morrow, a female solely because she was female. As admitted by Mr. Butler the State had only used 12 of its 28 peremptory strikes with 10 jurors seated, all female. According to his sworn statement, the State was looking for male jurors and a potential foreperson. The State was making a concerted effort to send male jurors to the defense. It is this kind of intentional discrimination based on gender that the Court condemned in *J.E.B.* As admitted by Mr. Butler, the State was looking for male jurors and a potential foreperson is the kind of discrimination that serves to ratify perpetuating archaic and overbroad stereotypes about the relative abilities of men and women. Although on its face Mr. Butler's affidavit only admits to the use of one challenge in an illegal, unconstitutional manner, as explained in *J.E.B.*, "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system". **(fn #13)** As the Court stated in *J.E.B,* "We have recognized that whether the trial is criminal or civil, potential jurors as well as litigants have an equal protection right to jury selection procedures that are free from state sponsored group stereotypes rooted in, and reflective of, historical prejudice" @ 128. "In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures." (citations omitted) @ 140, 141.

287. The determination that a defendant need not demonstrate an impact upon the jury's final gender composition is also well-supported by the courts' approach to *Batson* claims. *See Snyder v. Louisiana,* 552 U.S. 472, 477-78 (2008) (recognizing that the federal constitution forbids striking even a single African-American venire member for a discriminatory purpose, regardless of the outcome of the trial); *State v. Robbins*, 319 N.C. 465, 491 (1987) (explaining that "[e]ven a single act of invidious discrimination may form the basis for an equal protection

protection rights, *even when other black jurors are seated* and even when valid reasons are articulated for challenges to other black prospective jurors") (emphasis in original; internal citations omitted). "The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state sanctioned discrimination in the courtroom engenders" *J.E.B.* @ 140. Mr. Butler's admission to "a concerted effort" to use challenges in an unconstitutional manner makes it clear that the State was involved in an invidious scheme to discriminate against women as potential jurors; just that kind of discrimination condemned in *J.E.B.*

288. Intentional discrimination on the basis of gender by the State in the defendant's trial violated his and the jurors' right to equal protection under the Fourteenth Amendment to the United States Constitution and Article I § 19 of the North Carolina Constitution and requires that his conviction be set aside and that he be awarded a new trial.

Respectfully submitted this the 15 day of April, 2012.

Michael R. Ramos
N.C. State Bar No. 10484
Attorney for Bryan Christopher Bell
Post Office Box 2019
Shallotte, NC 28459
(910) 754-7557

Dionne R. Gonder-Stanley (MR)
Dionne R. Gonder-Stanley
N. C. State Bar No. 24253
Attorney for Bryan Christopher Bell
NCCU School of Law
640 Nelson Street
Durham, NC 27707
(919) 530-7153

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and exact copy of this **Amendment to Motion for Appropriate Relief** has been served upon counsel for all parties in this case, or upon the parties themselves if they are unrepresented by counsel by the method indicated below. (If a party is unrepresented by counsel, then any reference to service on counsel will refer to service on the party.)

(Applicable method of service indicated by check)

✓ By placing in the United States Mail, postage prepaid to address indicated below.

Ernie Lee,
District Attorney, Fourth Judicial District
Post Office Box 719
632 Court Street
Jacksonville, NC 28540

Sandra Wallace-Smith
Attorney General of North Carolina
Assistant Attorney General
NC Department of Justice
Capital Litigation Section
9001 Mail Service Center
Raleigh, NC 27699-9001

✓ By hand delivery

_____ By other means approved for service of pleadings.

This the 13 day of April, 2012.

Michael R. Ramos
Attorney for Bryan Christopher Bell

Dionne R. Gonder-Stanley
Attorney for Bryan Christopher Bell

Affidavit

I, Gregory Clement Butler, hereby state that the following information is true and accurate to the best of my knowledge:

I am an Assistant District Attorney in Johnston County, Prosecutorial District 11-B. I have worked as a prosecutor in Johnston County since 2006. I previously worked as an Assistant District Attorney in Prosecutorial District 4 from 1985 to 2002. I have been assigned to review and relate information regarding the Capital Murder Trial of Chris Bell, 00 CRS 50092; The Bell case was tried by me, District Attorney Dewey Hudson and ADA Bob Roupe. I have reviewed the relevant portions of the trial transcript provided to me, and I have reviewed mine and Mr. Roupe's notes on jury selection from the original case file located in the District Attorney's office. Specifically, I have been asked to examine the voir dire of prospective jurors who were excused peremptorily by the State of North Carolina and comment on the bases of the challenges.

Two Black Jurors were seated.

Viola Morrow: Has 2 children age of Defendants. Has an illness rheumatoid arthritis. Can flare up at any time and incapacitate her. State had only used 12 of its 28 preempts and 10 jurors were seated, all female. State was looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the Defense as they were taking off every male juror.
Batson motion denied, no PF case but allowed state to give reason on the record. (Did on p. 1731) P. 1634

Diana Roach: "To be honest under no circumstances (regards to DP) I do not believe in the DP. Brought up with that belief. Would follow the law even though against my better judgment" Criminal Record # of worthless checks in 1991 and Misd Prob Viol. in 1994.
Batson motion denied, no PF case but allowed state to give reason on the record. P. 1733

June Leaks: Real weak/shaky on the DP. Thought about question 10 seconds and asked to repeat the would you vote for DP question. 2nd time thought real hard "I guess if the evidence weighed it" If case warranted it, do it? Long pause "yes" " It (the DP) just kindy makes me uneasy."
Batson motion denied, no PF case but allowed state to give reason on the record. P. 1970

Mary Adams: Failed to file/pay State Taxes charge x3, dismissed in 1998, fraudulent crime. Son at home with special needs. Birth defects. Lived with her whole life. Juror was a homemaker her whole life and state feels may be more lenient. Because child's issues she may be able to empathize with one of the Co-defendants.
Batson motion denied, no PF case but allowed state to give reason on the record. P. 2246

Donald Morgan: 4th alternate seat. Did not question this juror. Review his questionnaire and record. Worked as a Resorsed (sic) Aid for Mental Health, DWI convictions in 1990 and 1994, and reduced to C&R in 1987. Felony drug conviction for sell and deliver Marijuana in 1987. 2 children, one works in Detox and other with Health Dept.
Batson motion denied, no PF case but allowed state to give reason on the record. P. 2272

Mary Shird-Malone: Has a foster son they are attempting to adopt that has biological family issues. Boy has "issues" from the past. The psychological issues that the foster son has are similar to the issues the Psychologist will discuss about Bell and his natural father. Juror would be receptive to Sims and Bell's "not my fault argument" (family/ childhood issues)
Batson motion denied, no PF case but allowed state to give reason on the record. P. 375

Milford Hayes: Juror requested deferral before jury selection and was denied. Had a 9:30 am Doctor's appt and showed up in court at noon. Said he had heart problems. Made clear that he did not believe in capital punishment and said that he wanted to "put it on the record" (his feelings against the death penalty) "Hard to vote to give the DP. Said that he would be unable to impose the DP. Opposed to the DP entire

adult life. No situation where he could give the DP. Then changed his mind and said could give the DP. State made challenge for cause that was denied.
Batson motion denied, no PF case but allowed state to give reason on the record. P. 374

La'Star Williams: Requested deferral but denied. Pregnant, she said about 2 months. Said she was sick. Looked real unhappy about coming back Monday. Seemed unhappy whole time in courtroom. Inattentive to State's voir dire. Seemed sleepy, looked visibly tired. Brother charged with stealing and violatin of probation in Onslow County. (case being tried in Onslow) Brother just has behavioral problems. Older sister is ____? Doesn't know where she is. Doesn't talk to her often. Family status similar to Defendants
Batson motion denied, no PF case but allowed state to give reason on the record. P. 976

Yvonne Midgette: Licensed minister and has ministered at the men's prison in Burgaw since 1995. In Delaware, worked as a drug and alcohol counseler. Met her husband in AA. Has her own drug and alcohol problems. Alcohol and drugs played a big part in the actions of the Defendants prior to and during the crime. In regards to acting in concert, as to the non actor, She said "I don't believe, I mean, if they haven't done anything, then I don't believe I would". (give DP) P. 1086 Daughter has had "issues" at similar age to Defendants.
Batson motion denied, no PF case but allowed state to give reason on the record. P. 1096

I made this known to Dr. Joseph Katz.

This the 9th day of January 2012.

Gregory C. Butler
Assistant District Attorney
Prosecutorial District 11B

Sworn and Subscribed to me this the 9th day of January 2012.

Billie F. Hood (Pass)
NOTARY PUBLIC

My commission expires 4-26-2015

BILLIE F. HOOD NOTARY PUBLIC JOHNSTON COUNTY, N.C.