No. COA13-586 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake
	)	
JASON LYNN YOUNG	)	

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING TESTIMONY RELATING TO A WRONGFUL DEATH ACTION AND DECLARATION UNDER THE SLAYER STATUTE THAT MR. YOUNG KILLED HIS WIFE, MR. YOUNG'S DEFAULT, AND ENTRY OF JUDGMENT?

II. WHETHER WHEN THE PROSECUTOR INFORMED THE JURY AND ELICITED TESTIMONY THAT JUDGE STEPHENS ENTERED THE WRONGFUL DEATH AND SLAYER JUDGMENT, MR. YOUNG WAS DEPRIVED OF A FAIR TRIAL BY THE EXPRESSION OF JUDICIAL OPINION?

III. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE CHILD CUSTODY COMPLAINT?

IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING STATEMENTS OF CASSIDY YOUNG WHICH DID NOT MEET ANY HEARSAY EXCEPTION, WERE IRRELEVANT, AND WERE OVERWHELMINGLY PREJUDICIAL?

V. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY THAT IT COULD CONSIDER MR. YOUNG'S FAILURE TO TALK TO FRIENDS AND FAMILY AS EVIDENCE OF GUILT?

VI. WHETHER THE TRIAL COURT ERRED IN DENYING MR. YOUNG'S MOTION TO DISMISS DUE TO INSUFFICIENT EVIDENCE?

STATEMENT OF THE CASE

On 14 December 2009, the Wake County Grand Jury indicted Jason Young for first-degree murder. (Rp. 4)[1] The cause was tried at the 31 May 2011 Session of Wake County Superior Court, Judge Donald Stephens presiding. On 27 June 2011, a mistrial was declared when the jury deadlocked eight to four for acquittal. (Rp. 22; Amendment to Record on Appeal) Retrial commenced at the 17 January 2012 Session before Judge Stephens. On 5 March 2012, the jury found Mr. Young guilty. The trial court sentenced Mr. Young to a term of life without parole and notice of appeal was given. (Rp. 61, 62, 64)

STATEMENT OF GROUNDS OF APPELLATE JURISDICTION

Mr. Young appeals pursuant to N.C.G.S. §15A-1444(a).

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[1] The Record on Appeal will be referred to as "R." Transcripts of the first trial will be referred to by their roman numerals, *e.g.* "Ip." Transcripts of the second trial will be referred to by their arabic numerals, *e.g.* "1Tp." References to hearings will be by the date appearing on the cover page. State's Exhibits will be referred to as "Exh." The following exhibits were forwarded to the Court: #9 transcript of 911 call, #135 therapist notes, #200 Child Custody Complaint, and #187 testimony of Jason Young. The 911 transcript was admitted at the first trial as State's Exhibit #130. (IIp. 129) Exhibit #187 is a verbatim transcript of Mr. Young's first trial testimony and is used in lieu of references to that transcript.

STATEMENT OF THE FACTS

At 12:10 p.m. on 3 November 2006, Jason Young called his sister-in-law Meredith Fisher from Duffield, Virginia. He left a voicemail asking her to go to his Raleigh home to pick up paperwork relating to an eBay search for Coach purses he conducted the previous evening. Mr. Young spoke with Fisher weeks earlier about buying a purse for his wife Michelle as a surprise belated anniversary present. He did not want Michelle to find the printouts. (IIp. 102, 104, 220-21, 261; 14Tp. 2735-38; 15Tp. 2892; 21Tp. 3962; 25Tp. 4756)

Fisher went to the house at about 1:00 p.m. She raised the unlocked garage door and entered through the unlocked kitchen door. (IIp. 108-10; VIp. 900; 14Tp. 2740, 2743-46) As she walked upstairs to the home office, she saw what looked like red hair dye in the bathroom used by 2½-year-old Cassidy Young, on the upstairs landing, and in the master bedroom. When Fisher saw her sister's body on the bedroom floor, she realized that the red substance everywhere was blood. (IIp. 121-123; 14Tp. 2751-52, 2754; 15Tp. 2784, 2799-2801) Michelle Young's body was cold and she appeared to be dead. (Exh. #9)

Cassidy Young was under the covers in the master bed. (IIp. 124; 14Tp. 2755) Her footprints were visible in blood in the master bedroom, her bathroom, and second floor landing. (IIIp. 280; Vp. 692; 14Tp. 2769; 19Tp. 3582-83, 3587,

3615-16) She was not diapered and had not soiled herself. (IIp. 128; IIIp. 305; 14Tp. 2772; 15Tp. 2814)

Fisher called 911. Cassidy repeatedly asked for band-aids for her mother and said, "Mommy has boo-boos everywhere[.]" (IIp. 124-25; 14Tp. 2754; 15Tp. 2814; 16Tp. 3013) Fisher asked Cassidy several times, "Was anybody here?" No answer appears in the 911 transcript. The 911 operator asked if Ms. Young had marital problems. Fisher replied, "Not really. You know, her and her husband fight a little bit. But nothing too ridiculous." (Exh. #9)

Paramedics and Wake County Sheriff's officers responded. (IIp. 274-75; 14Tp. 2764) A paramedic confirmed that Ms. Young had been dead for some time. He checked Cassidy, who was calm, uninjured, and not dehydrated. (IIIp. 302; 14Tp. 2770) An officer asked Fisher if she had cleaned Cassidy, as Cassidy was "shockingly clean." Fisher denied that she had. (IIp. 234; IIIp. 290-92; 15Tp. 2885; 16Tp. 3056)

Fisher called her mother in New York and Mr. Young's mother Pat and told them that Michelle was dead. (IIp. 127, 135; 15Tp. 2816-17) At the time of the calls, Mr. Young was driving from Virginia to his mother's house in Brevard. Pat Young decided not to break the news on the phone. When told on his arrival, Mr. Young sank to the ground, expressed disbelief, and cried. He and his family left for

Raleigh. (XIp. 1906, 1910-11; 29Tp. 5371-77) Fisher called and talked to Mr. Young, who became upset. (IIp. 134-35; 15Tp. 2819; 17Tp. 3409-10; 29Tp. 5375)

Officers asked Fisher and friends of the Youngs if the Youngs had marital problems. It was apparent to those questioned on 3 November that police suspected Mr. Young killed his wife. (IIp. 235-36; XIIp. 2026-27; 16Tp. 2997, 3147; 27Tp. 5131) Based on this questioning, Mr. Young's friends called while he was en route to Raleigh and told him not to talk to the police until he consulted an attorney. (XIp. 1916-17; XIIp. 1989, 2028; 16Tp. 3147; 27Tp. 5125) On advice of counsel, Mr. Young never answered any law enforcement questions and did not discuss his wife's death with friends or family. (IIp. 141, 144, 148, 371, 377; IXp. 1526-27; Xp. 1625, 1627, 1633; XIp. 1920-21; 15Tp. 2823-28, 2840; 16Tp. 2989, 3142; 18Tp. 3487-90, 3499-3500; 22Tp. 4195; 25Tp. 4782; 29Tp. 5379-80; 30Tp. 5476, 5563, 5569-70)

Michelle Young died from blunt force trauma to her head. Dr. Clark, who performed the autopsy, opined that skull fractures were caused by a heavy blunt object and that blows to the mouth could have been done by a fist. (IIp. 196, 201; 17Tp. 3296, 3307, 3328-29) Fisher did not observe any injury to Mr. Young on 3 November. (IIp. 236; 16Tp. 3002) Mr. Young was examined by police on 7 November. He had no cuts, bruises, or injuries to his hands or body other than a bruise on one toe nail. (VIp. 790-93, 817-19; 19Tp. 3733-36, 3797-805)

The State presented the same evidence at both trials regarding the Youngs' activities on 2-3 November 2006. Mr. Young was scheduled to conduct a sales call in Clintwood, Virginia at 10:00 a.m. on 3 November. (VIIIp. 1314; 25Tp. 4771) Shelly Schaad went to the Youngs' house at 6:30 p.m. on 2 November to dine with Ms. Young and watch television. She was surprised that Mr. Young was still home, but knew he did things at the last moment. Schaad invited Mr. Young to eat with them. He told her he wanted to eat at Cracker Barrel, drive to Galax, spend the night, and continue driving in the morning. (IIIp. 341-44, 349-52; 16Tp. 3095-99) At 6:43, Mr. Young printed Mapquest directions to Clintwood. Between 7:05 and 7:23, he did internet searches for Coach purses, accessed photo sites, and checked e-mail. (Xp. 1687; 24Tp. 4661-63) As he was leaving, Schaad asked if he would be back for the N.C. State football game on 4 November. He said it depended on whether his father-in-law Alan Fisher was coming for the weekend. (IIIp. 351; 16Tp. 3101)

Ms. Young and Ms. Schaad ate dinner, bathed Cassidy, dressed her in pajamas, and diapered her. (IIIp. 350, 354, 357; 16Tp. 3100, 3102) Ms. Young, who was five months pregnant, showed off new baby clothes. (16Tp. 3129; 17Tp. 3328) She said she and Jason were arguing about the upcoming holidays. Ms. Young wanted her mother Linda Fisher to stay with them from Thanksgiving through Christmas. Mr. Young opposed such a long visit. (IIIp. 359; 16Tp. 3109-

10) Alan Fisher called and cancelled his visit. Mr. Young called during "Grey's Anatomy," one of his seven calls to the house that night. (IIIp. 362, 394; 16Tp. 3106-07; 21Tp. 3949-54)

Ms. Schaad had an eerie feeling that the house was being watched. When she left between 10:00 and 10:30 p.m., she was so uneasy that she asked Ms. Young to walk her to her car. (IIIp. 364, 380, 396; 16Tp. 3110-11, 3150-52)

Ms. Young was wearing a zip-up sweatshirt and sweatpants, which was not her typical sleeping attire. She was still wearing those clothes on 3 November. (IIp. 237; IIIp. 355; 15Tp. 2782-83; 16Tp. 3127) A treadmill in an upstairs room was on when police arrived. (VIp. 884; 17Tp. 3394)

Mr. Young bought gas in Raleigh at 7:30 p.m., paid for a meal at the Greensboro Cracker Barrel at 9:25, and checked into the Hampton Inn in Hillsville, Virginia at 10:54. (IVp. 413; XIp. 1752-54; 15Tp. 2906; 17Tp. 3275-76; 25Tp. 4738-39) He entered his room at 10:56 and did not use the key card again. (IVp. 471; 17Tp. 3273) At midnight, hotel cameras photographed him at the front desk and walking down a hallway leading to stairs and an exit door. (XIp. 1760; 25Tp. 4754, 4852) He was not photographed on surveillance cameras again. (26Tp. 4896)

The night clerk slid check-out receipts under guest doors between 3:00 and 5:00 a.m. and hung copies of USA Today on door handles during that time frame or later. (IVp. 425-27, 455; 15Tp. 2911, 2921-22, 2945) The check-out receipt and

weekend edition of USA Today were in Mr. Young's Ford Explorer when police seized it on 3 November. (VIp. 755, 950; 20Tp. 3756, 3891, 3893)

Mr. Young called his mother at 7:40 a.m. on 3 November. The call bounced off a cell phone tower north of Hillsville. (XIp. 1829; 21Tp. 3956) He arrived thirty minutes late for his appointment. (VIIIp. 1314; 25Tp. 4771) At 12:06 p.m., he bought gas in Duffield. (XIp. 1788; 25Tp. 4756) After leaving the voicemail for Meredith Fisher, Mr. Young called a friend about pre-existing weekend plans. (21Tp. 3964; 30Tp. 5545-46)

Officers canvassed gas stations between Hillsville and Raleigh. (Vp. 582; 17Tp. 3263) Gracie Calhoun, a gas station clerk in King, North Carolina, was shown a photograph of Mr. Young's car on 5 November and was asked if she had seen that car three days earlier. When she said she had, Calhoun was shown Mr. Young's photograph. She identified him as the driver. (Vp. 555-57; 16Tp. 3216-17) Before viewing the photo, she was not asked to give a physical description. (Vp. 594-96; 17Tp. 3279-80) At the first trial, Calhoun, who is 5' tall, described the man as "just a little bit taller than me." (Vp. 565; 17Tp. 3237) Mr. Young is 6'1". (VIp. 796; 20Tp. 3748)

Calhoun said the man drove in between 5:00 and 5:30 a.m. on 3 November, parked at the farthest pump, and tried to pump gas. At that hour, customers had to pay at the pump with a credit card or pay inside with cash. A regular customer or

newspaper deliveryman told him to come inside to pay. The man threw $20 at Calhoun, cursed at her, pumped only $15 worth of gas, and left. (Vp. 539-41; 16Tp. 3194, 3198-99, 3203) Calhoun did not provide the customer's name and the newspaperman could not recall the incident. (XIp. 1846; 24Tp. 4704; 26Tp. 4909) Store records reflected numerous gas and in-store purchases between 5:00 and 5:40 a.m., including a $15 gas purchase at 5:27 and a $20 gas purchase at 5:36. (XIp. 1842-43; 25Tp. 4776; 26Tp. 4911-12)

Before the second trial, the defense learned that Calhoun had received disability benefits since childhood. (16Tp. 3117-24) She testified she was hit by a truck when she was six, her brain fell onto the street, and doctors had to reinsert her brain. Calhoun has had memory problems her entire life. (17Tp. 3239-41)

The 168 mile drive from Raleigh to Hillsville takes 2½ to 3 hours. (IVp. 408; Vp. 600; 17Tp. 3410) The only gas receipts found were those in Raleigh on 2 November, Duffield on 3 November, and Burlington at 8:32 p.m. on 3 November. (XIp. 1811; 25Tp. 4722, 4766) If Mr. Young drove from Raleigh to Hillsville to Raleigh to King on one tank of gas, he would have gotten better gas mileage than on any other leg of his trip. (25Tp. 4769) The State argued that Mr. Young, a traveling salesman, knew how to drive his car on fumes. (32Tp. 5941)

The State presented the same forensic evidence at both trials. Mr. Young's fingerprints and DNA were found in the bedroom, which was not unusual since he

lived there. (VIIp. 1166-67; 21Tp. 4082, 4088, 4099, 4109) None of his fingerprints were in blood. (VIp. 813; VIIp. 1103; 21Tp. 4065-66; 23Tp. 4365) No blood was found in or on the Ford Explorer, Mr. Young's clothes, or his hotel room. (VIp. 757, 759, 827; VIIp. 1115; 20Tp. 3752, 3758; 21Tp. 4062-64) No blood was found in any sink, tub, shower, or drain trap at the house or Hampton Inn or on a leaking outside spigot and concrete walkway at the house. (VIp. 834, 848, 869; 19Tp. 3597, 3617, 3634; 20Tp. 3822-23; 21Tp. 4065) The only blood found somewhere other than the second floor of the house was one drop on the doorknob between the kitchen and garage. (VIp. 859-60; 17Tp. 3394) No fibers transferred between the house and the hotel. (VIIp. 1054; 21Tp. 3995) No murder weapon was found.

Fingerprints and DNA on the bedroom door, a jewelry box missing two drawers, paperwork around Ms. Young's body, eBay paperwork in the printer, a Tylenol medicine cup and eyedropper in Cassidy's bedroom, items in Mr. Young's closet, and a surveillance camera at a Hampton Inn exit door did not match Mr. Young. (VIIp. 1154, 1160; VIIIp. 1292-96; IXp. 1436-40; 17Tp. 3398-99; 21Tp. 4095, 4103-04; 23Tp. 4357-58, 4376-77, 4453, 4477-78) The surveillance camera was unplugged by someone at 11:20 p.m., plugged back in by maintenance at 5:50 a.m., and swiveled up to the ceiling at 6:35 a.m. (XIp. 1785; 25Tp. 4751-52)

Pillows on the bedroom floor bore bloody footwear impressions consistent with size 10 athletic shoes sold at Family Dollar in 2003 and size 12 Orbital, Belleville, or Sealy model Hush Puppies. (Vp. 667; VIIp. 1255-60; VIIIp. 1374-75, 1424; 19Tp. 3587; 22Tp. 4278, 4324, 4330; 23Tp. 4487) All of the shoes in Mr. Young's closet were size 12 or 13. (23Tp. 4347) Mr. Young bought size 12 Orbital Hush Puppies in July 2005. (IXp. 1387; 24Tp. 4671) Law enforcement never found shoes matching either impression. (24Tp. 4692-93) Mr. Young testified that Michelle donated the Hush Puppies to Goodwill after they wore out. (Exh. #187 p. 101)

The State presented the same evidence at both trials about the Youngs' relationship. They had an up and down courtship and argued in public over petty matters. Their friends assumed they got married only because Michelle got pregnant. (IIIp. 320; XIIp. 2031-33; 16Tp. 3135; 18Tp. 3512-13; 27Tp. 5108-09) Michelle thought Jason was "the one" and Jason thought the pregnancy accelerated their inevitable marriage. (18Tp. 3512; Exh. #187 p. 13)

The relationship remained volatile. In public, they got along great or argued. (IIIp. 326; 16Tp. 3080; 27Tp. 5110; 30Tp. 5558) They argued before and at the Schaads' 14 October 2006 wedding. At one point, Mr. Young said he was "done." Everything was fine by the wedding reception. (IIIp. 329-31; Xp. 1711-18; 16Tp. 3090-92; 27Tp. 5115-20) Ms. Young told a therapist on 27 October that the

wedding ended up being a "wonderful experience" and the two had a "lot of fun." (Exh. #135)

Meredith Fisher thought Mr. Young was irresponsible and treated her sister poorly. She told Michelle to leave him. Michelle Young took no steps to divorce. (IIp. 78, 80; 15Tp. 2863-64) Linda Fisher had no emotional connection to her son-in-law, as Michelle called her frequently to complain. (IIp. 76, 85; 14Tp. 2708, 2866; 17Tp. 3356; 18Tp. 3476) Linda Fisher's involvement in their lives provoked arguments. She visited for extended periods and wanted to move to North Carolina to spend more time. She offered to renovate the house so she could stay there. (IIp. 87-88; IIIp. 327; VIIp. 1010; Xp. 1607; 14Tp. 2706; 18Tp. 3460, 3463, 3467) While Ms. Young wanted her mother there to do free cooking, cleaning, and child care, Mr. Young was adamant that she was not moving in. (IIIp. 360; 14Tp. 2724; 18Tp. 3467)

Michelle Young was a "type A" personality who stressed and sweated every detail. (IIIp. 313; 16Tp. 2998-99, 3112; 22Tp. 4214-15) She planned things months in advance. Jason Young did not. He was the "life of the party," flirtatious, and spontaneous. (IIIp. 352; 14Tp. 2722; 16Tp. 3082; 27Tp. 5002)

On 27 October 2006, Ms. Young saw a therapist about her marriage. (18Tp. 3531, 3535) She said her current pregnancy was planned. She did not report any

physical abuse (18Tp. 3552) and none of her family or friends ever witnessed any. (IIp. 218, 259; 16Tp. 3156; 27Tp. 5020)

The same evidence was introduced at both trials that Mr. Young was engaged to Genevieve Cargol in 1999. In December 1999, Cargol was disappointed when Mr. Young accepted a drinking challenge. When she later confronted him, Mr. Young said, "If I'm going to make such a terrible husband then give me back my ring." She told him she couldn't get it off her finger. He grabbed her, threw her onto the bed, and forcibly removed the ring. (IXp. 1566-75; 22Tp. 4139-52) Cargol begged for the ring back the next day. After they broke up, they periodically dated and e-mailed. (IXp. 1577-80, 1587-88; 22Tp. 4154-57, 4162, 4170-71) Mr. Young e-mailed her in September 2006 that he loved her and was not going to act on that feeling. (IXp. 1590; 22Tp. 4175; 23Tp. 4510-14)

The same evidence was introduced at both trials that Mr. Young had two sexual encounters outside the marriage. Carol Ann Sowerby, a childhood friend of Mr. Young's, visited the Youngs in October 2006. She and Mr. Young had sex one night when Michelle was out of town. (IXp. 1514-22; 22Tp. 4181-85, 4190) Michelle Money, a college friend of Ms. Young's, began confiding in Mr. Young in July 2006 about her marriage. In September 2006, the Moneys and other friends spent a weekend at the Youngs'. Mr. Young thought her husband's behavior confirmed Money's suspicions that he was having an affair. She talked to Mr.

Young about it and found him sympathetic. (VIIp. 972, 981-90; 22Tp. 4203, 4216-19) They began calling and texting several times a day. Mr. Young flew to Orlando on 7 October 2006 and spent the weekend with Money. (VIIp. 991-94; 22Tp. 4222-23) Though each knew the relationship had no future, they discussed getting together on 3-5 November. (22Tp. 4229, 4253) Mr. Young said that weekend would not work, as he had a business meeting and his father-in-law and friends would be staying at the house. (VIIp. 996; 22Tp. 4229, 4263)

Mr. Young and Money called each other numerous times on 2-3 November. (VIIp. 1000; 21Tp. 3950-69) In one call, he mentioned having left printouts in his office for a Coach bag he was buying Michelle as a surprise. (VIIp. 1004; 22Tp. 4239) Mr. Young sounded normal in all of the calls. (VIIp. 1026-27; 22Tp. 4223, 4255-56) Police repeatedly interviewed Money, accused her of being an accessory, and told her to cut off contact with Mr. Young. (VIIp. 1108-09, 1014, 1018, 1025; 22Tp. 4242, 4259-60)

Evidence was presented at both trials from people who drove by the house on 3 November. A newspaper deliveryman drove by at about 3:50 a.m., noticed nothing unusual, and did not see a vehicle. (XIIIp. 2273; 31Tp. 5763-65) A newspaper delivery woman passed the house between 3:30 and 4:00 a.m. She noticed that interior, exterior, and driveway lights were on, which was unusual at that hour. She saw a light colored SUV in the yard or on the street in front of the

house and a minivan across the street. (XIIp. 2058-61; 17Tp. 3363-77) A neighbor passed between 5:20 and 5:30 a.m. The house and driveway lights were on and a light colored "soccer-mom car" with its lights on was at the edge of the driveway. A white male was in the driver's seat and someone, possibly female, sat in the passenger seat. (XIIp. 2068-72; 30Tp. 5514-18) Another neighbor passed the house around 6:15 a.m. and saw an empty SUV at the edge of the driveway. (30Tp. 5501, 5507)

Mr. Young testified at the first trial. The State introduced his testimony at the second trial. (25Tp. 4825; Exh. #187) Mr. Young denied killing his wife, being present when she was killed, and having any knowledge of who killed her. (Exh. #187 p. 2, 112-13)

Mr. Young loved his wife, never seriously considered divorce, and did not intend to leave his wife for Money. (Exh. #187 p. 2, 40, 46) He wanted the marriage to work. (Exh. #187 p. 42-43) When a 2006 planned pregnancy ended in a miscarriage, they tried again as soon as medically allowed. Mr. Young was ecstatic when Michelle got pregnant again and was particularly excited they were having a boy. (Exh. #187 p. 31-33) He thought Michelle was an "absolutely amazing mother" and hoped they would have even more children. (Exh. #187 p. 25, 40)

Mr. Young did not think that they argued more than other couples, only that they argued more in public. (Exh. #187 p. 37) Their arguments were never physical. (Exh. #187 p. 43) He encouraged Meredith Fisher to act as a go-between. (Exh. #187 p. 38) Linda Fisher and others criticized him for not doing enough for their October wedding anniversary. Mr. Young felt bad because he had spent the anniversary weekend with Money. He decided to surprise Michelle with a Coach handbag. (Exh. #187 p. 89)

Mr. Young had a new job selling electronic health records software. His employer set up the Clintwood sales call. He decided to stay overnight at a hotel, rather than leave very early in the morning for the lengthy drive. He did not make a hotel reservation for 2 November. As he was driving, he pulled off at the Hampton Inn in Hillsville. After checking in, he called Michelle and Money. (Exh. #187 p. 53-56, 64-65)

Mr. Young was nervous about the sales call, as it was his first solo call. He decided to review the demonstration software, but could not as he had left the computer cord in his car. He pulled the hotel room door flush and walked downstairs, where he realized he could not get back inside without his room key card. He opened an exit door, saw a shrub, broke off a stick, stuck it in the door, retrieved the charger, and returned to his room. (Exh. #187 p. 54, 65-67)

After reviewing the sales materials, Mr. Young decided to smoke a cigar and get the Thursday newspaper. Smoking was not allowed in guest rooms. He pulled the door flush and walked downstairs. Mr. Young got a newspaper from the front desk clerk. He walked down a hallway, inserted another stick in the door, went outside, and smoked. He re-entered, walked to his room, and went to sleep. (Exh. #187 p. 73-78) He arrived late for his appointment because he got lost. (Exh. #187 p. 79-80, 83)

The State presented evidence at the second trial responding to Mr. Young's testimony. The State's crime scene investigator was able to prop the hotel exit door open with a stick and confirmed that guests could smoke just outside that door. (20Tp. 3835) Two officers got lost driving to Clintwood, but found the hospital without difficulty. (17Tp. 3277; 26Tp. 4903-04) Witnesses testified they never saw Mr. Young smoke cigars. (15Tp. 2852; 27Tp. 5128) The Youngs had a cigar humidor and a credit card receipt documented a cigar purchase. (30Tp. 5399; 31Tp. 5649)

At the second trial only, the State introduced evidence that on 29 October 2008, Linda Fisher filed a wrongful death action and request for a slayer declaration against Mr. Young. (27Tp. 5062-63) Mr. Young did not respond. On 5 December 2008, Judge Stephens heard a motion for entry of a default judgment. (27Tp. 5066-68) Judge Stephens reviewed evidence and affidavits and entered a

judgment finding that Mr. Young "willfully and unlawfully killed" Michelle Young. (27Tp. 5070, 5072, 5090-93; 28Tp. 5164)

At the second trial only, the State introduced a Child Custody Complaint filed by the Fishers on 17 December 2008. (28Tp. 5158; Exh. #200) The Complaint recited the wrongful death and slayer judgment and alleged incidents they contended demonstrated that Mr. Young was an unfit parent. (28Tp. 5163-65; Exh. #200)

At the second trial only, the State introduced hearsay statements of Cassidy Young. Daycare worker Ashley Parlmatier testified that on 9 November 2006, Cassidy picked out two dolls, called one the "mommy" doll, hit the dolls and a dollhouse chair together, and said, "Mommy's getting a spanking for biting. Mommy has boo-boos all over." (24Tp. 4581-86)

STANDARDS OF REVIEW

Issues I, II, and III raise violations of statutory mandates reviewable *de novo* without objection. *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989); *State v. Mackey*, 365 N.C. App. 116, 120, 708 S.E.2d 719, 721, *disc. review denied*, 365 N.C. 193, 707 S.E.2d 246 (2011). Issues I and IV raise evidentiary issues preserved for *de novo* and abuse of discretion review. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986); *State v. Martinez*, __ N.C. App. __, __, 711 S.E.2d 787, 789 (2011); *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d

790, 797 (2011). Issues I and V raise matters reviewable for plain error. *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012). Issue VI presents sufficiency of the evidence reviewable *de novo*. *State v. Smith*, 196 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Under the *de novo* standard, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-633, 669 S.E.2d 290, 294 (2008). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 526 (1988). Plain error arises when fundamental error had a probable impact on the verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING TESTIMONY RELATING TO A WRONGFUL DEATH ACTION AND DECLARATION UNDER THE SLAYER STATUTE THAT MR. YOUNG KILLED HIS WIFE, MR. YOUNG'S DEFAULT, AND ENTRY OF JUDGMENT.

No reference was made at the first trial to a wrongful death judgment and slayer determination obtained by Linda Fisher before Mr. Young's arrest. (Hearing 16 December 2011 p.7) The trial ended in a hung jury. The State told the jury in opening statement on retrial that a wrongful death action was filed alleging that

Mr. Young killed his wife, he defaulted, and judgment entered against him. (14Tp. 2639-40; Appendix) Before the State called the Clerk of Court to testify about the civil action, the defense objected, pursuant to N.C.G.S. §8C-1, Rule 403, "to the entire line of questioning about the wrongful death case." (27Tp. 5045-46) The court overruled the objection and ruled that the evidence was relevant and possessed probative value outweighing its prejudice. (27Tp. 5045-47)

The Clerk's recitation of allegations in the pleadings and testimony that Mr. Young defaulted by failing to respond was inadmissible under N.C.G.S. §1-149 and automatically preserved for *de novo* review. *State v. Ashe*, 314 N.C. 28, 29, 331 S.E.2d 652, 659 (1985); *State v. Wilson*, 217 N.C. 123, 126-27, 7 S.E.2d 11, 13 (1940). The Clerk's recitation of the judgment was error preserved by objection. *State v. Dula*, 204 N.C. 535, 536, 168 S.E. 836, 836-37 (1933). Assuming *arguendo* that the evidence was admissible and relevant, the court committed plain error in admitting hearsay. *Cf. State v. Ridgeway*, 137 N.C. App. 144, 147-48, 526 S.E.2d 682, 685 (2000). If admissible, relevant, and non-hearsay, the court abused its discretion under Rule 403. To any extent trial counsel failed to preserve matters for appellate review or invited the State to introduce additional inadmissible evidence, Mr. Young was deprived of the effective assistance of counsel. (*See* Motion for Appropriate Relief) Mr. Young's conviction must be reversed.

The defense learned before the retrial that the State intended to introduce evidence about the civil action. (Rp. 27) Counsel failed to research whether the evidence was admissible or move pre-trial to exclude the evidence on any ground. (MAR affidavits) Instead, counsel requested discovery of the civil attorneys' files. (Rp. 24-38) The State responded that it intended to introduce all public records in the civil case, have a witness explain the documents, and cross-examine Mr. Young about this if he testified. The court ruled that this evidence, if relevant, could be inquired into at trial. (Hearing 16 December 2011 p. 8-9)

At trial, Wake County Clerk Lorrin Freeman testified that on 29 October 2008, Linda Fisher, on behalf of Ms. Young's estate, filed a wrongful death action and request for disqualification under the slayer statute against Mr. Young. Freeman explained that a wrongful death action is a claim for monetary relief filed against a defendant alleged to have directly caused the decedent's death. The complaint also asked that Mr. Young be disqualified from benefiting from the estate, such as collecting life insurance proceeds. (27Tp. 5048, 5057, 5062-65) Although the complaint was not offered into evidence, the prosecutor asked Freeman to read "paragraph 6:" "In the early morning hours of November 3, 2006, Jason Young brutally murdered Michelle Young." (27Tp. 5065)

Freeman testified that the file showed that no attorney entered on Mr. Young's behalf and he did not respond to the suit. She testified that failing to

answer "has the legal implication or the legal result of the defendant having admitted the allegations as set forth in the complaint." Freeman entered a default on 2 December 2008. Fisher then moved for entry of a default judgment and slayer declaration. (27Tp. 5066-69)

On 5 December 2008, Judge Stephens heard the motion. Freeman testified that the judgment recited that Judge Stephens reviewed evidence and attachments to the motion including the autopsy report, a shoe print, a shoe tread design, Hampton Inn photos, a search warrant, an affidavit by Detective Spivey, and an affidavit by Fisher's attorney attesting to his opinion, based on review of the State's criminal investigation, that Mr. Young "brutally murdered" Ms. Young. (27Tp. 5068, 5070-71, 5090-93) Over objection, Freeman testified that Judge Stephens entered a judgment declaring that Mr. Young killed Michelle Young. (27Tp. 5072) Over a Rule 403 objection, Freeman testified that Mr. Young could have presented evidence in the civil action. (27Tp. 5093)

N.C.G.S. §1-149 provides that no civil pleading "can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." The common law provides additional protection to criminal defendants, as it

> is generally held that 'a judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reasons that the parties are not the same, and different rules as to the weight of the evidence prevail.' 15 R.C.L., 1004.

Dula, 204 N.C. at 536, 168 S.E. at 836-837. *See People v. Barker*, 29 Cal. App.2d Supp. 766, 77 P.2d 321 (1938) (collecting cases). Civil defendants are not afforded constitutional protections such as the right to counsel, *Trice v. State*, 755 So.2d 808, 810 (Fla. App. 2000), and

> the penalties are not the same; the causes of action are different; the burden of proof is not the same; [and] the rules of procedure are not the same, in that in a civil action the defendant may be forced to testify, while he cannot be compelled to do so in a criminal proceeding.

Helms v. State, 35 Ala. App. 187, 45 So.2d 170, 1950 Ala. App. LEXIS 372, p. 3 (1950).

The exclusion of civil pleadings and judgments in criminal prosecutions is particularly warranted when the matter was resolved by default. "It would be hard for a defendant...'that upon a criminal charge, which concerns his liberty, or even his life, he should be bound by any default of his in defending his property.'" *Britton v. State*, 77 Ala. 202, 209 (1884). Eliciting evidence that a criminal defendant failed to deny civil allegations constitutes use of civil pleadings against the defendant in violation of statute. *Wilson*, 217 N.C. at 126-27, 7 S.E.2d at 13.

Faced with a statutory and common law bar, the State never articulated a basis for admission. The court did not address whether some exception to the prohibitions applied, but instead ruled that the civil action, default, and judgment "might be relevant to any number of matters the jury has already heard and will

hear." (27Tp. 5046) The court never articulated what any of those matters might be.

A record of judicial proceedings may be "admissible to prove the fact, time, term and effect of the judgment...when the existence of the judgment is relevant," or when it reflects a guilty plea or other "solemn admission[.]" *State v. Rogers*, 198 S.C. 273, 275-76, 17 S.E.2d 563, 564 (1941). Evidence establishing the bare "fact, time, term, and effect of the judgment" was barred. The default was not comparable to a guilty plea, since no admission of record was attributable to Mr. Young. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969). Since Mr. Young did not author the complaint or testify at the second trial, the evidence had no impeachment use. *State v. McNair*, 226 N.C. 462, 38 S.E.2d 514 (1946). This evidence could not properly have corroborated Linda Fisher's thinly veiled opinions of guilt (18Tp. 3487, 3489, 3499-3500), since her opinions were themselves inadmissible. *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). The judgment had no *res judicata* effect. *Dula*, 204 N.C. at 536, 168 S.E. at 837; *Roden and Son v. State*, 30 Ala. App. 229, 231, 3 So.2d 420, 421 (1941). Mr. Young could not have introduced at the criminal trial a civil verdict in his favor any more than the State could have introduced a verdict rendered on a preponderance of the evidence. *Rogers*, 198 S.C. at 277, 17 S.E.2d at 564;

Kilpatrick v. People, 64 Colo. 209, 214-215, 170 P. 956, 958-959 (1918). The testimony was irrelevant.

If relevant, the evidence was inadmissible hearsay under Rule 802. 2 *Brandis & Broun On North Carolina Evidence* 781 and n.74. (7th ed. 2011). Freeman read extensively from the civil file. The evidence was offered to not merely prove the fact of a lawsuit, default, and judgment, but the content of documents. Admission of hearsay was plain error, as advising a jury of a default and judgment "would ordinarily tend to influence the mind of a juror in the criminal prosecution to the prejudice of the defendant." *Helms*, 1950 Ala. App. LEXIS 372, p. 4 (evidence of civil settlement inadmissible). This evidence thus had a probable impact on the verdict. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

If any credible argument could be advanced that this evidence was not barred by statute, case law, Rules 402 and 802, Rule 403 militated against its admission. "When the intrinsic nature of the evidence is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under [Rule 403] as a matter of law." *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992). Admitting such evidence constitutes a *per se* abuse of discretion, for

> sound judicial discretion means 'a discretion that is not exercised arbitrarily or willfully, but with regard to what

> is right and equitable under the circumstances of the law, and directed by the reason and conscience of the judge to a just result.'

State v. Tolley, 290 N.C. 349, 367, 226 S.E.2d 353, 367-68 (1976) (citation omitted). Just as evidence of a crime resulting in acquittal or shackling diminishes the presumption of innocence, evidence that Mr. Young defaulted, which caused admission of civil allegations and entry of judgment declaring he killed his wife, eroded his presumption of innocence and provided an improper basis for conviction. The prejudice resembled that sustained when a jury learns that the defendant was previously convicted of the charged offense, *State v. Lewis*, 365 N.C. 488, 496, 724 S.E.2d 492, 496 (2012), but was even greater, since "there is no rule by which courts can measure and determine [the] effect" when a jury learns of an enforceable judgment. *State v. Bradnack*, 69 Conn. 212, 216, 37 A. 492, 493 (1897).

Counsel has not found one case where a wrongful death judgment and slayer determination was admitted in a homicide prosecution. While a criminal judgment is admissible in a slayer action, *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 57, 213 S.E.2d 563, 569 (1975), the converse seems never to have occurred, no doubt due to the overwhelming risk of an unreliable guilty verdict.

Although the prosecutor stated in closing that the court had already told the jury how to use this evidence and would again in its final charge (32Tp. 5945), at

no time did the court explain its use. The court simply told the jury that judgment can enter in a civil action when the defendant fails to respond and the allegations, "whether true or not, which have not been denied by the defendant, are deemed in the civil law to have been admitted[.]" The court stated that entry of a civil judgment "is not a determination of guilt by any court that the named defendant has committed any criminal offense." (27Tp. 5057-59; 33Tp. 5963-64; Appendix)

The cautionary note that the truth of civil allegations does not bear on entry of judgment rang hollow since the State took pains to establish that this judgment was not mechanically entered by a clerk. It entered only after Judge Stephens reviewed evidence and affidavits. (27Tp. 5070, 5090-92) Advising the jury that the judgment did not constitute a judicial finding of criminal liability could hardly have been given effect since it declared that Mr. Young "willfully and unlawfully killed" Michelle Young. (27Tp. 5072-73; 28Tp. 5164; Exh. #200) "Willfully and unlawfully" connote intentional illegal conduct that is criminally punishable. *Black's Law Dictionary* 1536, 1595 (7th ed. 1999). Under §31A-3, "willfully and unlawfully" specifically "refer[] to an 'intentional' homicide." *Quick*, 287 N.C. at 51, 213 S.E.2d at 565.

"It is axiomatic that in a criminal trial when substantive evidence is admitted, it bears directly upon the question of the defendant's guilt or innocence." *State v. Coleman*, __ N.C. App. __, 742 S.E.2d 346, 2013 N.C. App. LEXIS 547,

p.11, *stay allowed*, 2013 N.C. LEXIS 481 (2013) Under these instructions, the jury could use this evidence in deciding the only contested issue in the case.

Assuming that the instructions could be read as limiting or prohibiting jury reliance on this evidence, though no such words appeared therein, admission of the evidence nonetheless to a reasonable probability affected the outcome of the case. This evidence derailed "the central purpose of a criminal trial [which] is to decide the factual question of the defendant's guilt or innocence[.]" *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

> Whether an instruction to disregard or give limited consideration to evidence cures an error potential in its admission must always depend upon the nature of the evidence admitted and the circumstances of the case....'[I]f the evidence admitted is especially prejudicial, and especially if it is emphasized by repetition or by allowing it to remain before the jury for an undue length of time, it may be too late to cure the error by withdrawal' or cautionary instructions.

Duke Power Co. v. Winebarger, 300 N.C. 57, 67, 265 S.E.2d 227, 233 (1980) (citations omitted).

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton v. United States, 391 U.S. 123, 135 (1968). This evidence was especially prejudicial. The State highlighted it in opening statement. Freeman's testimony was

lengthy. Any relief afforded by sustained objections in opening statement evaporated when Freeman testified that Mr. Young's failure to answer had "the legal implication or the legal result of the defendant having admitted the allegations as set forth in the complaint." (27Tp. 5067) The jury was exposed to the judgment again by Michael Schilawski (28Tp. 5164) and the Custody Complaint. (Exh. #200) Given the circumstantial nature of the case and the overwhelmingly prejudicial nature of this evidence, "there is a reasonable possibility that a different result would have been reached" had the evidence not been admitted, §15A-1443(a), as it had when this evidence was not offered.

Admission of this evidence requires a new trial. Should this Court determine that counsel's lodging of a Rule 403 objection deprived Mr. Young of *de novo* review of testimony about the pleadings and default, that counsel's objection to recitation of the judgment was not based on Rule 401, or that counsel invited the State to introduce the prejudicial testimony about the attorney affidavit, Mr. Young was deprived of the effective assistance of counsel. For the additional reasons set forth in the MAR, Mr. Young is entitled to a new trial.

II. WHEN THE PROSECUTOR INFORMED THE JURY AND ELICITED TESTIMONY THAT JUDGE STEPHENS ENTERED THE WRONGFUL DEATH AND SLAYER JUDGMENT, MR. YOUNG WAS DEPRIVED OF A FAIR TRIAL BY THE EXPRESSION OF JUDICIAL OPINION.

> Parties in a trial must take special care against expressing or revealing to the jury legal rulings which have been

> made by the trial court, as any such disclosures will have the potential for special influence with the jurors. *See* N.C.G.S. §15A-1222 (1999) (stating that 'the judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury'). As we have stated: '"The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him."']

State v. Allen, 353 N.C. 504, 509-10, 546 S.E.2d 372, 375 (2001) (citations omitted). The improper expression of judicial opinion may come directly from the judge or indirectly from the prosecutor. In either instance, §15A-1222 is violated. *State v. Wade*, 198 N.C. App. 257, 272, 679 S.E.2d 484, 493, *review denied*, 363 N.C. 662, 686 S.E.2d 153 (2009). In questioning Lorrin Freeman, the prosecutor told the jury that Judge Stephens entered the wrongful death judgment and slayer determination. (27Tp. 5070) Freeman confirmed Judge Stephens' role, the evidence and affidavits Judge Stephens reviewed, and that Judge Stephens found that Mr. Young killed Michelle Young. (27Tp. 5070, 5072, 5091-92) Advising the jury that the same judge presiding over the criminal trial entered a judgment, after reviewing the identical evidence the jury received, finding that Jason Young killed Michelle Young violated §15A-1222 and requires reversal.

In *Wade*, this Court ruled that when a prosecutor asked a witness whether the trial judge had found probable cause to conduct a search, the prosecutor conveyed the court's "favorable comment on the credibility of the State's

witnesses[.]" 198 N.C. App. at 272, 679 S.E.2d at 493. Unlike *Wade*, prejudice occurred herein as Freeman verified the role of the trial judge, the questions and answers clearly conveyed that Judge Stephens, in a separate proceeding, had assessed the reliability and trustworthiness of the State's evidence adversely to Mr. Young, and evidence of guilt was not overwhelming.

In *State v. Wilson*, 217 N.C. 123, 126, 7 S.E.2d 11, 13 (1940), the Court found error in the admission, over objection, of orders entered by the trial judge in a related civil proceeding because entry of orders suggested that the judge held opinions on the matter. The Court noted that the propriety of the judge's orders was

> not here questioned, but it was prejudicial to the defendant on this trial, charged with a felony, to have the weighty effect of those statements, opinions and court orders, relative to the matter then being inquired into, laid before the empanelled jury.

Id. at 126, 7 S.E.2d at 12-13.

Mr. Young objected when Freeman confirmed that the judgment declaring Mr. Young to be the killer was entered by Judge Stephens. (27Tp. 5071-72) Even without this objection, the improper expression of opinion was preserved as a matter of law. *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005). The questions and answers "clearly conveyed an opinion as to the credibility of evidence that was before the jury. This opinion was attributed to the trial judge in his presence, and he then overruled defendant's objection to this revelation." *Allen*,

353 N.C. at 509, 546 S.E.2d at 375. As in *Allen*, the State's case was entirely circumstantial and not overwhelming. Given that a jury which heard the case without this inadmissible opinion split eight to four for acquittal (Rp. 22; Amendment to Record), it cannot be said "that there is or can be no reasonable possibility that a different result would have been reached had this...not occurred." *Id.* at 511, 546 S.E.2d at 376.

III. THE TRIAL COURT ERRED IN ADMITTING THE CHILD CUSTODY COMPLAINT.

The court admitted a "Child Custody Complaint Request for Psychological Evaluation" into evidence without restriction. (28Tp. 5158-59; Exh. #200) Substantive use of the Complaint violated the mandate of N.C.G.S. §1-149. Mr. Young was prejudiced, as its contents could only have inflamed the jury and provided improper bases for conviction.

At the first trial, testimony was received from Meredith Fisher, Linda Fisher, Michael Schilawski, and Jason Young about curtailments in visitation after Michelle Young's death which prompted the Fishers to sue for custody of Cassidy Young. The matter was resolved by entry of a consent order granting custody to Meredith Fisher. (IIp. 150-57; Xp. 1629-36, 1720-35; XIIIp. 2223-24, 2254-57) At the second trial, in addition to virtually identical testimony (15Tp. 2841-50; 16Tp. 2987-88; 18Tp. 3493-505; 28Tp. 5146-92; Exh. #187 p. 110-11, 139-42), the State offered the Custody Complaint itself into evidence. The Complaint alleged that Mr.

Young "brutally murdered" Michelle Young and judgment entered declaring that he "willfully and unlawfully killed" Michelle Young. It alleged that Mr. Young had "not behaved as a grieving spouse would since Michelle's murder," failed to provide a stable living environment for Cassidy, not personally cared for Cassidy, posted photographs of Cassidy on the internet to get dates, engaged in sex with women he had affairs with prior to his wife's death, and "acted inconsistently with his Constitutionally-protected status as the biological parent to Cassidy." (Exh. #200) No witness testified about any of this alleged conduct.

The Complaint was inadmissible under §1-149. Its contents were not independently admissible. The civil judgment recited therein was inadmissible as argued in Issue I *infra*. Opinion evidence as to guilt was inadmissible. *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). Alleged poor parenting did not demonstrate consciousness of guilt, *cf. State v. Myers*, 309 N.C. 78, 87 and n.2, 305 S.E.2d 506, 511 and n.2 (1983), but was inadmissible character evidence under §8C-1, Rule 404(a). *State v. Maxwell*, 96 N.C. App. 19, 25, 384 S.E.2d 553, 557 (1989).

When a jury is tasked with deciding whether to believe a defendant's claim of innocence, the injection of inflammatory and irrelevant evidence in violation of a statutory mandate affects the outcome. The State did not produce overwhelming

evidence of guilt. To a reasonable possibility, the jury's unfettered consideration of the Complaint affected the verdict and requires reversal under §15A-1443.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING STATEMENTS OF CASSIDY YOUNG WHICH DID NOT QUALIFY FOR ADMISSION UNDER ANY HEARSAY EXCEPTION, WERE IRRELEVANT, AND WERE OVERWHELMINGLY PREJUDICIAL.

Over evidentiary and constitutional objections, the court admitted out-of-court statements of 2½-year-old Cassidy Young. The court correctly determined, under N.C.G.S. §8C-1, Rule 801(a), that the State offered the statements for their truth, but erred and abused its discretion in ruling that the evidence was admissible, relevant, and possessed probative value outweighing its prejudice. Mr. Young was deprived of a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. His conviction should be reversed.

At the first trial, the State told the jury in opening statement that Cassidy found her mother's body. (Ip. 13) No evidence was introduced suggesting she witnessed the murder. The State argued that the jury could infer Mr. Young was the killer because he drugged Cassidy during or after the murder. (XIVp. 2412)

In support thereof, the State introduced evidence that Tylenol cold medicine, Pancof-PD, and an eyedropper containing red liquid were in Cassidy's bedroom and, in Detective Spivey's opinion, both medications seemed out of place. (Vp.

686-87; XIp. 1770-71) A forensic chemist testified that the eyedropper contained cold medications and dihydrocodeine, a schedule III narcotic. (VIIp. 1081-82, 1086) Spivey testified that Pancof-PD, an adult cold medicine manufactured by Mr. Young's former employer, contains sleep-inducing dihydrocodeine and that the effectiveness of Pancof-PD in children was unconfirmed. (XIp. 1772-74, 1850) The theory ran aground when evidence was introduced that fingerprints on the Tylenol medicine cup and a partial DNA profile on the eyedropper did not match Mr. Young. (VIIp. 1161; XIp. 1848-49) Defense evidence established that Pancof-PD was prescribed for children and made them hyperactive. (XIIIp. 2264-68)

The State abandoned the forensic chemist, Spivey's speculations, and its "Cassidy was drugged" theory at retrial and instead offered evidence purporting to establish that Cassidy witnessed the murder. *In camera*, the State presented daycare worker Ashley Parlmatier, who testified that she told a Wake County detective on 9 November 2006 that Cassidy selected two female dolls that day, hit them together with a dollhouse chair, and said, "Mommy's getting a spanking for biting. Mommy has boo-boos all over." After napping, Cassidy said, "Mommy fell on the floor. Now she's on the bed with animals. The animals are asleep. There was a cow. Daddy bought me new fruit snacks." (23Tp. 4521-32) The State argued that Cassidy saw the murder and only Mr. Young would have left her unharmed. (23Tp. 4460)

The defense objected, citing hearsay, due process, lack of competency, relevance, and undue prejudice. (23Tp. 4458-59) The court ruled that (1) the statements met the present sense impression, excited utterance, and residual hearsay exceptions; (2) the evidence was relevant because if Cassidy witnessed all or part of the homicide and if the murderer knew that, her being left unharmed had probative value in determining the killer's identity; and (3) the evidence was more probative than prejudicial. (23Tp. 4465-66) The court *sua sponte* excluded the post-nap statements (23Tp. 4542) and granted the defense a line objection. (24Tp. 4549-50) It instructed the jury that evidence was being introduced of "observations" of Cassidy Young, made when she "may have had some memory" of her mother's death, which the jury could use in determining if Cassidy witnessed "part of the assault[.]" (24Tp. 4551-52; 33Tp. 5962-63; Appendix) A daycare teacher then testified that on 9 November 2006, Cassidy asked her for "the mommy doll." She gave Cassidy a bucket of dolls. Cassidy picked two dolls and hit them together. (24Tp. 4558-61) Parlmatier testified that she saw Cassidy strike a "mommy doll" with another doll and a dollhouse chair while saying, "Mommy has boo-boos all over" and "Mommy's getting a spanking for biting. Mommy has boo-boos all over, mommy has red stuff all over." (24Tp. 4580-81, 4585-86) The prosecutors argued that this evidence proved Mr. Young's guilt. (32Tp. 5936-37, 5944-45)

Rule 803(1) allows for admission of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." These statements were not made while perceiving an event or after a brief lapse of time. They did not meet 803(1). *State v. Maness*, 321 N.C. 454, 364 S.E.2d 349 (1988) (nine day delay); *State v. Wiggins*, 159 N.C. App. 252, 584 S.E.2d 303 (2003) (nine hour delay); 2 *McCormick on Evidence* 254 (6th ed. 2006).

Rule 803(2) allows for admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." A statement may relate to a startling event, yet not have been made while the declarant was "excited, startled, or under the stress of excitement[.]" *State v. Carter*, __ N.C. App. __, __, 718 S.E.2d 687, 696 (2012), *reversed on other grounds*, __ N.C. __, 739 S.E.2d 548 (2013). More flexibility is afforded statements by children, particularly if the statements relate to subjects like sexual abuse as to which children are unlikely to have alternate sources of knowledge. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985); *State v. Thomas*, 119 N.C. App. 708, 460 S.E.2d 349 (1995).

Cassidy was asked on 3 November what happened and whether "Mommy fell." She only responded, "Boo boo, my mommy's got boo boos." (Exh. #9) Ms. Young's cause of death was discussed by family members. (16Tp. 2997; 29Tp.

5316-17, 5335, 5372, 5380) Cassidy's statements six to seven days after the homicide, uttered without tears or excitement after ready availability to information about her mother's death were the product of a prolonged "opportunity to reflect on what had occurred." *State v. Jolly*, 332 N.C. 351, 360, 420 S.E.2d 661, 667 (1992). No North Carolina case has found a statement made six to seven days after an event to be an excited utterance. These statements did not meet 803(2). *See Maness*, 321 N.C. at 459, 364 S.E.2d at 351 (nine day delay).

> Before hearsay statements may be admitted as substantive evidence under Rule 803(24), the trial judge must undertake a six part inquiry. (citations omitted) The trial judge must determine in the affirmative that (A) the proper notice has been given, (B) the hearsay is not specifically covered elsewhere, (C) the statement is trustworthy, (D) the statement is material, (E) the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (F) the interests of justice will be best served by admission.

State v. Holden, 106 N.C. App. 244, 250, 416 S.E.2d 415, 419 (1992). Rote recitation of the factors does not suffice, as the court "is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness" and "give its analysis" as to the remaining prongs. *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988).

No notice of intent to offer the statements was given, perhaps because the State considered the evidence non-hearsay. (23Tp. 4459) The court found that two

other hearsay exceptions applied. The inquiry should therefore have ceased. *Smith*, 315 N.C. at 92-93, 337 S.E.2d at 844.

The trustworthiness determination is the most significant of the 803(24) inquiries. *Id.* at 93, 337 S.E.2d at 845. The court did not make trustworthiness findings. This Court must "review the record in its entirety" to determine if trustworthiness was shown. *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011). Any factor material to the determination may be considered. *Id.* at 64, 707 S.E.2d at 196. Militating against trustworthiness was Cassidy's subsequent lack of fear of her father (16Tp. 3004), statements during the 911 call which prompted Fisher to tell the 911 operator, "I know she doesn't understand," (16Tp. 3024), and her post-nap statements, which suggested an inability to distinguish between reality and imagination. *See State v. Stutts*, 105 N.C. App. 557, 414 S.E.2d 61 (1992).

Courts often examine whether the statement clearly demonstrated personal knowledge, the declarant's motivation to tell the truth, recantations, and the declarant's availability for cross-examination. *Smith*, 315 N.C. at 93-94, 337 S.E.2d at 844-45. Whether Cassidy had first-hand knowledge was precisely the question at hand. The State was required to show that she "must have had an opportunity to observe and must have actually observed the facts." Rule 602 cmt. *See State v. Poag*, 159 N.C. App. 312, 322-23, 583 S.E.2d 661, 669 (2003). That showing

could not be made by the statements alone. No witness testified that Cassidy customarily slept with her mother when her father was out of town. Schaad did not testify that Cassidy was put to sleep in the master bedroom. (16Tp. 3108) The 911 call reflects that Cassidy said, "(inaudible) Daddy (inaudible)." (Exh. #9) Fisher did not fill in those gaps. The record does not document a motive to tell the truth, as the statements were not made to a person in authority. *Cf. Deanes*, 323 N.C. at 517, 374 S.E.2d at 249. No determination was made that Cassidy was competent. No showing was made as to unavailability.

The materiality requirement "has been construed as a mere restatement of the requirement of relevancy set out in Rules 401 and 402." *Smith*, 315 N.C. at 94, 337 S.E.2d at 845. Fisher went to the house because Mr. Young asked her to. (14Tp. 2735-36) Given that he was in Virginia when he called (21Tp. 3962; 25Tp. 4756), if was aware his wife was dead he could not have prevented Cassidy from being questioned. It would seem he would have had a paramount interest in insuring that not occur.

The statement does not appear more probative on the killer's identity than any other reasonably available evidence since personal knowledge was not shown.

The residual nature of the exception "makes it a potential avenue for abuse." *State v. Nicholson*, 355 N.C. 1, 36, 558 S.E.2d 109, 133 (2002). The interests of

justice were not served by admission of statements requiring wholesale jury speculation.

If a hearsay exception was met, the evidence should have been excluded under Rule 403. The evidence suggested an improper emotional basis for conviction. *See State v. DeLeonardo,* 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986). The State elicited this testimony to assert that Mr. Young beat his wife and unborn son to death in front of his daughter. This explosive allegation, given its non-existent or limited probative value, deprived Mr. Young of due process. The State must demonstrate harmlessness beyond a reasonable doubt, §15A-1443, and cannot meet its burden.

V. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY THAT IT COULD CONSIDER MR. YOUNG'S FAILURE TO TALK TO FRIENDS AND FAMILY AS SUBSTANTIVE EVIDENCE OF GUILT.

Without objection, the trial court instructed the jury that Mr. Young's refusal to answer law enforcement questions was not substantive evidence of guilt and could only be considered as it might bear on the truthfulness of his testimony, but that the law does not accord that same protection to his failure to talk to family and friends. (Rp. 46-47; Appendix) Instructing the jury that it could infer guilt from Mr. Young's silence was error so fundamental that the jury probably would have returned a different verdict had it not been permitted to do so.

Pre-arrest silence may be used to impeach a defendant's pre-trial statement or trial testimony. *State v. Mack*, 282 N.C. 334, 193 S.E.2d 71 (1972); *State v. Hunt*, 72 N.C. App. 59, 323 S.E.2d 490 (1984). Silence does not demonstrate consciousness of guilt, as it is not a false, contradictory, or conflicting statement. *Cf. State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983). It has no substantive use outside of an adoptive admission under N.C.G.S. §8C-1, Rule 801(d)(B). No 801(d)(B) showing was made, as no person with first-hand knowledge made a statement in Mr. Young's presence "under such circumstances that a denial would be naturally expected if the statement was untrue[.]" *State v. Sibley*, 140 N.C. App. 584, 589, 537 S.E.2d 835, 839 (2000).

Even were this substantive evidence, the instruction needed to make clear it did not create a presumption of guilt, was insufficient to establish guilt, and could not be considered on premeditation and deliberation. *Cf. Myers*, 309 N.C. at 88, 305 S.E.2d at 512. This instruction did not. As in *Myers*, a new trial is required as the State's case "was entirely circumstantial." *Id.* Prosecutorial comment on Mr. Young's silence (14Tp. 2638) and testimony about his failure to discuss his wife's murder with friends and family was so extensive (15Tp. 2826; 16Tp. 2989, 3142; 22Tp. 4195; 30Tp. 5476, 5563, 5569-70), that the record as a whole demonstrates plain error as the instruction had a probable impact on the verdict. *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 334 (2012).

VI. THE TRIAL COURT ERRED IN DENYING MR. YOUNG'S MOTIONS TO DISMISS DUE TO INSUFFICIENT EVIDENCE.

From the outset of the investigation, law enforcement focused on collecting evidence to connect Jason Young to the crime. (16Tp. 3001, 3134; 17Tp. 3417-18, 3432, 3441; 19Tp. 3571; 20Tp. 3757, 3848, 3872; 21Tp. 3981; 22Tp. 4203, 4242; 27Tp. 5124) The State presented circumstantial evidence, hearsay, and innuendo that failed to rise above conjecture. The trial court erred in denying Mr. Young's motions to dismiss as the State failed to produce substantial evidence that he committed this crime. (28Tp. 5207-08; 31Tp. 5793-94) His conviction should be vacated.

> While it is the duty of the jury to determine the weight and credibility of the evidence, it is the court's duty, in the first instance, to determine whether sufficient evidence has been presented to permit the jury to pass on its weight and credibility.

State v. Lee, 34 N.C. App. 106, 108, 237 S.E.2d 315, 317 (1977), *affirmed*, 294 N.C. 299, 240 S.E.2d 449 (1978). A trial court must determine if substantial evidence was presented that death resulted from a criminal act committed by the defendant. *Id.* at 302, 240 S.E.2d at 451. Substantial evidence is that quantum of "relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the

suspicion is strong. *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983). The evidence must be viewed in the light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Defense evidence which "explains or clarifies evidence offered by the state or is not inconsistent with the state's evidence" can be considered. *State v. Furr*, 292 N.C. 711, 715, 235 S.E.2d 193, 196 (1977).

When the State's evidence is circumstantial, courts "often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime." *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983). "[E]vidence of either motive or opportunity alone is insufficient to carry a case to the jury." *Id.* at 238-39, 309 S.E.2d at 467.

Motive to kill is commonly established by a defendant's "history of threats or physical abuse of the victim." *State v. Hayden*, __ N.C. App. __, __, 711 S.E.2d 492, 495, *review denied*, __ N.C. __, 717 S.E.2d 737 (2011). The State's investigation revealed that the Youngs never engaged in physical fights. (26Tp. 4927) Ms. Young did not report any physical violence and no witness observed signs of physical violence. (16Tp. 3156; 18Tp. 3552; 27Tp. 5020; Exh. #135) No witness testified that Mr. Young threatened his wife with harm, expressed a desire to kill her, or solicited others to kill her. This case differs from *Hayden*, *Lee*, and

Furr, where motive was established by a level of hostility between the parties "that erupted at times in physical violence and threats[.]" *Hayden*, __ N.C. App. at __, 711 S.E.2d at 496.

A financial benefit may establish motive. *State v. Brewington*, 352 N.C. 489, 532 S.E.2d 496 (2000). Ms. Young had two life insurance policies. (26Tp. 4957; 27Tp. 5027-33) The State argued that the policies were not probative of motive, as it contended Mr. Young knew he would never be paid on them. (32Tp. 5934)

The State alleged that Mr. Young's motive arose from purported resistance to the "responsible life." (14Tp. 2620-21) In support, the State presented evidence about the Youngs' marriage, Mr. Young's extramarital sex, and the relationship between Mr. Young and Linda Fisher.

While much testimony was received as to the couple's arguments (14Tp. 2706, 2710-14; 16Tp. 3080-81, 3089-90; 18Tp. 3471-75, 3509, 3538; 27Tp. 5011, 5118-20), the State's evidence established that the Youngs jointly decided to have a second baby (18Tp. 3548; Exh. #135), that Mr. Young was agreeable to seeing a marriage counselor (24Tp. 4629), and that neither wanted to divorce. (15Tp. 2863-64) No evidence established any financial difficulties. (Exh. #187, p.18) Three weeks before her death, Mr. Young wrote his wife:

> Michelle, three years, one incredible baby, one cool dog, three 'Italian' turtles, and another little baby on the way. The memories we've built and the family we lead is more than any man could ask for. I love you! (20Tp. 3871)

Within days of writing that card, he and his wife argued over driving to the Schaads' wedding. Before the wedding was over, so was the argument. (16Tp. 3092; 27Tp. 5120) The State's evidence was far different than *Furr*, where the spouses were in a prolonged and litigious separation.

The State presented evidence that in October 2006, Mr. Young had sex once with Sowerby and spent a weekend with Money. (22Tp. 4185, 4190, 4224) Sowerby testified they did not speak again for months. (22Tp. 4194) Money testified that love was not discussed and she and Mr. Young intended to remain only friends. (22Tp. 4229, 4252) While the State argued that Mr. Young's dishonest adultery supported a conviction (32Tp. 5928-29), the evidence did not resemble that in *Hayden*, where the defendant had moved in with the victim's wife.

The State presented copious evidence about the animosity between Mr. Young and Linda Fisher, his opposition to her moving in, and his displeasure over spending the holidays with her. (14Tp. 2706-08, 2713-15, 2720, 2724; 16Tp. 3109-10; 18Tp. 3468-69, 3483-84, 3522-28; 24Tp. 4632-39) The State contended things reached "pressure cooker" level in the fall of 2006. (14Tp. 2624) The State argued that Mr. Young killed his wife to avoid spending time with his mother-in-law. (32Tp. 5895, 5899) No similar evidence has yet been held to constitute substantial evidence of motive.

To establish opportunity, the State

> must have presented at trial evidence not only placing the defendant at the scene of the crime, but placing him there at the time the crime was committed.

Hayden, __ N.C. App. at __, 711 S.E.2d at 497. Mr. Young proceeded on an alibi defense. (Rp. 45-46) The State did not establish time of death. The pathologist was not asked whether Ms. Young died on 2 or 3 November. A paramedic testified that when he saw her on 3 November, Ms. Young had been dead for "some time." (14Tp. 2770) Mr. Young's whereabouts on 2 November were well documented. At midnight, he was photographed at a hotel almost three hours from his home. (17Tp. 3410; 25Tp. 4754, 4852) If Ms. Young was killed on 2 November or before about 3:00 a.m. on 3 November, it is impossible that Mr. Young killed her. If she died later than 3:00, substantial evidence established that Mr. Young did not kill her.

Ms. Young spent the night of 2 November at home with Shelly Schaad. Schaad had an eerie feeling that the house was being watched and was so uneasy she did not walk alone to her car. (16Tp. 3111, 3150, 3152) No key was required to enter the house, as the garage and kitchen doors were left unlocked. Meredith Fisher entered the house that way on 3 November (14Tp. 2744-46) and a babysitter testified that she normally entered the house through the garage. (24Tp. 4597)

When Ms. Young's body was found, she was wearing the same sweatshirt and sweatpants as the night before. That was not what she usually slept in. (15Tp.

2782-83; 16Tp. 3127; Exh. #187 p. 30) A treadmill in an upstairs room was on and a half-empty water bottle sat beside it. (17Tp. 3384)

Fingerprints and DNA in the master bedroom, home office, and Cassidy's bedroom, including those found on paperwork near the body and a jewelry box missing two drawers of jewelry, were never matched to anyone. (21Tp. 4083, 4095; 23Tp. 4357-58, 4453, 4376-77, 4453, 4477-79) Police never determined whether one or two people left the bloody shoe impressions. (23Tp. 4386, 4390)

A newspaper deliveryman drove by the house at about 3:50 a.m. He noticed nothing unusual and no vehicle. (31Tp. 5763-65) A newspaper delivery woman drove by sometime between 3:30 and 4:00 a.m. She saw an SUV and house and driveway lights on, just as neighbors did who passed by at 5:20-5:30 a.m. and 6:15 a.m. (17Tp. 3363, 3365, 3375, 3377; 30Tp. 5501, 5507, 5514-18) Mr. Young made a cell phone call at 7:40 a.m. which bounced off a tower more than three hours north of Raleigh. (17Tp. 3410; 21Tp. 3956) All of the above-recited evidence suggests that Ms. Young was still awake when the perpetrator(s) entered the house and killed her.

Substantial evidence supported that Mr. Young did not leave the Hampton Inn until he drove off for his appointment. When his car was seized on 3 November, he had the check-out receipt and weekend USA Today which had been delivered to his room after 3:00 a.m. (15Tp. 2911, 2921-22, 2945; 17Tp. 3419;

20Tp. 3756, 3891-93) No one saw him leave or return to the hotel. He was not photographed on any hotel surveillance camera after midnight. (25Tp. 4754, 4852; 26Tp. 4896)

The State's theory was that Mr. Young disconnected the exit door surveillance camera, propped his hotel room door open, walked out that exit door after midnight, propped the exit door open with a rock, drove to Raleigh, killed his wife, stopped for gas in King, swiveled the camera up to the ceiling, walked to his hotel room, got the check-out receipt and USA Today, and drove away in sufficient time to make that 7:40 a.m. call.

The night clerk who slid the check-out receipt under Mr. Young's door and hung newspapers from door handles (15Tp. 2910, 2921-22) did not testify that Mr. Young's door was open. Fingerprints and DNA on the camera, an adjacent water pipe, and a rock did not match Mr. Young. (21Tp. 4088-89; 23Tp. 4358) No forensic evidence was found in Mr. Young's car or hotel room. (20Tp. 3752, 3758, 3835; 21Tp. 4060, 4062-64) None of his fingerprints in the house were in blood. (23Tp. 4365) He had no visible injuries on 3 November. (16Tp. 3002) The timing was such that the State tried to establish that Mr. Young chartered a plane in Hillsville. (17Tp. 3410-12) Opportunity was not established by substantial evidence.

The State did not present a murder weapon. It apparently relied on a 29 May 2006 car accident and an internet search by Mr. Young to establish capability.

The Youngs spent Memorial Day weekend in Brevard. While out driving, Mr. Young swerved when he thought the back hatch was open, overcorrected, and went down an embankment into a river. (14Tp. 2692, 2698-700; 16Tp. 3083; 17Tp. 3352) The investigating highway patrol officer determined that it was an unintentional wreck of the type he routinely saw. (29Tp. 5237)

On an unknown date, an internet search was conducted for "anatomy of a knockout," "head trauma blackout," "head blow knockout," and "head trauma." The State's forensic computer expert could not pull up the search results or determine whether the searches were manually deleted. (24Tp. 4617-18, 4621, 4663) Mr. Young testified that in the summer of 2006, he happened upon a car accident and tried to assist one of the drivers, who looked like he was knocked out. He could do little and felt helpless. He testified that he searched the internet to see what first aid he could have rendered, but did not find any useful information. (Exh. #187 p. 69-72)

This evidence was not mentioned by the State in closing arguments. It suggested, by innuendo, that Mr. Young previously tried to kill Michelle by subjecting them both to a car accident and that he needed to find out from the

internet that hitting someone multiple times in the head with a blunt object could cause their death.

As to identity, Cargol testified that Mr. Young forcibly removed her engagement ring in 1999 and gave it back the next day. (22Tp. 4150-55) Sowerby testified that, during her Raleigh visit, Mr. Young asked to see her wedding ring and pretended to swallow it. She described it as the typical Jason Young joke. He returned the ring the next day. (22Tp. 4191-93) The State contended that Mr. Young was the killer because he was fixated on wedding rings. Michelle Young's wedding ring was never found. (17Tp. 3398; 32Tp. 5915)

Ms. Calhoun, on which the State's case hinged, may have seen news coverage before being interviewed, though she denied having seen a photograph of Mr. Young. (16Tp. 3218-3221) Corroborating witnesses could not be found. (24Tp. 4704; 26Tp. 4909) Her medical history was quite unique. (17Tp. 3239-41)

The core evidence was the same at both trials. The first jury deadlocked. The wrongful death/slayer judgment, custody complaint, and Cassidy hearsay, offered only at the second trial though available before the first, did not change the equation. As in *Hayden*, *Furr*, *Bell,* and *Lee*, the evidence clearly established that a murder occurred. As in *Hayden, Furr, Bell* and *Lee*, it was insufficient to establish the killer.

> All the evidence engenders the question, if defendant didn't kill his wife, who did? To raise such a question, however, will not suffice to sustain a conviction.

State v. Jones, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971).

CONCLUSION

For the foregoing reasons and authorities, Jason Young, the Defendant-Appellant herein, asks this Court to vacate his conviction or reverse and remand for a new trial.

Respectfully submitted, this the 26th day of July, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

Undersigned counsel hereby certifies that this brief is in compliance with N.C.R. App. P. 28(j)(2), as extended by Orders of this Court issued on 11 and 18 July 2013, in that it is printed in 14-point Times New Roman font and contains no more than 12,500 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the brief.

This the 26th day of July, 2013.

Barbara S Blackman
Barbara S. Blackman
Assistant Appellate Defender

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Brief was filed, pursuant to Rule 26, by deposit in the United States mail, first-class and postage prepaid, duly addressed to the Clerk of the North Carolina Court of Appeals, Post Office Box 2771, Raleigh, North Carolina 27602.

I further certify that a copy of the foregoing Brief was served on Amy K. Irene, Assistant Attorney General, Post Office Box 629, Raleigh, North Carolina 27602, by deposit in the United States mail, first-class and postage prepaid.

This the 26th day of July, 2013.

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APPENDIX

During the course of this trial you'll learn that as time went on the defendant cut off or at least severely restricted the visitation that Meredith and Linda had with their niece and granddaughter, Cassidy. That as a result they went to see a lawyer and said we want to visit hacion (ph) schedule, we want to be able to see Cassidy, and that as part of that process at that time defendant turned over physical custody of his daughter rather than answer questions, submit to a deposition. Rather than talk about what questions were had about his activities, he gave up his daughter.

You will learn that there was a civil suit, a wrongful death suit filed in which the allegations were that the defendant murdered Michelle Young, and you will learn that instead of responding to that lawsuit, instead of responding to those allegations, the defendant defaulted. He didn't answer because that would have required him to submit to a deposition, to answer questions, so instead of doing that, he gave up his daughter, he allowed publicly allegations to be admitted.

MR. KLINKOSUM: Objection.

THE COURT. Sustained. Rephrase that.

MS. HOLT: Instead of responding, instead of answering questions, he defaulted. He allowed those allegations to be admitted.

MR. KLINKOSUM: Objection.

THE COURT: Come up here, please.

(Bench conference.)

THE COURT: Sustained as to Mr. Young. You may rephrase.

MS. HOLT: Instead of responding to those allegations, he allowed a civil judgment to be entered against him.

Ladies and gentlemen of the jury, the defendant did on June the 22nd of 2011 answer questions about the evening of November the 2nd and early morning hours of November the 3rd. He answered questions through his testimony, which you will hear during the course of this trial. He answered those questions 1,693 days after his wife's murder, and when he answered those questions what he said was he did not kill his wife, that when he went outside the hotel it was for the purpose of smoking a cigar, that he propped open the exit door, that he propped open or didn't shut his room door all the way. 1,693 days later. That is what he tells. How in any way would that have been incriminating?

Ladies and gentlemen of the jury, it's a lot of material, it's a lot of dates, it's a lot to summarize, but over the next few weeks you will have the opportunity for yourselves to judge this evidence, to judge the facts, to render a verdict on these facts and the law. The evidence in this case will convince you, each and every one of you, that Jason Young is responsible for the murder of Michelle Young, that he is guilty

clerk's office or part of the responsibilities in the clerk's office, is it also fair to say that you have what's called a civil division?

A. That is right, yes, I do.

Q. Is that correct? And that is the place where, for instance, if somebody sues somebody in civil court that's where those documents are kept and maintained; is that correct?

A. That is correct.

Q. Okay. And are you aware of whether or not a lawsuit was filed in civil court by Michelle Young's mother on behalf of her estate against this defendant, that is, Jason Young, in civil court?

MR. COLLINS: Objection.

THE COURT: Overruled. She can answer.

THE WITNESS: Yes. There was in fact a lawsuit filed in 2008.

BY MR. CUMMINGS:

Q. Okay.

THE COURT: Ladies and gentlemen, let me -- I think I probably need to give you some instructions with regard to the law relating to civil actions to help you understand some of the legal principles that are to be applied and should be applied and will be applied in your evaluation of the testimony concerning any civil litigation. I'm going to just give you some very general instructions about the civil law now. Prior to your

deliberation I will give you greater instructions in more detail as this information may apply to this criminal charge against the defendant which his plea of not guilty denies.

If a civil complaint is filed by plaintiff and the parties in a civil action are designated plaintiff, the person bringing the complaint, and the defendant, the person or entity being sued, if a civil complaint is filed by a plaintiff with the clerk of Superior Court, Lorrin Freeman and her office, and if a civil summons is issued by an officer of the court commanding the defendant named in the complaint to respond and otherwise answer to the allegations of the complaint within the time required by law and if the defendant named in the complaint is properly served with this complaint and this summons and if the defendant is an adult and is not otherwise incapacitated or in the military and if the defendant fails to file an answer to that civil complaint or otherwise respond to the allegations within the time required by law and if the plaintiff filing the complaint moves that the court to enter judgment in the plaintiff's favor by reason of that failure to respond or answer, then under the rules of civil law in civil cases and under the rules of the court a judgment can be entered in favor of the plaintiff bringing the lawsuit. Both failure for the defendant named to respond or otherwise answer the allegations, for purposes of the civil case that's been filed the allegations of the complaint under those circumstances, whether actually true or

not, which have not been denied by the named defendant are deemed in the civil law to have been admitted for the purpose of allowing the plaintiff to have judgment entered in the plaintiff's favor. The entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.

All right. With those instructions I'll let you proceed.

MR. CUMMINGS: Thank you, sir.

BY MR. CUMMINGS:

Q. So you are aware then that such a lawsuit, that is, that a lawsuit was filed; is that correct?

A. That is correct.

Q. And you had an opportunity to review that?

A. I have.

Q. And of course it at the top of it it has what's called a case caption. What would be the caption, that is, what is it entitled?

A. The case caption in this particular case is Linda Lee Fisher as Executrix of the Estate of Michelle Marie Fisher Young versus Jason Lynn Young.

Q. And the Linda Lee Fisher, Executrix of the Estate of Michelle Marie Fisher Young, that would be designating her as the plaintiff; is that correct?

A. That is correct.

this evidence, if you find it relevant, in determining whether or not the child actually witnessed some part of this assault on her mother. You may not consider this evidence for any other purpose. You may not consider the conduct and statements of the child as evidence of the identity of the person or persons who caused Michelle Young's death.

I further instruct you there is evidence that tends to show that a civil complaint was filed in the Civil Superior Court of Wake County against the defendant by Linda Fisher on behalf of the Estate of Michelle Young and that a civil summons was issued by the clerk of the court commanding the defendant to answer or otherwise respond to the allegations of that civil complaint within the time required by law. There is further evidence that tends to show that the defendant was timely served with these documents and that he did not file an answer or otherwise respond to the complaint and that a default judgment was entered against him by reason of that failure.

As I previously instructed you, when a defendant in a civil action has been properly served with the civil summons and the civil complaint and fails to timely respond, upon motion of the plaintiff the Court is authorized to enter a civil judgment against the defaulting defendant. For purpose of the civil law, the allegations of the complaint which have not been denied, whether actually true or not, are deemed to be admitted for the purpose of allowing the plaintiff to have a civil

judgment entered against the defendant. The burden of proof in a civil case requires only that the plaintiff satisfy the Court or the jury by the greater weight of the evidence that the plaintiff's claims are valid. This means that the plaintiff must prove that the facts are more likely than not to exist in the plaintiff's favor. When there is a default, that burden of proof is deemed in law to be met.

The entry of a civil default judgment is not a determination of guilt by the Court that the named defendant has committed any criminal offense.

Now, ladies and gentlemen, there is a concept in the criminal law known as "Acting in Concert." I need to explain that legal concept to you because you may determine that it has some application to the facts of this case. You may also find that the concept has no application to the evidence that you've heard.

The state contends, and the defendant denies, that there is evidence from which you may find beyond a reasonable doubt that defendant did not act alone in the killing of his wife. If you were to reach that conclusion, the state contends the defendant acted in concert with some other unknown person to commit this crime.

By his plea of not guilty and by his testimony at a previous trial, the defendant denies that he killed his wife and denies that he acted with anyone else in causing his wife's

folks. We're ready to proceed now. I apologize for the delay. I met with the attorneys in chambers this morning to address the next series of witnesses that will be called by the state in this matter and make some technical rulings, and also to discuss with them the limiting instruction that I will give to you with regard to how you may consider the testimony of these witnesses. The district attorney that's prosecuting this case has announced it will call at least three and perhaps more witnesses this morning first thing who will testify, as I understand it, from the witnesses' observations of the child, Cassidy Young, at a time shortly after her mother's death when she was at a day-care facility at a time which the state contends and the defendant denies that the child may have had some memory of the event surrounding her mother's death. Given the young age of the child and her obvious lack of maturity to fully appreciate and comprehend and understand events, that the testimony with regard to people who observed the child is going to be limited for your consideration. The testimony of the child's conduct and statements will be allowed for one purpose only. If you find that the testimony of these witnesses is accurate and true then you may consider their testimony regarding the actions and the statements of the child, Cassidy Young, in determining whether or not the child actually witnessed some part of the assault on her mother. You may not consider this evidence for any other purpose and you may not consider the conduct and the statements of the

child as evidence of the identify of the person or persons who caused Michelle Young's death, but I will allow you to consider this information for that limited purpose only, and I'll give you this instruction again later in the trial.

You may call your next witness.

MR. CUMMINGS: Thank you, sir. The state would call Brooke Bass.

THE COURT: Ma'am, be sworn, please.

You may proceed.

MR. CUMMINGS: Thank you, sir.

BROOKE BASS, having been duly sworn by the court clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUMMINGS:

Q. Good morning. Would you state your full name, please?

A. Meredith Brooke Bass.

Q. And Ms. Bass, you'll need to speak up like you're doing now, and I think the microphone is probably on. So tell me how you know Cassidy Young.

A. I was Cassidy Young's teacher from August 2006 until she left our facility at Country Sunshine Children's Center.

Q. Okay. And at that time, that is, in August of '06, how long had you been employed at, you said Country Sunshine?

A. Yes, sir.

Q. Tell me about that facility.

statement at a later time. The evidence presented in this case tends to show that the defendant elected to testify at a prior trial.

Therefore, I instruct you that you may consider evidence of the defendant's refusal to answer police questions during this investigation for one purpose only. If, in considering the nature of that evidence, you believe that such evidence bears upon the defendant's truthfulness as a witness at his prior trial, then you may consider it for that purpose only. Except as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case.

I also instruct you that this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim.

Ladies and gentlemen, I remind you that various witnesses from the Country Sunshine Day Care Center where Cassidy Young attended in 2006 testified regarding their observations of the child shortly after her mother's death. Due to a young child's limited understanding and comprehension and awareness of the significance of events in their young lives, this evidence should be viewed by you with care and caution. If you find this evidence to be accurate and true, you may consider the child's conduct and statements for one purpose only. You may consider

this evidence, if you find it relevant, in determining whether or not the child actually witnessed some part of this assault on her mother. You may not consider this evidence for any other purpose. You may not consider the conduct and statements of the child as evidence of the identity of the person or persons who caused Michelle Young's death.

I further instruct you there is evidence that tends to show that a civil complaint was filed in the Civil Superior Court of Wake County against the defendant by Linda Fisher on behalf of the Estate of Michelle Young and that a civil summons was issued by the clerk of the court commanding the defendant to answer or otherwise respond to the allegations of that civil complaint within the time required by law. There is further evidence that tends to show that the defendant was timely served with these documents and that he did not file an answer or otherwise respond to the complaint and that a default judgment was entered against him by reason of that failure.

As I previously instructed you, when a defendant in a civil action has been properly served with the civil summons and the civil complaint and fails to timely respond, upon motion of the plaintiff the Court is authorized to enter a civil judgment against the defaulting defendant. For purpose of the civil law, the allegations of the complaint which have not been denied, whether actually true or not, are deemed to be admitted for the purpose of allowing the plaintiff to have a civil

The burden of proving an alibi does not rest upon the defendant. To establish the defendant's guilt, the state must prove beyond a reasonable doubt that the defendant was present at and participated in the crime charged. The defendant's contention that he was not present and did not participate is simply denial of the facts essential to the state's case.

Therefore, I instruct you that if, upon considering all the evidence in the case, including the evidence with respect to the alibi, you have a reasonable doubt as to the defendant's presence at or participation in the crime charged, you must find him not guilty.

Ladies and gentlemen, the Fifth Amendment to the United States Constitution protects a citizen's right to refuse to answer questions of the police during a criminal investigation. The exercise of that Constitutional right may not be used as evidence against that citizen later at trial to create an inference of guilt. Therefore, the defendant's decision not to answer questions by law enforcement officers during the criminal investigation may not be considered against him as evidence of guilt to the pending charge. However, that same Fifth Amendment does permit the jury to consider the defendant's refusal to answer police questions to the extent that the evidence surrounding that refusal bears upon the defendant's truthfulness if the defendant elects to testify or made a

statement at a later time. The evidence presented in this case tends to show that the defendant elected to testify at a prior trial.

Therefore, I instruct you that you may consider evidence of the defendant's refusal to answer police questions during this investigation for one purpose only. If, in considering the nature of that evidence, you believe that such evidence bears upon the defendant's truthfulness as a witness at his prior trial, then you may consider it for that purpose only. Except as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case.

I also instruct you that this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim.

Ladies and gentlemen, I remind you that various witnesses from the Country Sunshine Day Care Center where Cassidy Young attended in 2006 testified regarding their observations of the child shortly after her mother's death. Due to a young child's limited understanding and comprehension and awareness of the significance of events in their young lives, this evidence should be viewed by you with care and caution. If you find this evidence to be accurate and true, you may consider the child's conduct and statements for one purpose only. You may consider