4-18-00

NO. COA99-1518 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
THEODORE MEAD KIMBLE	)	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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STATEMENT OF THE CASE

1. The State does not disagree with defendant's Statement of the Case, albeit, the State invites the Court's attention to the 28 January 1999 Transcript of Plea (Rpp 17-20) containing the following matters defendant has not emphasized:

a. Defendant's plea agreement is dated 28 January 1999, the same day he entered his pleas of guilty.

b. Defendant's plea agreement states, inter alia, that in return for the State's acceptance of his plea to Second Degree Murder, defendant will plead guilty to certain listed offenses, including "eight counts of Solicitation to Commit Murder [on 4 November 1998] in Bills of Information" filed on 28 January 1999, and that "defendant understands that he will received consecutive sentences in each of these cases."

c. Certifications were signed by trial counsel and the prosecutor, and the Plea Adjudication signed by the trial court. N.B., trial counsel certified that he "fully explained to the defendant the nature and elements of the charges to which he is

pleading," and the trial court found that "the plea is the informed choice of the defendant and is made voluntarily and understandingly."

STATEMENT OF THE FACTS

2. The prosecutor's summary of the evidence (Plea Tpp. 40-55[1]) concerning the 1995 murder, the conspiracy, and the arson offenses was based on evidence presented at the trial of defendant's brother, Ronnie Lee Kimble. The summary included the following information:

a. Defendant wanted to buy Lyles Building Supply business where he worked. To purchase the business, defendant needed to be married because Mr. Lyles, the owner, wanted to sell his business to a stable person who would not default on the mortgage. Defendant and Patricia (the murder victim) were married in a private ceremony on or about 2 December 1993; a public ceremony followed on 7 May 1994.

b. On 28 June 1994, defendant changed Patricia's $50,000 life insurance policy to name himself as the beneficiary (the policy limits were later increased to $100,000). On 14 September 1995, defendant forged Patricia's signature on an application for a $200,000 life insurance policy after Patricia refused to sign the application. On 9 October 1995, when Patricia learned that defendant had forged her signature on the application and that she

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[1] References herein to different transcripts use abbreviations noted in Defendant's Brief, p. 3, n. 1.

was supposed to take a blood test, she became upset and told friends that she was afraid for her life.

c. Patricia left work for home at 3:30 p.m. on 9 October 1995 (the date of her murder). After finishing work at Lyles Building Supply, defendant went to his second job at Precision Fabrics, a new job he applied for in September 1995, arriving at 6:00 p.m. It was defendant's first and last day of work at Precision Fabrics, a fact supporting the State's argument that he took the job to have an alibi. Around 7:00 p.m., defendant called his brother-in-law, Rubin, and indicated that he wanted Rubin to check on Patricia, an unusual request causing Rubin to drive to Patricia's home, which was then on fire.

d. Evidence indicated that Patricia came home on 9 October 1995 at about 3:45 p.m. and pulled her car to the left of the driveway before entering the house. The State argued that she pulled to the left because she recognized Ronnie Lee Kimble's car in the driveway. As she walked by the bathroom going down a hallway, **Ronnie Kimble shot her once in the head with a .45 caliber pistol with a laser sight**. She died almost instantly.

e. The back bedrooms were ransacked in an effort to make it look like a robbery had occurred, but law enforcement officers were not fooled because cash, t.v.'s, and stereos remained in the house. **Gasoline was poured on Patricia's body and ignited.** The fire burned through the floor boards, causing Patricia's body to fall into a crawl space. Experts said the evidence was consistent with

a fire set on 9 October 1995 at approximately 4:00 p.m. that burned until it was discovered.

f. State's Exhibits 1, 4, 5, 11, 17, 46, 57, and 60 were introduced, (Tp. 48). **The exhibits fleshed-out the prosecutor's commentary by graphically showing the trial court considerable evidence regarding Patricia's murder.** E.g., the exhibits showed Patricia at the time of her wedding, the exterior of the house where she was murdered, the driveway, the burned area in the hallway where Patricia's body was found, Patricia's burned body, and the .45 caliber pistol with laser sight owned and carried by defendant (which the State contended was the murder weapon).

g. Patricia's friend, Rose Lyles, received a call from Patricia shortly before Patricia's death. Patricia was then very afraid; she described the life insurance policy and indicated that she did not know if she would wake up each morning and that she was very afraid of defendant.

h. The prosecutor recapped the insurance payments made after the trial, adding that evidence shows that defendant has been involved in schemes to defraud an insurance company prior to meeting Patricia. After Patricia's death, defendant attempted to make a claim on the $200,000 policy, to no avail because the blood test had never been done (i.e., the policy was never in effect).

i. After Patricia's death, defendant entered into a scheme to steal and sell large amounts of building supplies, sometimes dealing with Mr. Nichols. **After he and Nichols "got close,"**

defendant admitted to Nichols that he was responsible for Patricia's death. A search of defendant's business was conducted as a result of Nichols' comments about defendant's reference to guns and silencers. During the search, law enforcement personnel found a homemade silencer, a number of books and video tapes on making bombs, and C-4 explosives. When defendant felt the Sheriff's Department was closing in on him, he purchased a sniper rifle for $5,500, which he showed to various people in an effort to keep them quiet about his participation in the offense.

j. Defendant told Mr. Pardee, a close friend who stole items with him, that he had an alibi for the time of Patricia's murder. Defendant told Pardee that his brother Ronnie killed Patricia. He also told Pardee about the shooting and pouring gasoline on the body, that the weapon used was the Glock .45 the police had, and that he was upset because he was not paid the $200,000 life insurance policy.

k. Defendant began dating Miss Lynn McLeod three weeks after Patricia's death. McLeod testified that defendant was upset because the insurance company was not paying him. One day he took McLeod to the location in the house where Patricia's body was found and went down into the hole and looked around. He exhibited no emotions whatsoever, but he was very upset about the insurance not paying.

l. In January 1997, defendant visited a friend who is now a reverend, Reverend Whidden, and confessed as to what he and his

brother had done. Reverend Whidden later provided information that led to defendant's arrest on 4 April 1997. (Plea Tpp. 40-55).

m. After presenting the aforementioned evidence of guilt, the prosecutor called Special Bureau of Investigation [herein "S.B.I."] Agent James Bowman, to testify about the 1998 solicitation to murder offenses. Bowman testified about his interviews with William Wayne Stewart, an inmate who had been incarcerated with defendant at Piedmont Correctional Institute in Salisbury and at Southern Correctional Institute in Troy. **Please see Appendix 1 (Tpp. 56-60) hereto for part of Bowman's testimony reporting defendant's bone-chilling plans to send Stewart on a $100,000 five-mission campaign to assassinate eight witnesses in different death scenarios intended to divert suspicion from defendant (e.g., one an electrical wiring murder, one a robbery murder, one a rape murder, one a double suicide, on a kidnaping gone bad or Satanic cult type murder), and ¶ 22.b below for additional evidence confirming the trustworthiness of Stewart's report to Bowman summary of Bowman's testimony.**

3. Defendant presented evidence summarized in Defendant's Brief, pages 7-12. In addition to testimony defendant highlights, the Court's attention is invited to testimony summarized as follows:

a. Mr. Michael Hollman served time with defendant (white man) and Mr. William Stewart (a black man), observing defendant and Stewart walking together, a fact leading him to ask Stewart, who

was from Hollman's hometown, whether there was homosexual activity between Stewart and defendant. Stewart told Hollman that he was only trying to play "the cracker" (defendant) out of some money. (Tpp. 75-80).

b. Mr. Webster H. Moore knew defendant (his neighbor) for about 17 years, believed that defendant was a great straight up and honest kid, and that defendant's guilty plea to murder was very much out of character. Moore had little contact with defendant and Patricia after their marriage. (Tpp. 81-84).

c. Mr. Homer Wilson, knowing defendant pled guilty to murder of his wife, still thinks defendant is a fine man because Wilson does not "know the circumstances under which he made that plea." (Tp. 100).

d. Mr. Jamie L. Gayles, a rebellious inmate convicted of murder, said that Stewart was planning on breaking into defendant's locker and stealing his radio. According to Gayles, to get money from defendant, Stewart was trying to convince defendant that he was a killer when he was not. (Tpp. 89-99).

e. Mr. Carl Foust believes defendant is a fine boy and a hard worker. His opinion has not been changed by what he heard about defendant killing Patricia because, in his words, "I don't know that all that happened." (Tp. 105).

f. Mr. Joe Hagler had a positive experience with defendant in school and when defendant was working. Hagler believes defendant's act of murder was out of character with the young man

he knew. (Tpp. 105, 115-18).

g. Mr. Gary W. Durham, an inmate convicted of "many things" (e.g., kidnaping, breaking and entering, burglary, larceny, escape, assault on a female, breaking into cars, stealing cars), opined that Stewart was a homosexual and habitual liar. (Tpp. 108-15).

h. Mrs. Edna Kimble, defendant's mother, does not believe defendant murdered Patricia. She will stand by her son until the day she dies. (Tpp. 120-24).

i. Mr. Rodney A. McLean testified about his knowledge of the relationship between defendant and Stewart, stating that defendant told him in an institution in Troy a couple of months before trial that he was afraid for his girlfriend's safety because Stewart had called her asking for money. Defendant never mentioned any escape plans to McLean, but he did say he was afraid of Stewart. McLean has been convicted of three counts of second degree murder and two counts of armed robbery. (Tpp. 124-27).

j. Mr. Ronnie L. Kimble, defendant's father, is a minister, a graduate of Liberty University, who was once an alcoholic. He believes with all his heart that neither of his sons had anything to do with Patricia's murder. He went to the gun show with defendant when defendant bought the rifle described as a sniper's rifle. (Tpp. 127-36).

k. Defendant's self-serving direct testimony, summarized in his brief, was significantly impeached during cross-examination by questions revealing his lack of moral fiber. For example, please

consider the following responses demonstrating defendant's lack of candor and credibility:

(1) When asked whether he filed a life insurance claim for $200,000, defendant responded with rambling answers, stating, inter alia, that his attorney filed a demand on his own, and that he was "not interested" in litigation to pursue a claim.

(2) Defendant denied being upset when he called Mr. Sasnoff in New York about his wife's insurance at work.

(3) Defendant acknowledged helping Rob Nichols, a drug addict ripping people off, by buying stolen property from him, adding that "he got me to help him."

(4) Defendant acknowledged buying two way walkie talkies and possessing a police scanner.

(5) **Defendant acknowledged that his handwriting appears on State's Exhibit TK-2 (discussed below in ¶ 22.b(1)), and that he drew the maps.**

(6) When asked why he put Mitch Whidden's name, address, age, and description on the exhibit, and if that action was taken to inform someone how to find and kill Whidden, defendant answered "[t]hat was for my future reference," a response bringing laughter to the courtroom. See Tp. 178, recording "laughter in the audience." See also Tp. 179 for another "laugher" (defendant responded to a similar question about a woman with "dirty blonde hair, 5'8", 180 pounds" and the specific written instructions for getting to her house with "I can't remember if that's her address

or my youth minister's."

(7) Defendant admitted that he possessed books about how to make bombs and booby traps, and how to beat a polygraph.

(8) Defendant admitted that he bought two books on being a sniper, a video entitled "The Ultimate Sniper", and a sniper rifle (which he called a deer rifle) with scope and tripod for "like $5,300," and that he illegally possessed a silencer. (Tpp. 136-91).

4. Patricia's family members addressed the trial court and expressed their agony over her murder. (Tpp. 193-207).

ARGUMENT

I. DEFENDANT'S EIGHT ALFORD PLEAS (TO SOLICITATION TO COMMIT MURDERS) SHOULD NOT BE VACATED BECAUSE THE TRIAL COURT WAS SATISFIED THAT THERE WAS A FACTUAL BASIS FOR THE PLEAS, AND THE TRIAL COURT'S CONCLUSION IS SUPPORTED BY INFORMATION IN THE RECORD.

Assignment of Error Nos. 3 & 6; Rpp. 88-89.

5. Defendant's Brief, pages 3-4, accurately summarizes the prosecutor's statement of the facts demonstrating a factual basis for the Alford pleas of guilty to the eight 1998 solicitation to murder charges, a statement satisfying the requirements for acceptance of such a plea. See State v. Sinclair, 301 N.C. 193, 199, 270 S.E.2d 418, 421-22 (1980)(N.C.G.S. § 15A-1022(c) requires that "some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.")(quoted in State v. Hoover, 89 N.C.App. 199, 203-04, 365 S.E.2d 920, 923, cert. denied, 323 N.C. 177, 373 S.E.2d 118

(1988)(factual basis for plea of nolo contendere must appear in record)). Accord State v. Atkins, 349 N.C. 62, 96, 505 S.E.2d 97, 118 (1998).

6. The prosecutor's statement of facts advised the trial court, inter alia, of the following matters "tend[ing] to show that defendant is, in fact, guilty," the Sinclair bottom line:

a. On 4 November 1998, defendant knew that a fellow prisoner, William Stewart, was about to get out of prison.

b. Defendant communicated to Stewart his desire to have certain witnesses killed.

c. Defendant gave Stewart a handwritten list of "eight witnesses and spouses of witnesses that he wanted killed, and instructions . . . in code."

d. The aforementioned list contained a diagram listing "witnesses that he wanted to kill, and directions to their homes."

e. Defendant's fingerprints and handwriting were on the aforementioned diagram.

7. Defendant's main argument is that communication of a desire to have certain identified witnesses killed along with a list of instructions concerning how they should be killed does not amount to asking, counseling, manipulating, enticing, or inducing the commission of the crime of murder of those witnesses. This argument is patently frivolous for numerous reasons, including the following:

a. The term "desire" must be interpreted in context, here a

context demonstrating beyond cavil that this killer's desire to have witnesses murdered was not just a passing comment falling short of planning, scheming, suggesting, encouraging, and inciting Stewart to act. See State v. Mann, 317 N.C. 164, 171-72, 345 S.E.2d 365, 369-70 (1986)(quoted in Defendant's Brief, page 14).

b. Defendant failed to object to the statement being considered.

c. Defendant stipulated "that a factual basis exists for the entry of the pleas of guilty [and] . . . that . . . the State may summarize the factual basis," (Plea Tp. 13).

d. Defendant declined the trial court's invitation "to present any evidence on the factual basis" for the plea (Plea Tp. 17).

e. In addition to the prosecutor's statement, considerable testimony illuminates the meaning of the prosecutor's statement, thereby assuring that the record contains some substantive evidence tending to show that defendant is in fact guilty. For example, at the sentencing hearing, Special Agent Bowman provided additional details concerning both the letter and map defendant prepared, and Bowman's conversation with Stewart. Most significantly, Bowman described State's Exhibit TK-3, notes **in Stewart's handwriting made while listening to defendant**, which

> referred to the potential ways of doing the murders, electrical wiring, robbery motive, rape, double suicide, murder/suicide, kidnaping, ransom gone bad, and Satanic cult victims. And he also made two notations of amounts of money. One was $100,000 and one was $50,000, which he stated was amounts of money that was discussed in his

conversation with Kimble."

(Tpp. 64-65).

8. The State disagrees with defendant's assertion that he did not also stipulate that there was a factual basis for his Alford pleas. (Defendant's Brief, p. 15). Although not dispositive, neither defendant nor his experienced counsel uttered any words limiting the stipulation to only non-Alford guilty pleas (e.g., nothing they said asserted that a factual basis for defendant's Alford pleas was lacking). Surely, trial counsel was not attempting to "sandbag the court"!

9. Defendant cites no appellate cases finding a plea improvidently accepted when a prosecutor made a statement as thorough as the one at bar. Even a "brief statement by the prosecutor" may establish the factual basis for acceptance of an Alford plea of guilty. State v. Brooks, 105 N.C.App. 413, 418, 413 S.E.2d 312, 315 (1991).

10. Considering the clearly understandable meaning of the prosecutor's statement succinctly describing defendant's solicitation efforts, the trial court did not incorrectly find that "a factual basis exists for the entry of the defendant's plea of guilty." (Plea Tp. 18).

II. DEFENDANT WAIVED ANY ERROR BASED ON THE NUMBER OF SOLICITATION OFFENSES TO WHICH HE PLED GUILTY. ASSUMING ERROR ARGUENDO, IT WAS "INVITED ERROR" NOT "PLAIN ERROR." FURTHERMORE, DEFENDANT HAS NOT SHOWN THAT THERE WAS ONLY ONE SOLICITATION AS A MATTER OF LAW.

Assignment of Error Nos. 3 & 6; Rpp. 88-89.

11. Three facts erect a procedural bar to merit review of defendant's Argument II:

a. Defendant submitted no request or motion to the trial court requesting either that the solicitation charges be consolidated for sentencing or that the court direct other relief deemed appropriate based on the number of solicitation offenses before the court.[2]

b. Defendant entered into a plea agreement stating, inter alia, that in return for his pleas of guilty to offenses listed in the agreement (e.g., "eight counts of Solicitation to Commit First Degree Murder in Bills of Information which are to be filed this date." (Rp. 14 (emphasis added)), he "will receive consecutive sentences in each of these cases." Id. (emphasis added).

c. In argument prior to sentencing, trial counsel Zimmerman began by advising the trial court that "defendant understands that he will receive consecutive sentences . . . ." (Tp. 208).

12. The aforementioned facts demonstrated that defendant (a) bargained for the counts he now contends should not be before the Court, (b) agreed to be found guilty and sentenced on each of the eight counts of solicitation, (c) agreed to consecutive sentences on each count of solicitation, and (d) affirmatively acted to

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[2] N.B., case law demonstrates that the trial court, The Honorable Peter M. McHugh, understood how to handle a motion to consolidate counts for sentencing purposes. See State v. Furlow, 336 N.C. 534, 536, 444 S.E.2d 913, 915 (1994) (Judge McHugh consolidated offenses for sentencing).

insert in the proceedings the exact alleged error he now contends should be the basis for vacation of judgment and re-sentencing.

13. Under the aforementioned circumstances, merit review of his claim should be denied based on the following applicable procedural bars:

a. Under NCR App. P. 10(b)(1), to preserve a question for appellate review a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." State v. Eason, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

b. Constitutional questions not raised and passed upon at trial will not be considered on appeal. State v. Benson, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). E.g., a claim of violation of the Double Jeopardy Clause must be raised and ruled on in the trial court before it can be considered on appeal. State v. Elliott, 344 N.C. 242, 277, 475 S.E.2d 202, 218 (1996); State v. Mitchell, 317 N.C. 661, 670, 346 S.E.2d 458, 663 (1986); State v. McKenzie, 292 N.C. 170, 176-77, 232 S.E.2d 424, 428-29 (1977).

c. Under N.C.G.S. § 15A-1443(c),"[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." State v. Wilkinson, 344 N.C. 198, 213, 474 S.E.2d 375, 382 (1996) (Where defendant told trial court he had no objection to a change in instruction he had

requested, Court found he could not complain on appeal the instruction was error.)

d. Under N.C.G.S. § 15A-952(e), failure to file motions set out in N.C.G.S. § 15A-952(b) within the time required in N.C.G.S. § 15A-952(c) constitutes a waiver of the motion. Motions listed under N.C.G.S. § 15A-952(b) include "Motions addressed to the pleadings" (i.e., a type motion defendant could have made to complain about the number of solicitation counts).

e. State v. Davis, 349 N.C. 1, 28-29, 506 S.E.2d 455, 470 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999), states, inter alia:

> The plain error rule holds that the Court may review alleged errors affecting substantial rights even though defendant failed to object to the admission of the evidence at trial. State v. Cummings, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), cert. denied, __ U.S. __, 139 L. Ed. 2d 873, 118 S. Ct. 886 (1998). This Court has chosen to review such "unpreserved issues for plain error when Rule 10(c)(4) of the Rules of Appellate Procedure has been complied with and when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." 346 N.C. at 313-14, 488 S.E.2d at 563. The rule must be applied cautiously, however, and only in exceptional cases where, "after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375,378 (1983) (quoting United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)). Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error. Id. at 661, 300 S.E.2d at 378-79.
>
> A review of the evidence in the present case reveals that this is not the exceptional case where such a

> pervasive defect or plain error occurred which would have tainted all results and denied defendant a right to a fair trial. Accordingly, this assignment of error is without merit.

349 N.C. at 28-29, 506 S.E.2d at 470. Furthermore, "the test for 'plain error' places a much heavier burden upon the defendant than that imposed upon those defendants who have preserved their rights on appeal by timely objection. (citation omitted)." State v. Waddell, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2000)(No. 418A98, 7 April 2000, slip op. at 9). Under the aforementioned standards, defendant has not demonstrated either grounds for merit review or "plain error."

14. Defendant's argument that "settled conspiracy law" based on California v. Morocco, 191 Cal. App. 3d 1449(1987), should drive this Court's decision is without merit. See People v. Liu, 46 Cal. App. 4th 1119 (Cal. App. 1st Dist. 1996), 1996 Cal. App. LEXIS 596, rejecting a similar suggestion in the following words:

> Under this [conspiracy] rule, where the evidence shows that a group of conspirators agreed to commit a number of different crimes incidental to a single objective, there is only one conspiracy, and convictions for multiple conspiracies cannot be sustained. (Citation omitted).
>
> However, this rule does not apply where the several different criminal acts are separate murders of different individuals, even if the separate murders are incidental to a single objective. Just as the commission of several murders of separate identifiable victims results in more harm than the commission of a single murder, a conspiracy to commit several murders is a more serious wrong than a conspiracy to commit a single murder, no matter the extent to which the several murders are planned for the accomplishment of a single criminal purpose. Each separately planned murder is the goal of a separate conspiracy. (citations omitted).

46 Cal. App. 4th at 1133, 1996 Cal. App. LEXIS 596 *21-*22 (emphasis added).

15. More to the point, recalling that defendant solicited Stewart to commit eight murders at different times and places using different killing scenarios as a ruse to deflect suspicion from himself, vice one big "hit" killing all the witnesses at one time, see People v. Davis, 211 Cal. App. 3d 317(Cal. App. 1st Dist. 1989), 1989 Cal. App. LEXIS 567, rev. denied, 1989 Cal. LEXIS 4240 (Cal. Aug. 24, 1989), debunking defendant's Argument II concerning solicitations in the following terms:

> We reject the notion that the number of solicitations shown by the evidence is a question of fact for the trier of fact. We make this rejection with an appreciation that, according to a later opinion of the Morocco court, both People v. Cook, supra, (First Appellate District, Division Three) "and Morocco stress that whether one or multiple solicitations has occurred is a question of fact." (People v. Williams, supra, 201 Cal.App.3d at p. 444.) Although the Court of Special Appeals of Maryland has "rejected as too simplistic the theory that there are necessarily as many solicitations as potential victims" in Meyer v. State, supra, 425 A.2d at p. 670 (People v. Cook, supra, 151 Cal.App.3d at p. 1146), Ramos applies precisely such a simplistic theory in a robbery context.
>
> We believe that the simplistic theory is the correct theory. One of the purposes of section 653f is "to prevent solicitations from resulting in the commission of the crimes solicited." (Benson v. Superior Court (1962) 57 Cal.2d 240, 243 [18 Cal.Rptr. 516, 368 P.2d 116].) The commission of several murders results in more harm than the commission of a single murder. Thus, solicitation to commit several murders is a more serious wrong than solicitation to commit a single murder, no matter to what extent the solicitation constitutes a package deal for the accomplishment of a single purpose. We believe the law to be that the prosecutor may charge and, upon proper findings of guilt, the trial court may convict on, as many counts of solicitation to murder as there are

> identifiable victims. We express no opinion as to what rule might apply in cases where the defendant proposes one victim, but approaches several solicitees.
>
> Defendant mistakenly interprets Morocco as being based on section 654, n9 and contends that his "sentences must be reversed under the provisions of Penal Code section 654." If a trial court violates section 654, the proper remedy on appeal is not reversal of the counts involved, but elimination of the penalty for all but one of them (the one carrying the greatest penalty, if the penalties are disparate), by staying execution of, or simply striking, the terms of imprisonment for all but one of them. (citations).

211 Cal. App. 3d at 322-23, 1989 Cal. App. LEXIS 567 at *10-*111 (emphasis added).

16. Defendant knowingly entered pleas pursuant to his plea agreement, under Alford principles, to each count alleging solicitation to murder an identified victim. Matters of record demonstrate a factual basis for the pleas. Contrary to defendant's argument, sound public policy does not support his argument. The sounder policy is that expressed above in Davis.

III. DEFENDANT IS NOT ENTITLED TO A NEW SENTENCING HEARING IN THE MURDER AND ARSON CASES BECAUSE FINDINGS OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES MADE IN THOSE CASES ARE SUPPORTED BY (A) THE PROSECUTOR'S STATEMENT OF EVIDENCE FROM DEFENDANT'S BROTHER'S TRIAL, PRESENTED WITH DEFENDANT'S CONSENT, AND (B) INFORMATION STATED IN INDICTMENTS CHARGING OFFENSES OF MURDER (SECOND DEGREE WORDING), FIRST DEGREE ARSON, AND CONSPIRACY TO COMMIT FIRST DEGREE MURDER, OFFENSES TO WHICH DEFENDANT PLED GUILTY.

Assignment of Error Nos. 8, 9, 10; Rpp. 89-90.

17. The following six key facts undermine defendant's Argument III, and demonstrate that the trial court properly found the non-statutory aggravating factors stated in Defendant's Brief,

page 21 (re murder case: premeditation and deliberation, and pecuniary gain; re arson case: for purpose of avoiding detection in the murder, and covering up the murder).

a. The trial court asked trial counsel Crumpler "do you stipulate that, if necessary, the state may summarize the factual basis" for the guilty pleas, and Mr. Crumpler replied, "yes, sir. We do." (Plea Tp. 13).

b. Defendant's Brief, page 21, lines four and five, uncandidly omits important wording emphasized in the following quotation reporting the complete and accurate phraseology used by the prosecutor before summarizing the evidence:

> In reference to the homicide and the conspiracy and the arson, I'd like to summarize the evidence, unless counsel has objection. This case was tried and, therefore, everyone is aware of the evidence. The evidence is contained in transcripts of the prior trial of co-defendant, Ronnie Kimble. The evidence shows that. . . .

(Tp. 40)(emphasis added).

c. The transcript reflects no objection to the prosecutor stating the evidence in State v. Ronnie Kimble, no objection to the prosecutor's actual statement of the evidence in Ronnie Kimble, and no effort to add anything to the prosecutor's statement of the evidence in Ronnie Kimble.

d. Defendant pled guilty to second degree murder based on wording in the indictment charging first degree murder, conspiracy to commit first degree murder, and first degree arson. Please see wording in each of the aforementioned indictments (found in Record, pages 4-6), wording the trial court could properly consider under

authority cited below (e.g., the conspiracy count states, inter alia, that defendant and Ronnie Lee Kimble conspired and agreed to murder Patricia Kimble).

e. In the absence of any objection by defendant after the prosecutor's invitation for an objection by trial counsel, the prosecutor made a lengthy statement to the trial court summarizing the evidence in Ronnie Lee Kimble (consuming 15 pages of the transcript; see Tpp. 40-55). See ¶ 2 above for summary of evidence presented by the prosecutor. During that statement, without objection, the prosecutor submitted to the trial court a number of photographs (State's Exhibits 1, 4, 5, 11, 17, 46, 57, 60, and 84-A) and explained what each photograph depicted (E.g., "[t]his is a .45 caliber pistol that belonged to . . . defendant." (Tp. 49).[3]

f. The prosecutor's lengthy statement fully supports the aggravating factors found by the trial court.

18. State v. Mullican, 329 N.C. 683, 406 S.E.2d 854 (1991), presents a factual situation virtually identical to the one at bar, stating, inter alia:

> When the prosecuting attorney said he would summarize the State's evidence with the permission of the defendant, this was an invitation to the defendant to object if he had not consented. He did not do so. The

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[3] N.B., defendant does not contend that the substance of the prosecutor's lengthy statement inadequately presents an adequate factual basis for the finding of the aggravating factors found by the trial court; rather, defendant contends, incorrectly, that the statement is not evidence that could be properly considered.

> defendant said he too would then like to present his own evidence with the consent of the State. We can infer from this that the defendant had consented to the prosecuting attorney's making the statement. . . . We hold that the statement of the prosecuting attorney considered with the statement of the defendant's attorney shows that there was a stipulation that the prosecuting attorney could state what the evidence would show.

329 N.C. at 686, 406 S.E.2d at 855 (emphasis added). Accord State v. Sammartino, 120 N.C.App. 597, 601, 563 S.E.2d 307, 310 (1995) (considering trial counsel's request for prosecutor to recite factual basis for guilty pleas, reading of defendant's statement, and comments of trial counsel, court can infer that defendants consented to the prosecutor's recitation of the factual basis and the reading of co-defendant's statement).

19. Sammartino is also dispositive authority for the State's assertion that, when finding aggravating factors, the trial court could properly rely in part on phraseology in the indictments alleging second degree murder (based on wording in the indictment charging first degree murder), conspiracy to commit first degree murder, and first degree arson. See Sammartino, 120 N.C. at 601, 563 S.E.2d at 310 ("When a defendant pleads guilty, the trial court may rely upon the circumstances surrounding the offense, including factual allegations in the indictment, in determining whether aggravating factors exist. (citation omitted)."). Accord State v. Flowe, 107 N.C.App. 468, 472, 420 S.E.2d 475, 478, disc. review denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

20. When sentencing defendant, the trial court was required to "consider all circumstances that are both transactionally

related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense." Flowe, id.

IV.A DEFENDANT IS NOT ENTITLED TO A NEW SENTENCING HEARING IN SIX SOLICITATION CASES BECAUSE (A) HE WAIVED ANY ERROR CONCERNING THE ADMISSIBILITY OF SPECIAL AGENT BOWMAN'S TESTIMONY BY FAILING TO OBJECT, (B) ADMISSION OF THE TESTIMONY WAS NOT "PLAIN ERROR," AND, (C) THE TRIAL COURT PROPERLY FOUND STATUTORY AGGRAVATING FACTORS BASED ON COMPETENT EVIDENCE OF RECORD.

Assignment of Error No. 11; Rp. 90.

21. As defendant acknowledges by his claim of "plain error," **defendant did not make a timely objection to Special Agent James Bowman's testimony**, thereby failing to preserve for appellate review any issue, except a plain error issue, concerning the admissibility of Bowman's testimony. See N.C.G.S. § 8C-1, Rule 103; N.C.G.S. § 15A-1446(a); N.C.R.App.P. 10(b)(1); State v. Conaway, 339 N.C. 487, 507, 453 S.E.2d 824, 837 (1995). For "plain error" test, see ¶ 13.d above(i.e., whether claimed error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done as a result of the error).

22. Admission of Bowman's testimony was not plain error for many reasons, including the following:

a. The Supreme Court of North Carolina has "repeatedly stated that the Rules of Evidence do not apply in . . . sentencing proceedings. N.C.G.S. § 8C-1, 1101(b)(3)(1992). Therefore, a trial court has great discretion to admit any evidence relevant to

sentencing. (citation omitted)." State v. Thomas, 350 N.C. 315, 359, 514 S.E.2d 486, 513 (1999). That Court has recognized, however, that the Rules of Evidence "may be helpful as a guide to reliability and relevance." State v. Bond, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996), reh'g denied, 345 N.C. 355, 479 S.E.2d 210, cert. denied, 522 U.S. 1124, 117 S.Ct. 2521, 138 L.Ed.2d 1022 (1997). Defendant has neither shown that the Court either abused its discretion or erred as a matter of law by considering Bowman's testimony and the exhibits admitted into evidence based on Bowman's testimony, nor carried his heavy burden of demonstrating plain error.

b. Although Bowman repeated Stewart's comments, matters of record demonstrate that Bowman's testimony and the exhibits admitted into evidence as a result of his testimony were relevant to sentencing and not untrustworthy. Most significantly, Bowman did not merely repeat what Stewart told him. Rather, **Bowman presented considerable evidence tending to confirm the truth of Stewart's statements supporting the accusation that defendant solicited Stewart to commit murder**. Specifically, Bowman presented the following evidence tending to demonstrate the reliability of Bowman's testimony reporting Stewart's comments:

(1) Stewart gave Bowman a letter (State's Exhibit TK-2, a two page document, Tp. 63) Stewart received from defendant on 4 November 1998 containing a hand drawn map of the Guilford County courthouse depicting hallways, holding cells, and other areas of

the courthouse. The letter also contained the name, address, and phone numbers of defendant's parents and a female acquaintance. (Tpp. 57-58). The letter contained "Xes" indicating the potential positions of victims, bailiffs, Assistant District Attorneys or District Attorney who might need to be shot during an escape attempt. (Tp. 64).

(2) Bowman testified that his investigation determined that the aforementioned map was a map of the third floor of the courthouse. (Tp. 63).

(3) Bowman presented a hand drawn map (State's Exhibit TK-5) containing directions to the Greensboro location of one of the intended murder victims.

(4) **Bowman presented an S.B.I. laboratory report (State's Exhibit TK-6) concerning the letter Stewart got from defendant. The report compared a latent fingerprint on the aforementioned letter to defendant's fingerprints, concluding that defendant's left index finger print was on the letter.** (Tp. 65).

(5) **Bowman presented a S.B.I. laboratory report prepared by a documents examiner (State's Exhibit TK-7) comparing the handwriting on the aforementioned letter to defendant's handwriting sample, concluding that defendant was the author of the aforementioned letter and maps.** (Tp. 66).

(6) Bowman confirmed from the superintendent of the prison that Stewart reported his conversations with defendant.

IV.B DEFENDANT IS NOT ENTITLED TO A NEW SENTENCING HEARING IN SIX SOLICITATION CASES BASED ON HIS INCORRECT ASSERTION THAT THE TRIAL COURT USED THE SAME EVIDENCE TO PROVE TWO AGGRAVATING FACTORS. THE EVIDENCE WAS USED TO PROVE ONLY ONE AGGRAVATING FACTOR, AGGRAVATING FACTOR (5) IN N.C.G.S. § 15A-1340.16(d). ASSUMING ERROR ARGUENDO, IT WAS HARMLESS.

Assignment of Error No. 11; Rp. 90.

23. Defendant's Argument IV.A is based on a false premise concerning the sentences adjudged for each of the six relevant offenses of solicitation: that the trial court found two aggravating factors based on the same evidence. The trial court found but one aggravating factor for each solicitation offense (i.e., aggravating factor "(5)" in N.C.G.S. § 15A-1340.16(d)'s list of aggravating factors, which is that "[t]he offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws" [herein "aggravating factor 5"]), as demonstrated by the following observations concerning matters of record:

a. Most significantly, the trial court's statements at the sentencing hearing manifest the trial court's intention to find but one aggravating factor for each of the six relevant solicitation offenses. Specifically, when referring to case number 23241, the trial court stated:

> Pursuant to North Carolina General Statute 15A-1340.16(d)(5), this Court finds . . . that this offense was committed for the purpose of disrupting the enforcement of the laws, and that the act of paying someone to murder a person who would be expected to testify against the defendant in the prosecution of the charged murder of Patricia Gail Kimble is an act tending to **disrupt or hinder** the enforcement of the laws of this

> state. . . . And the Court concludes as a matter of law that **the aggravating factor found** outweighs the mitigating **factors** found, and concludes that the defendant is subject to sentence in this action within the aggravated range prior offender level 2 on the Class C felony of solicitation to commit first degree murder.

(Tp. 223)(emphasis added). **Thereafter, the trial court stated findings concerning the other relevant solicitations offenses in words demonstrating to any reasonable jurist that the trial court's mental computer factored into the adjudication process one and only one aggravating factor for each offense.** Frequently, visuals images are better than verbal descriptions. **Thus, to quickly gain insight into the mental process of the trial court, please see Appendix 2 hereto** (Tpp. 223-26), containing the undersigned's black felt pen notations, circles, and underlining. N.B., the trial court astutely distinguishes "the [aggravating] factor," without an "s", from "the factor**s** found in mitigation," with an "s".

b. The AOC-CR-605 forms used by the trial court to record findings of aggravating factors lists the statutory factors, and show that only one aggravating factor was found for each offense of solicitation (i.e., aggravating factor 5)(e.g., see R.p. 42). The two X's next to "a" and "b" do not refer to separate aggravating factors; they merely record as best as can be done on this particular form the findings articulated from the bench by the trial court and preserved in the transcript by the reporter.

c. State v. Ahearn, 307 N.C. 585, 599, 300 S.E.2d 689, 698 (1983), discussing old sentencing law, merely cautions trial courts to eliminate inapplicable portions of statutory aggravating factors

listed in the disjunctive. Ahearn does not mandate re-sentencing whenever a trial court makes one aggravating factor finding that the offense was committed "to disrupt or hinder" the enforcement of the laws of this state.

d. The term "aggravating factor" has a clear meaning expressly conveyed by the General Assembly when that body determined by legislative fiat the statutory aggravating factors by listing them as separate and distinct factors. The "old" legislation listed sixteen factors; the new lists 20 aggravating factors after declaring that "[t]he following are aggravating factors." N.C.G.S. § 15A-1340.16(d). Parlance used by the Supreme Court of North Carolina recognizes that the factors are those listed sequentially in the legislation identifying aggravating factors. See State v. Melton, 307 N.C. 370, 373, 298 S.E.2d 673, 676 (1983)("In deciding upon the length of a sentence of imprisonment differing from the presumptive term listed in N.C.G.S. 15A-1340.4(f), a judge must consider sixteen possible aggravating . . . factors . . . .").

e. This Court and the Supreme Court of North Carolina have approved sentences based on findings of aggravating factors parroting the wording in N.C.G.S. § 15A-1340.16(d)(5) (i.e., findings containing "disrupt or hinder"). See State v. Evans, 113 N.C.App. 644, 646, 439 S.E.2d 775, 776 (1994), stating:

> Defendant is correct that the same item of evidence may not be used to prove more than one factor in aggravation. N.C.G.S. § 15A-1340.4(a)(1). However, this Court addressed the same argument as applied to the same two

> aggravating factors in State v. Brown, 67 N.C. App. 223, 313 S.E.2d 183, appeal dismissed and disc. review denied, 311 N.C. 764, 321 S.E.2d 147 (1984). In that case, the defendant conspired to kill a detective and a witness for the State, both of whom were playing key roles in the defendant's assault prosecution. Id. at 236, 313 S.E.2d at 192. The trial judge found that the offenses were committed to disrupt or hinder the enforcement of the law and that the intended victims were a fire department investigator and a State's witness against the defendant, both among the class protected by section 1340.4(a)(1)(e). Id.

113 N.C.App. at 646-47, 439 S.E.2d at 776-77.

f. State v. Morston, 336 N.C. 381, 409-10, 445 S.E.2d 1, 16-17 (1994), relied on by defendant, is not dispositive. Morston was based on a finding that the trial court found two separate aggravating factors based on the same evidence. In the case at bar, the trial court's repetitious and clear statement from the bench (discussed in ¶ 23 above) demonstrates that the trial court intended to -- and did -- find only one aggravating factor for each solicitation at issue. Furthermore, the trial court's findings parroted the verbiage set forth by the General Assembly (i.e., "disrupt or hinder") when it listed the statutory aggravating factors. Morston is also an acknowledged cautious opinion decided under the Fair Sentencing Act resolving a debatable question in the defendant's favor. The State submits that Morston is not precedent that mandates victory for defendant on this one issue. Nothing in Morston compels this Court to blindly reject the repetitious and clearly expressed findings articulated by the trial court, findings manifesting the trial court's intention to find but one aggravating factor for each offense of solicitation.

g. Assuming error arguendo, considering all circumstances noted in ¶¶ 23.a-23.f above, the error was harmless. See N.C.G.S. § 15A-1443. To conclude otherwise is to totally reject logic and disregard the trial court's intelligence, judgment, and experience.

CONCLUSION

24. Defendant is obviously a ruthless and calculating killer with ice in his veins -- a man who must be confined to protect our citizens. Matters of record demonstrate that defendant received a sentence comporting with the terms of the agreement knowingly and voluntarily entered into by defendant and his counsel. He received a fair sentencing hearing. He has failed to demonstrate prejudicial error. Accordingly, the State respectfully requests that the Court reject his appeal and affirm the findings of guilty and sentence adjudged by the trial court.

Very respectfully submitted this the 18th day of April 2000.

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APPENDICES

1. Transcript reporting part of trial court's findings concerning aggravating factors (Tpp. 223-26).

2. Transcript reporting part of S.B.I. Special Agent Bowman's testimony concerning solicitations offenses (Tpp. 56-60).

Re: 23241 R.P. 60

On the defendant's plea of guilty to the offense of solicitation to commit first degree murder, the Court makes the following findings in aggravation and in mitigation. Pursuant to North Carolina General Statute 15A-1340.16(d)(5), this Court finds by a preponderance of the evidence that this offense was committed for the purpose of disrupting the enforcement of the laws, and that the act of paying someone to murder a person who would be expected to testify against the defendant in the prosecution of the charged murder of Patricia Gail Kimble is an act tending to disrupt or hinder the enforcement of the laws of this state. The Court finds the same statutory factors in mitigation as previously found. And the Court concludes as a matter of law that the aggravating factor found outweighs the mitigating factors found, and concludes that the defendant is subject to sentence in this action within the aggravated range prior offender level 2 on the Class C felony of solicitation to commit first degree murder. In that offense the judgment of the Court is defendant is to be confined to serve a term of imprisonment for a minimum of 108 months and for a maximum of 139 months, assigned to the North Carolina Department of Corrections. The sentence imposed by the Court in this action is to commence at the expiration of the sentence imposed by the Court in case 23486.

In the next action, which is 23242 on the defendant's previously entered and accepted plea of guilty to the offense of solicitation to commit first degree murder, the Court enters the same findings in aggravation and in mitigation as are recorded in case 23241. Court finds in this action that the factor found in aggravation outweighs the factors found in mitigation. The judgment of the Court is in 23242 that the defendant should be confined to be assigned to the North Carolina Department of Corrections for a term of 108 months minimum and a maximum term of 139 months. And this sentence shall commence at the expiration of the sentence imposed by the Court in 23241.

Judgment shall be entered next by the Court in case 23243 R. p. 64 In this action, upon the defendant's plea of guilty to solicitation to commit first degree murder, the Court makes those same findings in aggravation and in mitigation as are recorded previously in case 23241. The Court concludes in this action that the factor found in aggravation outweighs the factors found in mitigation, and enters judgment that the defendant shall be confined in this action to serve a term of imprisonment for a minimum term of 108, and a maximum term of 139 months. The sentence imposed by the Court in case 243 is to commence at the expiration of the sentence imposed by the

R.P. 66

Court in case 23242.

Judgment shall be entered next in case 23244. In that action the judgment of the Court is that upon the finding of the same factors in aggravation and in mitigation as were found by the Court in case 23241, the judgment of the Court upon the conclusion that the defendant is subject to sentence within the aggravated range as a prior offender level 2, that he be confined to serve a term of imprisonment of not less than 108 months, and not more than 139 months to be assigned to the North Carolina Department of Corrections. And this sentence shall commence at the expiration of the sentence imposed in case 23243.

Judgment to be entered next in case 23245. In that action the Court makes no findings in aggravation or in mitigation. The defendant shall be sentenced within the presumptive range, prior offender level 2 as a Class C felon. The judgment of the Court is that the defendant should be confined to serve a term of imprisonment of not less than 96 months, and a maximum term of 125 months, assigned to the North Carolina Department of Corrections, and this sentence shall commence at the expiration of the sentence imposed by the Court in case 23244.

R.P. 70

Judgment to be entered next in case 23246.

In this action the judgment of the Court is based upon the findings that the same aggravating factors and mitigating factors as found to exist by a preponderance of the evidence in case 23241 are found in this action. The Court concludes that the aggravating factor found outweighs the mitigating factors found. The judgment of the Court in this action is that the defendant is ordered confined to serve a term of imprisonment for a minimum term of 108, and a maximum term of 139 months. This sentence shall commence at the expiration of the sentence imposed by this Court in case 23245.

R.p.72

Judgment is to be entered next in case 23247. In this action the Court makes findings in aggravation and in mitigation identical to those findings entered in case 23241. In this action the judgment of the Court is that the defendant should be confined to serve a term of imprisonment of not less and 108 and not more than 139 months assigned to the North Carolina Department of Corrections. And this sentence is to commence at the expiration of the sentence imposed in case 23246.

The final judgment of this Court shall be entered in case 23248. In that action the Court makes no findings in aggravation or in mitigation. The judgment of the Court in that action upon the previously entered conclusion that the defendant is subject to sentence at

Q. State your name, please, sir.

A. James Bowman.

Q. And you're an agent with the State Bureau of Investigation; is that correct?

A. Yes, sir.

Q. In the course of your duties, did there come a time when you came into contact with a Mr. Stewart in reference to this investigation?

A. Yes, sir. I did.

Q. Would you explain that to the Court, please?

A. On November 20th, of 1998, correction, November 23rd, 1998 I interviewed a William Wayne Stewart, who was an inmate with the North Carolina Department of Corrections. Stewart related that he had information related to the defendant. He stated that he had been incarcerated with the defendant at Piedmont Correctional Institute in Salisbury, and also at Southern Correctional Institute in Troy. He related that during the time he was incarcerated with the defendant, he had informed the defendant that he was going to be getting out of prison soon, and that the defendant proceeded to talk to him about after he got out of prison he was interested in him assisting in eliminating some witnesses in his pending murder trial. Stewart related that Kimble offered him $100,000 to perform what he referred to as a series of

five missions. He related that the missions were to kill people that Kimble had referred to numerically to him as number one, Louis Whidden, Jr. in Arcadia, Florida; number two, Gary and Rose Lyles in Long Beach, North Carolina; number three, Kara and David Dudley in Greensboro, North Carolina; number four, Linda and Kevin Cherry in Archdale, North Carolina; and number five, Patrick Roy Pardee in Greensboro, North Carolina.

Stewart related that Kimble sent him several handwritten notes during the time that they were incarcerated together; however, he stated that he had disposed of most of the notes, except for one which he had received by mail on November 4th, 1998. He provided a copy of that letter to me during the course of the interview, which I submitted to the State Bureau of Investigation Laboratory in Raleigh for some laboratory analysis.

Reviewing the letter prior to submitting it to the Lab, I observed that it contained a map of the Guilford County courthouse. It was a hand drawn map, which outlined the hallways, holding cells, and other areas of the courthouse.

The letter also contained the name and address of Kimble's parents, the Reverend R. L. Kimble in Julian, North Carolina. And it contained his father's

home phone number and pager number. It also contained the name and address of a female acquaintance, a Melanie Oxendine, and it contained her home telephone number.

Stewart went on to explain that when he had conversations about the escape with Kimble that in their face-to-face conversations he would, in his words, talk straight out about what he wanted done. However, he stated that he had established a code that in any written correspondence he referred to it as "going to school." And he referred to the various missions as his "tests." And he stated that frequently Kimble would make reference to him that he wanted him to make an A+ on the tests. He stated that he would make reference to school supplies in referring to money and vehicles which had been promised to him in exchange for him completing the missions.

He stated that he also talked to him about the potential of escaping from custody. He talked to him about escape plans related to escaping from the Guilford County courthouse, which is what the hand drawn map referred to. And then he also talked to him about the potential of escaping from Southern Correctional Institute in Troy. That plan involved stealing a dump truck, crashing through a predetermined location on the fence at a predetermined time when Kimble would be on the yard and escaping.

He also stated that Kimble told him that each of the murders should be done differently so that it would not appear obvious what was going on. He stated that when he did number two, which was Gary and Rose Lyles, that he could do it as a robbery. He stated that he had information that Mr. Lyles frequently had a lot of money on him, and that would be extra money for Stewart. He also suggested other methods of killing the witnesses. He suggested death by electrical wiring, robbery motive, a rape motive, double suicide, and a kidnapping gone bad, or Satanic cult type murder.

Stewart explained that he went along with the conversations because during his association with Kimble, Kimble was frequently buying him things from the Canteen and giving him small amounts of money, which he was able to buy snacks and things from the Canteen. He stated that he didn't intend to participate in anything like this, and at the point he realized that Kimble was serious about his plans, he went to the superintendent of the prison and reported his information.

I later interviewed the superintendent and confirmed that Stewart did report to him his conversations with Kimble.

Stewart stated that the last contact -- during that interview, Stewart stated that the last

contact he had with Kimble was on Sunday, November 22nd, and in passing, and he stated at that time Kimble made the statement to him, "Are you ready to go to school?" And he said, "I hope you get an A+," and he gave him the thumbs up sign as they parted.

I conducted a subsequent interview with Stewart on Thursday, December 17th. He stated that he had had another contact on December 13th with Kimble, and at that time Kimble had stated that he was more interested in trying to escape from prison. He stated that he wanted to attempt a crash through the gate at Southern Correctional Institute on Wednesday, December 23rd, and he provided Stewart with a time that he would be on the courtyard. Stewart stated that Kimble talked to him about having someone on the outside potentially to help with the plans; however, he did not identify that person to him.

Q. I draw your attention to his plans to escape, specifically on page 3 of your report. That his plans to escape from the Guilford County courthouse, did he have any specific plans about how he would get the weapons into the courthouse?

A. Are you referring to page 3 of Stewart's interview?

Q. Yes.