NO. COA11-1382 **TWENTY-SEVEN A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Gaston**
	)	
MARK BRADLEY CARVER	)	

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BRIEF FOR THE STATE

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ISSUES PRESENTED

I. **DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS THE FIRST DEGREE MURDER CHARGE AGAINST HIM SINCE SUFFICIENT EVIDENCE EXISTED WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE TO ESTABLISH EACH ESSENTIAL ELEMENT OF THE CRIME AND THAT DEFENDANT WAS THE PERPETRATOR?**

II. **DID THE TRIAL COURT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY REGARDING THE ELEMENTS NECESSARY FOR THE STATE TO PROVE DEFENDANT GUILTY OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT, AND IF SO DID ANY INSTRUCTIONAL ERROR INURE TO DEFENDANT'S BENEFIT?**

STATEMENT OF THE FACTS

University of North Carolina student Irina Yarmolenko's dead body was found at the banks of the Catawba River in Gaston County early afternoon on 5 May 2008. She had been strangled to death by three ligatures wrapped around her neck. Jet skier Dennis Lovelace and his girlfriend Brenda Pierce were jet skiing on the Catawba River around lunchtime on 5 May 2008 near the I-85 highway bridge when he observed a blue sedan which had come to rest at the base of a steep embankment, almost in the water. (Tpp 34-35, 37). The car was mere inches from the water, and Mr. Lovelace observed that the

front and back doors of the car were open on the driver's side. (T p 37). Because the embankment was so steep, Mr. Lovelace opined that it would have been impossible to drive the car back up to the top and in fact would have been difficult to walk back up the embankment which was heavily overgrown with weeds. (T pp 37, 49).

Mr. Lovelace drove his jet ski within ten feet of the river's bank in order to investigate. (T p 38). Logs and debris at the water's edge prevented them from driving their jet skis closer to the river's bank. (T p 51). When Mr. Lovelace was approximately ten feet away he observed a body lying beside the car. (T p 38). He got off his jet ski and was standing knee-deep in the water when he observed something tied around the neck of the body he saw on the bank. (T pp 45-46). Mr. Lovelace instructed his girlfriend to return to the boat landing from where they had launched their skis so that she could call 911. (T p 38, 52). She did so, placing an emergency 911 call shortly after 1:00 p.m. (T pp 53-54; State's Exhibit 2). Meanwhile, Mr. Lovelace proceeded down the river in the opposite direction in hopes of locating someone closer to contact police. (T pp 38-39). Eventually he located a construction worker with a cell phone who agreed to contact the authorities. (T p 38).

Mr. Lovelace, who frequently drove boats and jet skis on the Catawba River, (T pp 34-35), was familiar with a fishing spot close to where he had seen the body, but that day he saw no one in the fishing area at the time he saw the body and the car. (T p 40). Kayakers also frequent the area, but Mr. Lovelace saw none on this

date. (T p 41).

Subsequent investigation revealed that Ms. Yarmolenko, a student at the University of North Carolina at Charlotte, (T p 72), had been to the State Employee's Credit Union on University Boulevard at 10:20 a.m. (T pp 61-63) and then at the Goodwill store on University Boulevard dropping off donations at 10:33 a.m. on the morning of her death. (T pp 65, 67-69). Nothing appeared abnormal about her at that time. (T p 69). She was alone. (T p 70). She made other stops at Foodlion, Wendy's and Exxon. (T p 183). Then surveillance video of the parking lot of the YMCA just off Highway I-85 in Gaston County, captured Ms. Yarmolenko driving her car shortly after 11:00 a.m. to a nearby neighborhood which was under construction and located less than a mile from the Catawba River. (T pp 83-85, 93)(State's Exhibits 10 and 11). From YMCA Drive it is possible to follow a paved road through a subdivision which then became a dirt road by the river. (T pp 93-94). Access from the dirt road to the river was only possible by foot. (T p 88).

Ms. Yarmolenko, a photographer and writer, was preparing to move to Chapel Hill. (T pp 72-74). Diane Carlton, a photo editor and fellow writer at the University Times paper at UNC Charlotte last spoke with her friend Ms. Yarmolenko during the last week in April. (T p 74). They discussed the Olympic trials that were being held at the Whitewater Center located off Highway 485 toward Gaston County. (T pp 74, 76). Ms. Yarmolenko was curious if anyone could get into the Whitewater Center or if it was necessary

to have a press pass. (T p 75). She was interested in photographing action shots of the kayakers or rafters in the river to add to her portfolio. (T pp 75, 81). She expressed her hope to have photographs of the kayakers at the river before the end of the semester, which was mid-May. (T p 77). The Whitewater Center is located directly across the river from the location where Ms. Yarmolenko's body was located. (T p 40).

When investigators arrived at the scene shortly after 1:20 p.m., they found tire tracks which started at the dirt road near the Catawba River and which led directly down the embankment to the car which had come to rest against a stump at the river's edge. (T pp 95-96, 112-13, 116-17, 121). The area was overgrown with high grass and a lot of brush which extended to the water's edge. (T pp 116, 204, 223). The dirt road at the top of the embankment extended from the paved road and continued into a wooded area. (T p 113). Beyond the wooded area was an isolated fishing spot. (T pp 113-14). There investigators encountered two sets of men fishing, including Defendant who was loading fishing rods into his Blazer at approximately 2:15 p.m. (T p 113-14, 199-200, 202). Defendant later confirmed that his cousin, Neal Cassada, was with him fishing and that they arrived around 11:30 a.m. (T pp 100, 102-103). Investigators also spoke with two other fishermen, John and James Beatty, who told investigators that they had just arrived at the area. (T pp 199-200, 202).

A worn path led from the fishing spot where Defendant had been to the location at the top of the embankment where the tire tracks

began. (T pp 103, 142). It was a short walk between the two areas, and investigators discovered that the two areas were in easy earshot of one another when they were able to talk to each other in normal voices, having positioned themselves in the two areas. (T pp 104-06, 140-42, 207).

Ms. Yarmolenko's blue sedan had come to rest against a stump which was hidden under some thick underbrush at the edge of the river (T p 117). The car had sustained extensive front end damage. (T p 117, 254). Ms. Yarmolenko's body was located near the car. (T pp 117-118). Both the front and back doors on the driver's side of the car were open. (T p 118). Ms. Yarmolenko's body was on its back with her head facing the embankment and her feet tangled underneath the think underbrush near the river. (T p 118). Her hand grasped one of the vines in the underbrush. (T pp 118, 129). The car was not in the water, yet Ms. Yarmolenko's clothes, body, and hair were wet. (T pp 117-18). Her back and the back of her arms were smeared with mud and dirt. (T p 129). The back driver's side passenger door was also smeared with mud. (T p 124). A set of keys were located outside the car at the driver's side rear corner, although investigators did not confirm if the car key was among them. (T p 241).

A later analysis of the crash data retrieval device, which was built into the vehicle for use in the air bag control module (T pp 247-51), confirmed that the airbag did not employ. (T pp 259-60, 262). Based upon the extensive damage to the vehicle, experts in accident reconstruction determined that the air bags should have

deployed had the car been turned on at the time of impact. (T pp 255-57). There was no evidence to indicate who, or even if, anyone was driving the car at the time of impact since the vehicle was not turned on during this impact. (T pp 259-60). The vehicle did record a prior incident in which the airbags also did not deploy which occurred at least three ignition cycles before the damage was done to this car, and could have included merely hitting a pothole or driving over rough terrain. (T pp 259-60). During that prior incident several ignition cycles before, the driver's seat belt was buckled. (T pp 259-60). However, there was no evidence that the driver's seat belt was buckled during the descent down the embankment and subsequent impact with the tree stump at the river's edge on 5 May 2008. (T pp 259-60).

Three separate ligatures were wrapped around Ms. Yarmolenko's neck including a blue ribbon, a drawstring from the sweatshirt she was wearing, and a blue bungee cord. (T pp 128-29, 144). The blue ribbon around her neck matched a ribbon cut from a gift bag located in the back seat of the driver's side of the vehicle. (T pp 128-29). Both the blue ribbon and the drawstring were wrapped very tightly and knotted on the front of her neck. (T p 314). The bungee cord around her neck, which was the same type as another found in her trunk, was wrapped multiple times around her neck and hooked together on the back of her neck. (T pp 134-35, 144, 314).

A later autopsy confirmed that Ms. Yarmolenko died of asphyxia caused by ligature strangulation. (T p 322). She had also sustained bruising and red marks on the top of her thighs which

would have been consistent with pressure being applied from on top of her. (T pp 320-21). She had sustained one potentially defensive wound, a scrape to her index finger. (T p 326). There was no evidence of any sexual assault. (T p 327).

Later that night Defendant returned to the crime scene but was not allowed entry. (T p 211). He claimed to be there to retrieve some fishing nets. (T p 211).

Investigators interviewed Defendant on 15 May 2008 at his home. (T p 99). He was not a suspect at that time and was interviewed because he was near the area where Ms. Yarmolenko was found dead. (T p 102). Defendant confirmed that he was fishing near the crime scene on the day Ms. Yarmolenko's body was found and that he was fishing with his cousin, Neal Cassada. (T p 100). Defendant told investigators that he arrived at the Catawba River at approximately 11:30 a.m. that day. (T p 102). Defendant stated that he and his cousin were the only people in the area, but that he saw a man and woman on jet skis. (T p 103). He heard the man on the jet ski tell a black man in a nearby boat to call 911. (T p 103).

In October of 2008, Defendant, his cousin, and the two other fishermen who were in the area when investigators arrived at the scene consented to submit DNA from skin cells taken from swabbings of the insides of their cheeks. (T pp 173-80, 203, 210).

On 10 December 2008 Defendant was again interviewed but was not under arrest. (T p 184). At this interview Defendant told investigators that he arrived at the fishing spot on 5 May 2008

between 10:00 a.m. and 11:00 a.m. (T p 192). Defendant was interviewed again on 12 December 2008 and prior to this interview was read his Miranda rights. (T p 191). At the interview on 12 December 2008, Defendant told investigators he arrived at the fishing spot approximately 10:30 to 11:00 a.m. on 5 May 2008. (T p 192). Defendant told investigators that he had heard a scraping sound and that he heard the jet skiers discovering the dead body and asking someone to call 911. (T p 192). Defendant confirmed he had a cell phone on him that day but did not call 911. (T p 193). Defendant claimed that other than his cousin, he only saw the jet skiers and a black man out on a boat that day. (T p 193).

Ms. Yarmolenko's vehicle was processed for fingerprints and DNA. (T pp 160-61, 208, 242). No latent print lifted from the interior or exterior of the vehicle was suitable for comparison purposes. (T pp 225-27, 243). In July of 2008 the vehicle was swabbed for DNA left from skin cells. (T p 267). Subsequent analysis of swabbings taken from the vehicle (T pp 230-37) revealed a DNA profile that matched Defendant's on the outside of the vehicle on the pillar above the driver's side rear door. (T pp 167-69, 271-72). This profile was 126 million times more likely to be observed from Defendant than any other in the Caucasian population. (T p 273). A DNA profile that matched Defendant's cousin's DNA was located on the inside front passenger side door arm rest and the inside glass of the front passenger side door. (T pp 169-70, 275, 278). The profile from the interior door glass was approximately 680 million times more likely to be observed from

Neal Cassada than if it was generated from another in the Caucasian population. (T p 276). The profile from the front passenger arm rest was consistent with a mixture of DNA profiles and was 84.7 million times more likely found from Neal Cassada than from another in the Caucasian population. (T pp 278, 280). The swabbing from the seat belt button in the passenger side back seat revealed a DNA profile which was consistent with a mixture, from which Defendant could not be excluded as a contributor, but Neal Cassada was excluded. (T pp 169, 281). Enough material was found to be consistent with Defendant's DNA profile on the seat belt button, but not enough to make a definitive match. (T p 281).

Defendant denied seeing or touching Ms. Yarmolenko's car. (T p 194). When confronted with the DNA results from the car, Defendant stated that he did not know why his cousin's DNA would be in the car since Mr. Cassada was with him the entire day. (T p 196). He also did not know how his DNA would have been left on her car. (T p 196).

Defendant also denied ever seeing or hearing Ms. Yarmolenko. (T p 194). However, when asked, Defendant was able to describe Ms. Yarmolenko's height relative to his own. (T p 197). He described her as a "little" thing, standing up during the interview to indicate on his body how tall Ms. Yarmolenko was in comparison to himself. (T p 197). Then Defendant stated, "I guess. I've never seen her." (T p 197). When questioned about how he could know how tall she was relative to himself, Defendant responded with "I guess I saw it on TV." (T p 198). No news footage depicting Ms.

Yarmolenko established her height relative to Defendant's. (T pp 197-98).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS THE FIRST DEGREE MURDER CHARGE AGAINST HIM SINCE SUFFICIENT EVIDENCE EXISTED WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE TO ESTABLISH EACH ESSENTIAL ELEMENT OF THE CRIME AND THAT DEFENDANT WAS THE PERPETRATOR

Defendant alleges that the trial court erred in denying his motion to dismiss the first degree murder charge. Because the evidence in the light most favorable to the State was sufficient to establish each essential element of first degree murder and that Defendant was the perpetrator, the trial court did not err in denying Defendant's motion.

A. Sufficiency of the Evidence Standard and this Court's Review

In order to survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of each essential element of the charged offense and the defendant's being the perpetrator. State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." State v. Blake, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987), quoting State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences to be drawn from the evidence. Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455; State v.

Robbins, 309 N.C. 771, 774-75, 309 S.E.2d 188, 190 (1983)(the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom).

"Contradictions and discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." Fritsch, 351 N.C. at 379, 526 S.E.2d at 455. It does not matter whether the State's evidence is direct, circumstantial, or both; the test for resolving a challenge to the sufficiency of the evidence is the same regardless. Id.; see also, State v. Berry, 356 N.C. 490, 500, 573 S.E.2d 132, 141 (2002)("[c]ircumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence.") (citations omitted), supersedeas denied, mandamus denied, cert. denied, 358 N.C. 236, 594 S.E.2d 188 (2004). Circumstantial evidence need not "rule out every hypothesis of innocence." Fritsch, 351 N.C. at 379, 526 S.E.2d at 455. In fact, as this Court recently noted that "[m]ost murder cases are proved through circumstantial evidence." State v. Banks, 2011 N.C. App. LEXIS 302, 706 S.E.2d 807, 813 (2011).

Resolving discrepancies and competing inferences is not the role of an appellate court in determining whether the evidence was sufficient. Instead, the appellate court's role is to examine whether, after viewing the evidence in the light most favorable to the State, there was enough evidence to submit the charge to the jury for the jury's decision. See Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455. Here there was sufficient evidence presented to

survive Defendant's motion to dismiss these charges and to warrant submission of the first degree murder charge.

B. Evidence Sufficient To Establish First Degree Murder

The evidence submitted in this trial was sufficient to establish each essential element of first degree murder. "In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." State v. Peterson, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007), citing N.C.G.S. § 14-17. Defendant alleges that insufficient evidence existed to establish motive and opportunity for Defendant to have been convicted of the murder of Ms. Yarmolenko. However, the State need not prove motive for murder. State v. Elliott, 344 N.C. 242, 273, 475 S.E.2d 202, 216 (1996) ("[m]otive is not an element of first-degree murder, nor is its absence a defense"), citing State v. Gainey, 343 N.C. 79, 84, 468 S.E.2d 227, 230 (1996), and State v. Van Landingham, 283 N.C. 589, 600, 197 S.E.2d 539, 546 (1973)), cert. denied, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). Rather, motive and opportunity along with capability or means may be established in order to identify a defendant as the perpetrator of a crime. These are not essential elements of the crime but are circumstances "relevant to identify an accused as the perpetrator of the crime." State v. Bell, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983).

Defendant points to several cases where our Supreme Court has found insufficient evidence to establish defendant as the

perpetrator of the crime. In each of these cited cases, the evidence of motive was strong, but evidence of opportunity was lacking.[1] See State v. Furr, 292 N.C. 711, 235 S.E.2d 193 (1977)(defendant threatened the victim, his ex-wife, repeatedly and lived close by but evidence was lacking as to his opportunity to commit her murder) and State v. Lee, 294 N.C. 299, 240 S.E.2d 449 (1978)(defendant beat and threatened to kill the victim, but no evidence ever linked murder weapon to defendant).

Likewise, in State v. Hayden, 2011 N.C. App. LEXIS. 1051, 711 S.E.2d 492 (2011), the court found sufficient evidence from which the jury could infer intent to kill the victim, or motive for the murder, based upon defendant's prior threats and ill will which existed between defendant and victim but found evidence of opportunity and means lacking. The court found insufficient evidence of opportunity to commit the crime when the evidence only established that he was seen two miles from the scene and no evidence placed defendant at the scene of the crime when the crime was committed. Hayden, 2011 N.C. LEXIS at *15, 711 S.E.2d at 497. Additionally, the court found insufficient evidence of means to kill the victim since there was no evidence linking defendant to the specific weapon used, a M16 rifle. Hayden, 2011 N.C. LEXIS at

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[1] Defendant points to this Court's divided holding in State v. Pasteur, 2010 N.C. App. LEXIS 1316, 697 S.E.2d 381 (2010), as "illustrative value" on the point of sufficiency of the evidence. Yet, Pasteur, which was affirmed by an equally divided court, is completely without precedential value. Pasteur, 2011 N.C. LEXIS 817, 715 S.E.2d 850; see, State v. Johnson, 286 N.C. 331, 332-333, 210 S.E.2d 260 (1974).

*18, 711 S.E.2d at 498-99.

Here, in contrast, the State has not attempted to supply a motive for this killing. It is, from all the evidence shown, a crime of opportunity. Surveillance videotape from the parking lot of the YMCA adjacent to the Catawba River established that Ms. Yarmolenko arrived at the area shortly after 11:00 a.m. (T pp 102, State's Exhibits 10 and 11). Defendant first told investigators that he and his cousin arrived at 11:30 that morning, and then later told investigators he arrived between 10:00 and 11:00 a.m. (T p 192). Ms. Yarmolenko's dead body was discovered approximately two hours after she arrived in the area by jet skiers passing by the bank of the Catawba where her car had come to rest down the embankment. (T pp 35-37). By that time, Ms. Yarmolenko's body had developed a noticeable blue, purple hue to it. (T p 38). When police arrived at the scene, they found Defendant and his cousin still in the area, within earshot of the place where the car and dead body were located. Defendant told investigators that only he and his cousin were in the area, but that he saw the jet skiers and a boater on the water. (T p 103). From all the evidence presented, Defendant was in the immediate area where this murder occurred at the time the murder occurred. Defendant's own statement placed him steps away from the crime scene during the time of the murder within easy earshot. From this, there was sufficient evidence to establish that Defendant had the opportunity to kill Ms. Yarmolenko. Defendant's claim that he never saw or heard Ms. Yarmolenko was only a contradiction or discrepancy for

the jury to resolve. Fritsch, 351 N.C. at 379, 526 S.E.2d at 455.

Furthermore, the evidence established that Defendant had the means for the murder, which were three ligatures tied tightly around Ms. Yarmolenko's neck. All three ligatures were available from on or around the victim's belongings. One ligature was from the black sweatshirt she wore while another was a bungee cord similar to another found in her trunk, and the last was a blue ribbon, cut from a gift bag located in her back seat. In contrast to Hayden, in the instant case sufficient evidence existed to establish opportunity and means such that the jury could find defendant was the perpetrator of this crime.

Besides the fact that Defendant was in the immediate area during the time of this murder, other physical evidence points directly at Defendant as the perpetrator of this offense. Defendant's DNA was located on the pillar above the back passenger door on the driver's side of the vehicle. (T pp 271-72). This door was found open and smudged with mud. (T pp 37, 118, 124). Just inside this door was a gift bag, from which a blue ribbon had been cut to strangle Ms. Yarmolenko. (T pp 128-29). This was powerful evidence establishing the identity of the perpetrator, most particularly because Defendant steadfastly claimed he never saw nor touched the vehicle. (T p 194).

The DNA evidence in this case establishes that Defendant was present and participated in this murder. Defendant alleges that the State has not established that his DNA could only have been left on the car at the time of the murder. The facts in

combination with the law show otherwise. Our courts have repeatedly held that in order to establish sufficient evidence, the State must establish that identifying evidence which incriminates a defendant could only have been left at the scene at the time of the crime. In State v. Scott, 296 N.C. 519, 522, 251 S.E.2d 414, 416-17 (1979), the court found insufficient evidence of opportunity to commit the crime when the evidence establishing opportunity existed only from a fingerprint found on a box that could have been handled by the defendant at a time other than the time of the crime. Likewise, in State v. Bass, 303 N.C. 267, 273, 278 S.E.2d 209, 213 (1981), defendant made a statement which explained the presence of his fingerprints on the premises of a residence which had been the subject of a break-in, larceny and the location of a rape. Hence the State was unable to establish that the evidence of his fingerprints could only have been left at the time of the commission of the offense. Id.

However, our courts have noted that a defendant's denial of ever being at the scene is evidence that the identifying evidence could only have been left at the time of the crime. "Circumstances tending to show that a fingerprint lifted at the crime scene could only have been impressed at the time the crime was committed include statements by the defendant that he had never been on the premises[.]" State v. Irick, 291 N.C. 480, 492, 231 S.E.2d 833, 841 (1977); see also, Bass, 303 N.C. at 273, 278 S.E.2d at 213 (contrasting the facts in Bass with the case when a defendant denies ever being at the crime scene).

Here Defendant denied ever touching the car, and therefore the evidence of his DNA on the car establishes that he touched the car at the time of the murder. In this regard, this case is more closely aligned with State v. Cross, 345 N.C. 713, 483 S.E.2d 432 (1997) and State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975). In Cross, the court concluded that the motion to dismiss for insufficiency of the evidence was properly denied where substantial evidence existed to establish that a defendant's fingerprints could only have been impressed at the time that the crime was committed. Cross, 345 N.C. at 717, 483 S.E.2d at 435. This is so because "'such evidence logically tends to show that the accused is present and participated in the commission of the crime.'" Id., citing State v. Miller, 289 N.C. at 4, 220 S.E.2d at 574. In State v. Miller, defendant's thumbprint was found on a lock at the crime scene, no other prints were found at the scene, and defendant told police that he had never been to the crime scene. The court in Miller concluded that these facts and circumstances "raise[ed] legitimate inferences from which a jury may properly conclude that the thumbprint could only have been impressed on the lock at the time the crime was committed[.]" Miller, 289 N.C. at 5, 220 S.E.2d at 574. The court analyzed the evidence as follows:

> Defendant's thumbprint on the lock conclusively establishes that defendant was in the launderette *at some unspecified time*. Furthermore, we know defendant falsely stated he had *never* been in the building. There is no evidence whatsoever that defendant was *lawfully* in or around the launderette at any time. When the thumbprint evidence is considered under these attendant circumstances, the most compelling permissible inference arising from defendant's falsehood is that he broke into

> and entered the building on the night the crime was committed and left his thumbprint on the lock at that time. Otherwise, had his thumbprint been impressed at any other time and under lawful circumstances, he would have so stated when the potentially incriminating presence of his thumbprint was brought to his attention by the officers. This suffices to repel nonsuit and carry to the jury the question whether defendant's thumbprint on the lock could have been impressed only at the time the offense was committed. The weight to be accorded such evidence is a question for the jury to determine in light of all the surrounding facts and circumstances.

Miller, 289 N.C. at 6, 220 S.E.2d at 575 (emphasis in original); see also, State v. Tew, 234 N.C. 612, 68 S.E.2d 291 (1951)(defendant's fingerprints found on broken glass from the front door of a filling station was sufficient evidence to establish that defendant was present when the crime was committed and participated in the crime since the proprietor who personally attended her station did not know and had not seen defendant before the date of the crime).

Distinguishable from Scott and Bass, in the instant case, Defendant denied ever seeing the car or ever touching the car, yet Defendant's DNA was found on Ms. Yarmolinko's car, which was mere feet from her dead body. In this context, Defendant's DNA serves to identify him as present at the scene. Likewise here, Defendant's own statements that he never saw nor touched Ms. Yarmolenko's car, combined with his close proximity at the crime scene at the time of the murder was sufficient evidence to establish that his DNA could only have been left on her car at the time of the crime and that he participated in the crime. Miller,

289 N.C. at 6, 220 S.E.2d at 575; See also, State v. Foster, 282 N.C. 189, 192 S.E.2d 320 (1972)(evidence sufficient to survive nonsuit where defendant testified he had never been in the home where his fingerprint was found because combined with other evidence it established that he was present at the crime scene and participated in the crime).

The location of identifying evidence can also be significant evidence. Cross, 345 N.C. at 718, 483 S.E.2d at 435 (partial print found on rear door did not extend over back quarter panel, suggesting defendant left print as he was closing door). Similar to Cross, here the location of Defendant's DNA on the car is significant. Defendant's DNA was located on the outside pillar above the rear passenger side door, which would have been an ideal location for holding on to the car to push it over the embankment. It would have also been a logical place to hold on to the car while reaching into the back seat. It is significant that one of the murder weapons, the blue ribbon wrapped around Ms. Yarmolenko's neck, had been cut from a gift bag which was later located just inside the rear passenger door where Defendant's DNA had been left. His DNA profile could also not be excluded from the possibility of having contributed to the mixture of DNA found on the seat belt button of that same backseat.

In accord with Cross and Miller, this evidence was sufficient to show that Defendant was present and participated in the commission of the crime. The weight to be given any of this evidence was up to the jury to determine from all the facts and

circumstances. Miller, 289 N.C. at 6, 220 S.E.2d at 575.

Here the trial court needed only satisfy itself that evidence was sufficient to take the case to the jury; it did not have to concern itself with the weight to be given the evidence. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982). In the present case there is clearly more than "a reasonable inference of defendant's guilt." From the totality of the evidence presented and in the light most favorable to the State, the jury had substantial evidence from which it could reasonably conclude that Defendant was the perpetrator of this crime and that the State had established each essential element of first degree murder. The defendant's argument is without merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY REGARDING THE ELEMENTS NECESSARY FOR THE STATE TO PROVE DEFENDANT GUILTY OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT, AND ANY INSTRUCTIONAL ERROR INURED TO DEFENDANT'S BENEFIT

Defendant alleges that the trial court abused its discretion by failing to appropriately instruct the jury after the jury sent the trial court a note during deliberations, inquiring whether they were still to consider acting in concert. (See R p 27). Because Defendant failed to object the trial court's instructions, he has failed to preserve this issue for appellate review. Furthermore, Defendant bases his argument on what he contends the State argued before the jury in closing argument but because Defendant failed to have the closing arguments transcribed, he has failed to preserve this issue for review. Alternatively, because the State was

entitled to an acting in concert instruction, any error in the trial court's instructions inured to Defendant's benefit. The State was held to a higher standard of proving Defendant's guilt than the law required. Therefore, even if this Court reviews this alleged instructional error under the plain error standard, the trial court's instructions appropriately instructed the jury as to the elements necessary for the State to prove Defendant guilty of first degree murder beyond a reasonable doubt, and this claim is without merit.

A. Defendant has failed to Preserve This Issue for Appeal Because He Failed to Object to the Jury Instructions Given

Defendant alleges that the trial court failed to appropriately instruct the jury after the jury inquired about whether they were to consider acting in concert. After the jury sent a note inquiring as to whether they should consider acting in concert, the trial court elected to re-instruct the jury as to the law it had previously given. (T p 376). The trial court did so without objection from the defense. (T p 376, 382). Because Defendant failed to object when he had the opportunity to do so, this issue has been waived for purposes of appellate review. Where a defendant fails to object to the trial court's instructions at trial, he has failed to preserve the issue for appellate review. See N.C. R. App. P. 10(a)(2)(2012). This claim should be dismissed.

B. Defendant has Failed to Preserve this Issue for Appeal Because He Failed to Request that the Closing Arguments Be Transcribed And This Court Cannot Review The Premise of His Contention From this Record

Defendant's claim is predicated upon his contention that the State improperly argued a theory of acting in concert to the jury and that thereafter the trial court erred by failing to respond to the jury's question regarding the acting in concert theory. (Defendant-Appellant Brief, pp 19, 24, 27). However, because Defendant failed to have the closing arguments of counsel transcribed, it is impossible to tell from the record what the prosecution argued before the jury. As such, Defendant has failed to supply this Court with an adequate record upon which this Court could determine what was actually argued to the jury. See State v. Bellamy, 159 N.C. App. 143, 146, 582 S.E.2d 663, 666 (dismissing assignment of error because the record was insufficient for appellate review), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003); see also State v. Brogden, 329 N.C. 534, 545, 407 S.E.2d 158, 165 (1991) (holding that the defendant has the burden of providing the appellate court with an adequate record to determine whether jurors were improperly excused by peremptory challenges).

In appeals from the trial division, review is made exclusively from the Record on Appeal. N.C. R. App. P., Rule 9(a)(3)(i)(2012). The Record on Appeal must include "copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of the proceedings[.]" Id. (emphasis added). "It is the appellant's duty and responsibility to see that the record is in proper form and

complete[,]" State v. Alston, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983), and an "appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it." State v. Moore, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, disc. rev. denied, 315 N.C. 188, 337 S.E.2d 862 (1985). Defendant has not supplied the transcripts of the prosecution's argument and as such predicates his argument on an incomplete record.

C. Because Defendant Has Failed to Preserve the Issue For Appeal, This Court's Review is for Plain Error

Because Defendant has failed to object to the jury instructions given, this Court may only review the trial court's instructions for plain error. See State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). It is the rare case in which an improper instruction will justify reversal of a criminal conviction where no objection has been made in the trial court. Id. at 661, 300 S.E.2d at 378. The error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." State v. Collins, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

However, "[a] prerequisite to [the court] engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." State v. Torain, 316 N.C. 111, 116, 340 S.E. 2d 465, 468 (1986). Because the jury instructions were an accurate statement of the law as to the elements of first degree murder this claim should be denied. Furthermore, because the State was entitled to an acting in concert

theory which the trial court failed to give, any error in the jury instructions inured to Defendant's benefit and is not plain error.

D. The State Was Entitled to An Acting In Concert Instruction From the Evidence Presented and Any Error In the Instructions Inured to Defendant's Benefit

Defendant alleges that the trial court erred by failing to instruct the jury that they were not to consider acting in concert in determining Defendant's guilt. (Brief, p 26). From the evidence presented, the State was entitled to an acting in concert instruction. Consequently, any error in the trial court's instructions inured to Defendant's benefit.

The North Carolina Supreme Court's decision of State v. Brown, 327 N.C. 1, 23-24, 394 S.E.2d 434, 447-48 (1990), is directly on point. In Brown, the defense complained that the prosecution argued an acting in concert theory to the jury but that the trial court failed to instruct on an acting in concert theory. In Brown, the defendant claimed that he had specifically requested an instruction requiring the jury to find that defendant personally acted with premeditation and deliberation, rather than acting in concert, although the court found the record devoid of any such request. Brown, 327 N.C. at 23 fn 2, 394 S.E.2d at 447 fn 2. The arguments of counsel were transcribed in the Brown case, and from those arguments, the court found that the prosecution did argue an acting in concert theory. Brown, 327 N.C. at 24, 394 S.E.2d at 448. The court determined, however, that the absence of the acting in concert instruction "could only have inured to defendant's

benefit" explaining,

> [h]ad the trial court instructed the jury in accordance with the North Carolina Pattern Instruction on acting in concert – that if two persons act together with a common purpose to commit a crime, each is responsible for the acts of the other – defendant could have been convicted of murder on the basis of [the co-defendant's] acts.

Brown, 327 N.C. at 24, 394 S.E.2d at 448, citing N.C.P.I. Criminal 202.10. Furthermore, the court noted that the trial court's instructions "provided ample direction to the jury to consider only defendant's acts when determining his guilt or innocence on the murder charge." Brown, 327 N.C. at 24, 394 S.E.2d at 448.

Likewise here the fact that the trial court did not instruct the jury on acting in concert inured to Defendant's benefit as the application of this law would have allowed the jury to convict Defendant based upon the actions of another. Under the principle of acting in concert, a defendant

> may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Wilson, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988). It is not necessary that the State establish a verbal agreement between two people; rather, "[e]vidence of the existence of concerted action may come from other facts." State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

> It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary

> to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id.; see also, State v. Lovelace, 272 N.C. 496, 158 S.E. 2d 624 (1968)(acting in concert appropriate in conviction of possession of burglary tools where evidence showed two men acting together to unlawfully force entry into restaurant even though tools found in only one man's possession).

From the evidence here there was evidence to establish and it was reasonable for the jury to conclude that more than one perpetrator participated in this murder. The State presented evidence of injuries to Ms. Yarmolenko from which the jury could reasonably conclude that she was held down and assaulted by more than one perpetrator. The medical examiner identified injuries she sustained to the tops of her thighs which were consistent with pressure being applied from on top of her. (T pp 320-21). This physical evidence was sufficient to allow the jury to conclude that two perpetrators worked in concert to kill her -- one holding her down while another obtained and tied three ligatures around her neck. Three separate ligatures were used, and the evidence would support a conclusion that these ligatures were obtained from separate areas of the car, indicating more than one perpetrator working together. It is also significant that two of the ligatures wound tightly around her neck were tied with tight knots at the front of her neck while another, the bungee cord, was hooked in the back of her neck. The differences in the manner in which these ligatures were secured could indicate more than one perpetrator

participated in strangling her. The evidence could also support the conclusion that it would have required the effort of two people to push a sedan down the embankment in order to attempt to conceal the evidence of this crime. Finally, two sets of DNA were found in and on the car. In addition to Defendant's DNA found on the pillar above the back passenger door, Defendant's cousin's DNA was found inside the car on the front passenger side door. All of this evidence was sufficient to support an acting in concert theory. Consequently, the trial court erred in failing to instruct the jury on the theory of acting in concert. However, this error inured to the benefit of Defendant who should not now profit from the trial court's instructional error.

Notwithstanding the trial court's failure to give an acting in concert instruction, the trial court provided ample direction to the jury in considering only defendant's actions in determining his guilt. See Brown, 327 N.C. at 24, 394 S.E.2d at 448.

Here the trial court instructed the jury as follows:

> The Court further instructs you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

(T pp 363-64)(R pp 16-17).

Because the trial court failed to give the acting in concert instruction, the State was held to a higher standard of proving Defendant's guilt of first degree murder. This Court has noted that "a defendant may not be convicted of an offense on a theory of

his guilt different from that presented to the jury." State v. Smith, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117, modified and aff'd, 311 N.C. 145, 316 S.E.2d 75 (1984); see also, State v. Wilson, 345 N.C. 119, 478 S.E.2d 507 (1996). In accord with Smith and Wilson, where a trial court fails to instruct on an acting in concert theory, "[t]he only theory of the defendant's guilt submitted to the jury was that defendant actually committed every element of each of the offenses." Smith, 65 N.C. App. at 772, 310 S.E.2d at 117; Wilson, 345 N.C. at 124, 478 S.E.2d at 511.

Here, even though the trial court erred in failing to instruct the jury as to the applicable acting in concert standard, the trial court's instructions provided ample direction to the jury as to the State's burden of proving Defendant guilty of first degree murder. The State submitted evidence from which the jury could determine that Defendant was guilty of each essential element of first degree murder. Defendant, who was found in the immediate area of this murder, left his DNA on the outside of Ms. Yarmolenko's car which was found next to her dead body at the base of the embankment beside the Catawba River. Defendant claimed he never saw or touched the car, and that he never saw the victim, yet he was able to describe her height relative to his own when talking with investigators. There would have been no way of Defendant knowing how tall Ms. Yarmolenko was in comparison to himself unless he stood beside her. As the investigator confirmed, no news footage depicting Ms. Yarmolenko would have established her height relative to Defendant's. (T pp 197-98). The jury could reasonably infer

from Defendant's admission that he was in Ms. Yarmolenko's presence, when she was still alive and standing next to him. The physical evidence established Defendant's presence at the crime scene and participation in the murder. See Cross, 345 N.C. at 717, 483 S.E.2d at 435. The location of the DNA on the car also established that Defendant touched the car immediately adjacent to where a gift bag was located, the strap of which was cut to form a ligature that strangled Ms. Yarmolenko.

The evidence also supported the jury finding that Defendant acted after premeditation and deliberation. The process of gathering the ligatures from Ms. Yarmolenko and her car prior to the murder evidences premeditation and deliberation as does strangling Ms. Yarmolenko with three separate ligatures. Not only was there time and planning involved in acquiring the means of this murder – three separate ligatures - but also the physical act of strangulation is sufficient to establish premeditation and deliberation. Our Supreme Court has held that "[t]he jury may infer premeditation and deliberation from the circumstances of a killing, including that death was by strangulation." State v. Richardson, 328 N.C. 505, 513, 402 S.E.2d 401, 406 (1991). Indeed, strangulation is a slow, brutal death. See State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983) (finding all the evidence showed the defendant acted with premeditation and deliberation where the murder was "brutal and senseless" and where "[a]s with any victim of strangulation, death came slowly"), overruled on other grounds, State v. Johnson, 317 N.C. 193, 203,

344 S.E.2d 775, 781 (1986); see also, State v. Jones, 303 N.C. 500, 505, 279 S.E.2d 835, 838-9 (1981)("proof of premeditation and deliberation is also proof of intent to kill.")

Furthermore, a defendant's actions after a murder can support a finding of premeditation and deliberation. Here there was evidence from which the jury could determine that Defendant attempted to conceal the crime by pushing the car down the embankment in an attempt to submerge it in the Catawba River. Defendant's DNA was found on the pillar above the back driver's side door, a prime location for pushing the car down the embankment. The evidence showed the area was heavily overgrown with weeds and brush and reasonably could easily have hidden the dark blue car for some time. In fact, the car was not discovered until after 1:00 p.m. by passing jet skiers who happened to see it on the banks of the river. The evidence was sufficient to establish each essential element of first degree murder and that Defendant was the perpetrator.

Here the State did not present evidence of only Defendant's cousin's guilt and ask that the jury attribute guilt to Defendant based upon his cousin's actions and Defendant's presence. Instead, the State submitted a chain of evidence which in its totality established that Defendant was responsible for the murder of Ms. Yarmolenko.

The State's evidence succeeded only on the theory that Defendant himself committed the acts constituting first degree murder. After the jury asked the Court for clarification about

whether it should consider acting in concert, the trial court responded by re-instructing the jury as to the only theory it was allowed to consider in the absence of an acting in concert theory, that Defendant was responsible for every element of each of the charged offense. (T pp 379-82)(R pp 31-34). The Court made clear to the jury during its re-instructions that the only law to be applied was that which had been given them and which was being re-read to them.

> The law that the Court gives you is the law that you are to follow and to apply. That is the only law that you are to consider in response to your request as to what you are to consider.

(T p 378)(R p 30).

Consequently, even if Defendant were able to prove that the prosecution argued an acting in concert theory in closing statements which would have been inconsistent with the trial court's instruction, any inconsistency in the prosecution's argument was cured by the subsequent instructions of the court. It is well settled that a trial court's correct jury instructions on the law cure any misstatements of the law in a prosecutor's closing argument. See, e.g., State v. Price, 344 N.C. 583, 594, 476 S.E.2d 317, 323-24 (1996) ("If the alleged misstatement of law was made, it was cured by the trial court's correct jury instructions on the relevant law."); State v. Rose, 339 N.C. 172, 197, 451 S.E.2d 211, 225-26 (1994) (holding that trial court's correct jury instruction regarding definition of "reasonable doubt" cured any error in prosecutor's statement of the law in closing argument), cert.

denied, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995); State v. Gladden, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91 (holding that trial court's correct jury instruction regarding inconsistent statements cured any error in prosecutor's statement of the law in closing argument), cert. denied, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Therefore, even if the jury heard inconsistent statements regarding the applicability of the law regarding acting in concert in the prosecutor's closing argument, any inconsistency was remedied by the trial court's later jury instructions regarding the elements of the crime which the State was required to prove beyond a reasonable doubt.[2]

Defendant has failed to prove any error "so fundamental that it denied the defendant a fair trial" as he is required to do after failing to preserve this issue for appellate review. State v. Collins, 334 N.C. at 62, 431 S.E.2d at 193. In fact, any error in the jury instructions inured to Defendant's benefit. The evidence in the light most favorable to the State was sufficient to establish that Defendant was guilty of the first degree murder of Ms. Yarmolenko. This claim should be denied.

E. Harmless Error

The only error here was the failure of the trial court to instruct the jury on the theory of acting in concert which was supported by the evidence. The effect of the lack of such an

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[2] The jury was instructed on both first and second degree murder. (T pp 365-67, 379-82, R pp. 18-20, 31-34). The jury rejected second degree murder and found Defendant guilty of first degree murder. (R p 35)

instruction could only be beneficial to Defendant as it made greater the State's burden of proof in the case. State v. Brown, 327 N.C. at 24, 394 S.E.2d at 448 (holding absence of an instruction on acting in concert increased the State's burden of proof and therefore "could only have inured to defendant's benefit"). Consequently, any error in the trial court's instructions is harmless to Defendant.

Nonetheless, Defendant contends that trial court erred in failing to instruct the jury that they were not to consider acting in concert. If error, this error is harmless. However, our Courts have previously declined to review this type of instructional error for harmless error. Wilson, 345 N.C. at 123, 478 S.E.2d at 510-11 (reversing without harmless error review). Our courts have done so relying upon the United States Supreme Court decision of Presnell v. Georgia, 439 U.S. 14, 58 L. Ed. 2d 207 (1978) (per curiam), which has since been clarified by Mitchell v. Esparza, 540 U.S. 12, 17 n.2, 157 L. Ed. 2d 263, 270 n.2 (2003)(clarifying due process violation which was not reviewed for harmless error in, because the jury found the defendant guilty of an offense (1) for which he did not have notice and (2) which was never submitted to the jury). Unlike in Presnell, upon which our Supreme Court relied in determining Wilson, Defendant was on notice that the State might rely upon an acting in concert theory and no further notice beyond the short form murder indictment was necessary. State v. Glynn, 178 N.C. App. 689, 695-96, 632 S.E.2d 551, 556 (affirming first degree murder conviction pursuant to aiding and abetting theory

where short form murder indictment murder sufficient to apprise defendant of charges), appeal dismissed, cert. denied, 360 N.C. 651, 637 S.E.2d 180 (2006). Consequently, there is no due process violation issue which would prevent this Court from reviewing this instructional error for harmless error.

A trial court's failure to instruct on an element of an offense is subject to harmless error review. See Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35 (1999); see also Washington v. Recuenco, 548 U.S. 212, 165 L. Ed. 2d 466 (2006) (applying harmless error analysis in the context of Blakely error); State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (2006) (recognizing applicability of Neder and Recuenco), cert. denied, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007). The theory of acting in concert is not an element of the offense of first degree murder. State v. Westbrooks, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (holding that where acting in concert is not an element of an offense any allegation as to acting in concert in the indictment is surplusage). Consequently, where the trial court fails to instruct the jury on a specific theory supported by the evidence this Court should conduct harmless error review.

Instructional error is harmless beyond a reasonable doubt if there is overwhelming and uncontroverted evidence to support a finding of each element of the crime. Neder, 527 U.S. at 9, 144 L. Ed. 2d at 47. Pursuant Esparza, in which the Court clarified that harmless error review can apply to an error under Presnell, the same should be true where the trial court fails to instruct the

jury on a specific theory supported by the evidence.

Here the trial court failed to instruct the jury as to a specific theory supported by the evidence which was that Defendant acted in concert with his cousin to murder Ms. Yarmolenko. The State requested this instruction but the trial court denied the request. Any error then in failing to properly instruct the jury as to the theory of acting in concert inured to the benefit of Defendant. This error was harmless beyond a reasonable doubt as it held the State to prove Defendant's guilt at a higher burden. The State did so by establishing that Defendant had the opportunity and means to kill Ms. Yarmolenko, which he did after premeditation and deliberation. This allegation should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests the judgment of the trial court be affirmed.

Respectfully submitted this the 12th day of March, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by electronically mailing the same in PDF format to his counsel of record, using the following electronic address:

Mr. M. Gordon Widenhouse, Jr.
mgwidenhouse@rwf-law.com

This the 12th day of March 2012.

Electronically Submitted
Danielle Marquis Elder
Special Deputy Attorney General