

HEARSAY EXCEPTIONS—CASE PROBLEMS

QUESTION NO. 1. The defendant was charged with first degree murder. The State called Faye Puryear, the mother of the victim, to testify, regarding a conversation she shared with her daughter. Her daughter came over to her house crying and said to Ms. Puryear that the defendant had kicked her out of his house. Prior to making the statement, the witness' daughter drove from the defendant's house in Willow Springs, North Carolina (it's in Johnston County in case you don't know) to her mother's house in Raleigh. The defendant objected to this hearsay testimony. Despite the objection, the trial court admitted the statement. Did the trial court err in admitting this statement?

ANSWER: NO. This case involves the application of Rule 803(1) or the Present Sense Impression exception. "A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." This question focuses on what is "immediately thereafter." There is no "per se rule indicating what time interval is too long" and admissibility depends on the facts of the particular case. In *State v. Cummings*, 326 N. C. 298, 389 S. E. 2d 66 (1990), the victim's statement to her mother was determined to be made sufficiently close to the event to be admissible as a present sense impression.

QUESTION NO. 2. The defendant was on trial for murder. The State offered as evidence a tape recording of a 911 call made by the defendant's son immediately after hearing the gunshot and from the room in which the male victim lay dying. The contents of the tape reflected the following conversation:

911 Operator: Okay. Is he conscious?

Wright: I don't know. I don't know. He just fell over. He just fell over. I think he fell over. Mom shot.

911 Operator: So your mother did it?

Wright: Yeah.

911 Operator: When did this happen? How long ago?

Wright: A minute ago. I don't know. I heard it and I got up and I don't know. I don't know to touch him -- if I should touch him. I don't know.

911 Operator: Yeah. You were in the bed when it happened?

Wright: I was in the bedroom. Yeah. I wasn't -- I was in the room right next to 'em. Is there somebody on the way?

911 Operator: Yeah, they're all on the way and you say it's not bleeding right now?

Wright: I can't -- it looks -- it's not like its spurting.

911 Operator: Uh huh. And you don't know where she went for sure? You know she's not in the house.

Wright: No. I don't know. I don't know. I don't know. Oh God, Almighty. And my mom.

The trial court admitted this evidence over the defendant's objection that the statements were inadmissible hearsay. Did the trial court correctly overrule the objection and admit the evidence?

ANSWER: YES. This case involves the Excited Utterance exception created by Rule 803(2). An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In order for a statement to be an excited utterance, there must be "(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." The critical determination is whether the statement was made under conditions which demonstrate that the declarant lacked the opportunity to fabricate or contrive the statement. In this instance, the Court of Appeals concluded that the statements fell within the Excited Utterance exception. *State v. Wright*, 151 N. C. App. 493, 566 S. E. 2d 151 (2002) In another case, the Court of Appeals observed that "while the period of time between the event and the statement is without doubt a relevant factor, the element of time is not always material. The modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." *State v. Safrit*, 145 N. C. App. 541, 551 S. E. 2d 516 (2001).

QUESTION NO. 3. The defendant was on trial for the murder of his wife. The State called a day care worker to testify about statements that the defendant's two and a half year old daughter made at day care. The child made the statements in question while playing and without prompting or questioning. The defendant's daughter hit two female dolls together and told the worker that "Mommy's getting a spanking for biting, Mommy has boo-boos all over." The worker also indicated that the defendant's daughter said, "Mommy has boo-boos all over, mommy has red stuff all over." These statements were made six days after the child's mother was killed. Did the trial court properly admit these statements from the defendant's daughter?

ANSWER: YES. The Court of Appeals in *State v. Young*, ___ N. C. App. ___, 756 S. E. 2d 768 (2014), affirmed the trial court's admission of these statements as excited utterances. For the excited utterance exception to apply, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication. The rationale underlying the admissibility of an excited utterance is its inherent trustworthiness. Excited utterances are often made and admitted into evidence because they fall within a time frame that is close in proximity to the startling event. The stress and spontaneity upon which the exception is based are often present for longer periods of time in young children than in adults. Our State's appellate courts have thus extended the length of time that the excited utterance exception may apply when considering statements by children. In this instance, the

Court of Appeals held that the statements were made within the time for an excited utterance even with the six day delay.

QUESTION NO. 4. The defendant was on trial for murder. During the trial, the prosecutor called the victim's mother and asked her to read the February 27, 1992 entry in the victim's diary to the jury. The diary entry for February 27, 1992 was read to the jury. It said:

Charlie (the defendant) went off this morning. He wanted to take his break and I said, 'Please, let's catch up the dishes first,' and he got mad. When we finished the dishes, he wouldn't leave. I said, 'Act immature, why don't you? Why don't you try acting like an adult male?' He hit me in the side of the head and slapped me across the face, then took off. He came back a little later, didn't apologize, and wanted to use the vacuum. David changed the lock on my break. Late that night, he went off berserk, threw water, dishes, ashtrays, paper at me. Screamed he was going to kill me. Alan came to help mop and tried to hold him back. He jumped up in the car and broke the steering wheel adjuster. We filed a harassment charge. Waiting twenty-four hours.

Defendant objected on the grounds the diary entry was hearsay. The trial court overruled the objection and ruled that the diary entry was admissible under Rule 803 to show "the relationship of the parties." Did the trial court err by admitting the diary excerpt?

ANSWER: YES. This example involves a Statement of Then Existing Mental, Emotional or Physical Condition under Rule 803(3). That is "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, but not including a statement of memory or belief to prove the fact remembered or believed..." The diary contained no statements that asserted the victim's state of mind. Instead, they were "merely a recitation of facts which described various events." The "policy behind the state-of-mind hearsay exception is that there is fair necessity, for the lack of better evidence, for resorting to a person's own contemporary statements of his mental or physical condition and that such statements are more trustworthy than the declarant's in court testimony." The absence of statements of the declarant's state of mind justified exclusion of this evidence. *State v. Hardy*, 339 N. C. 207, 451 S. E. 2d 600 (1994).

QUESTION NO. 5. The defendant was on trial and charged with first degree murder. The victim's mother, Faye Puryear, testified about a conversation she had with her daughter, the alleged victim. In that conversation, the victim told her mother that she had taken out a child support warrant against the defendant and had sought advice from an attorney regarding obtaining custody of the children. The defendant objected to this evidence on the ground that it was hearsay. The Court overruled the objection and admitted this evidence. Did the trial court rule correctly?

ANSWER: YES. This case also involves the State of Mind Exception to the Hearsay Rule. "Evidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value." The victim's state of mind on the date that she disappeared was highly relevant to show the status of her relationship with the defendant and the likelihood that she would run off and leave her children with the defendant. *State v. Cummings*, 326 N. C. 298, 389 S. E. 2d 66 (1990).

QUESTION NO. 6. The defendant was on trial for rape. The State called as a witness the assistant director of nursing at the hospital where the victim was taken after the alleged assault. Frances Prevatte, assistant director of nursing, testified that on the morning of August 13, 1986 the victim told her that she was afraid of the defendant and requested that the defendant not be allowed near her. The defendant objected to this testimony on the ground that it was hearsay. The trial court overruled the objection and admitted the evidence. Was the trial judge correct?

ANSWER: YES. This case is a clearer example of a statement under the State of Mind Exception. The declarant's statements described fear that she was presently experiencing in the trauma room and were made only three hours after the alleged assault. The victim's state of mind in the trauma room was relevant to the issue of whether the sexual intercourse was committed by force and against her will. *State v. Locklear*, 320 N. C. 754, 360 S. E. 2d 682 (1987).

QUESTION NO. 7. The defendant was on trial for first degree murder. During the trial, the State offered as evidence a telephone message written by the victim's next-door neighbor, Sherri Elliott, to the victim's roommate. The victim, when he was unable to reach his roommate by telephone, called Elliott and left a message. Elliott reduced the following message to writing for the defendant's roommate:

Steve called and said that he was riding to Waynesville[,] North Carolina with his father-in-law. If he is not back by 5:00 call the Smyrna Police because something may have happened to him.

Sherri

The trial court admitted only the first sentence of this message into evidence over the defendant's objection. Did the trial court err by admitting that message?

ANSWER: NO. This evidence addresses another aspect of Rule 803(3) which includes a statement of the declarant's "intent, plan, motive, or design." These provisions refer to a statement of the declarant's then existing intent to do an act in the future. "Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party." The North Carolina Supreme Court has observed that "the sound basis for its admission is the exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention, when the intention is relevant per se and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind." This exception would not be applicable if the time lapse is so great as to make the statement too remote to be acceptably relevant. *State v. McElrath*, 322 N. C. 1, 366 S. E. 2d 442 (1988).

QUESTION NO. 8. The defendant was charged with involuntary manslaughter arising from a motor vehicle accident that occurred at approximately 10:00 p.m. Defendant's blood was tested one or two minutes after 11:00 p. m. at the major trauma area of the hospital emergency room. The defendant's blood was drawn pursuant to an emergency room doctor's orders as a part of routine emergency room treatment. A nurse, who testified, saw the defendant's blood being

drawn and later the nurse retrieved a copy of the lab report and took it to the defendant's bedside. The surgeon on call testified that he received the lab reports and it indicated that the defendant's blood alcohol level was .254. The doctor recorded the result in his admission notes that were part of the defendant's records at the hospital. The actual lab report could not be located for use at trial. Is the doctor's own notation admissible?

ANSWER: YES. This question raises an issue under the Business Records Exception created by Rule 803(6). The foundational elements of the Business Record Exception must be shown by "the testimony of the custodian or other qualified witness." Authentication of a business record is not undermined when the person who actually analyzed the blood in the laboratory was not present to testify. The term "other qualified witness" has been construed to mean a witness who is familiar with the business entries and the system under which they were made." In this instance, both the nurse and the doctor were qualified witnesses. *State v. Miller*, 80 N. C. App. 425, 342 S. E. 2d 553 (1986).

QUESTION NO. 9. The defendant was charged with first degree murder and robbery in connection with an incident at the Bishop Motel. The victim was the operator of the motel. Bhartsang Jadeja, the victim's brother, testified that the day after the stabbing he went to the Bishop Motel and checked the motel records to ascertain what, if anything, was missing. According to the motel's daily records, \$ 219.40 in receipts had been received since the last deposit of money received for the rental of rooms. Bhartsang Jadeja did not find any money in the motel office and no money was found on the body of the victim. Jadeja identified certain documents as the motel's daily records which indicated the number of rooms which had been rented and the amount of money received for each room. He further testified that these records were in the deceased's handwriting. Bhartsang Jadeja did not operate or work at the Bishop Motel. The defendant objected to the admission of the records from the Bishop Motel and the Court overruled the objection. Did the trial court err in admitting these records?

ANSWER: NO. Business records must be authenticated by a witness who is familiar with them and the system under which they were made. The authenticity of business records may also be established by circumstantial evidence. There is no requirement that the person who made the record authenticate it and the witness need not testify from personal knowledge about the particular record. *State v. Wilson*, 313 N. C. 516, 330 S. E. 2d 450 (1985).

QUESTION NO. 10. The defendant was on trial for rape and the victim's testimony was complicated by her difficulty identifying the location in the house where she was attacked and the car in which she was abducted. The victim testified that she suffered from "night blindness." The State offered the testimony of a medical assistant technician from the victim's ophthalmologist's office. The technician testified that she was the keeper and had the custody and control of the doctor's medical records, that they were made in the regular course of business and that they were made close to the time of the transaction indicated. The technician testified that the medical records disclosed that the victim had retinis pigmentosa or "night blindness." The defendant objected to the introduction of this medical opinion or diagnosis on the ground that it was hearsay. Did the trial court properly admit these records containing an opinion or diagnosis?

ANSWER: YES. Rule 803(6) specifically provides that “a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses” may be admitted. *State v. Galloway*, 304 N. C. 485, 284 S. E. 2d 509 (1981).

QUESTION NO. 11. The defendant, who was on trial for rape and attempted murder, sought to offer into evidence medical records detailing the victim’s medical history. In preparing the discharge summary, Dr. Clancy, who examined the victim the morning after the alleged attack, noted that the victim had a "psychiatric history including anti-social behavior, substance abuse, substance addiction, [and] uncooperativeness" and was "well-known to The Oaks [a psychiatric facility] for previous psychiatric history." When questioned, the doctor did not recall the source of this information. The doctor indicated that the victim’s mother provided some information and that he had access to a medical record from previous treatment. Did the trial court err by sustaining the State’s objection to the defendant’s offer of these medical records?

ANSWER: NO. Rule 803(6) provides that Business Records are admissible “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” “The simple fact that something qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial.” Trustworthiness is the foundation of the business record exception. When the trial court determines that the source of the information is, in fact, unreliable, the judge may exclude the statement as evidence for any purpose. Similarly, if the opinion is based solely on the unreliable information, then the opinion should not be admitted. *State v. Galloway*, 145 N. C. App. 555, 551 S. E. 2d 525 (2001).

QUESTION NO. 12. The defendant was on trial for first-degree rape and first-degree kidnapping. During the trial, SBI agent Troy Hamlin, a specialist in fiber and hair analysis, testified that he conducted a hair comparison on hairs taken from the victim's head and pubic area and hairs taken from defendant's pubic area. The examination revealed that a negroid pubic hair found in the pubic hair combings received from the victim after the rape was microscopically different from defendant's pubic hairs, and therefore the pubic hair in question "did not originate from defendant." The State objected to the defendant's request to have the report introduced into evidence and this objection was sustained. SBI agent Jeb Taub, a specialist in the analysis of bodily fluids, testified that he performed tests on a rape kit taken from the victim and on a blood sample taken from defendant. The tests disclosed that the semen found in the victim's panties was not attributable to defendant. The State also objected to the defendant's request to have Taub's report introduced into evidence and that objection was also sustained. Did the trial court err by sustaining these objections to exclude the reports as hearsay?

ANSWER: YES. This case involves the application of Rule 803(8) or the Public Records exception. It is critical that the defense was offering these records. Rule 803(8)(C) allows admission of “records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth.. (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law...” If the State offered these, the exception would not apply. *State v. Acklin*, 317 N. C. 677, 346 S. E. 2d 481 (1986).

QUESTION NO. 13. The defendant was on trial for first degree murder in a case that was the subject of considerable local controversy. Al Beaty, the assistant city manager for Winston-Salem, testified that after the first trial in this matter, he was asked by the city manager to do a review of the Winston-Salem Police Department's investigation of the Deborah Sykes murder. Beaty testified that he conducted this review by interviewing individuals who had information about the case, including persons employed by the Police Department, the District Attorney's office and the defendant's attorneys, and reading the transcript of the first trial. After conducting the review, Beaty testified that he prepared a report entitled, *Review of the Winston-Salem Police Department's Investigation of the Deborah B. Sykes Murder*. The report was released by the city manager's office. At the conclusion of Beaty's testimony, defendant's counsel moved to introduce the report and an exhibit from the report as evidence. The State's objection to defendant's request to introduce the report into evidence was sustained. Did the trial court err in sustaining the State's objection?

ANSWER: NO. The defense offered the Assistant City Manager's report as a Public Record under Rule 803(8)(C). Rule 803(8)(C) is limited to "factual findings resulting from an investigation made pursuant to authority granted by law." This investigation by the City officials does not fit that limitation. *State v. Hunt*, 339 N. C. 622, 457 S. E. 2d 276 (1994).

QUESTION NO. 14. In an assault with a deadly weapon with intent to kill inflicting serious injury case, the defendant attempted to elicit certain testimony from an SBI agent. The SBI agent had arrived at the scene several hours after the shooting occurred and interviewed an eyewitness. The SBI agent interviewed the eyewitness in the agent's state issued vehicle outside the police department. The agent testified on voir dire that the eyewitness stated the victim's car was "flying down the road" followed by an SUV. The driver jumped out of the SUV, ran up to the victim's car, and shot out the rear windshield and one of the rear side windows. Then the victim staggered out of the car. The eyewitness called 911 and tried to plug the victim's wounds. The eyewitness told the SBI agent that he asked the victim who did this and the victim said, "Bruce did it." The defendant was not named Bruce. The eyewitness indicated to the SBI agent that he did not know how many people were in the SUV -- maybe two or three. This eyewitness was not available to testify at the trial. Did the trial court err by sustaining the State's objection to the admission of the statement made by the now unavailable eyewitness to the SBI agent that was contained in the agent's official report of his investigation?

ANSWER: NO. This is also a case under the Public Records exception. Rule 803(8) limits the admission of such records when "the sources of the information or other circumstances indicate lack of trustworthiness." "Guarantees of trustworthiness are based on a consideration of the totality of the circumstances but only those that surround the making of the statement and that render the declarant particularly worthy of belief. In this situation, the Court of Appeals noted that "we cannot say the circumstances surrounding the witness' statement so minimized the risk of inaccuracy and imparted a sense of trustworthiness as to allow" the SBI agent to testify to the witness' statement. *State v. Little*, 191 N. C. App. 655, 664 S. E. 2d 432 (2008).

QUESTION NO. 15. The defendant was on trial for failure to register as a sex offender. During the presentation of the State's case, the following testimony was offered:

[PROSECUTOR]: (Hands Witness Exhibit) Now, I am going to show you another document that has previously been marked as State's Exhibit Number 12. Can you identify this document?

[DEPUTY BURGESS]: Yes that's the sex offender registration worksheet.

[PROSECUTOR]: As the custodian, was this a record that was made by the sheriff's department?

[DEPUTY BURGESS]: Yes, it was.

[PROSECUTOR]: Is it kept in the normal course of business by your office?

[DEPUTY BURGESS]: Yes, it is.

[PROSECUTOR]: Is it regular practice of the sheriff's department, in fact, to establish a sex offender worksheet when a person initially comes and registers?

[DEPUTY BURGESS]: Yes, sir. Every time.

The trial court admitted the document as a business record under *Rule 803(6)*. Was the trial court's ruling to admit the records as business records correct?

ANSWER: THE BETTER ANSWER APPEARS TO BE NO. This question deals with the interaction between the Business Records exception and the Public Records exception. The Official Comments to Rule 803 observe that "public records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6)."

Admittedly, the Court of Appeals has admitted police reports as business records and in the case that gave rise to this question, the Court of Appeals affirmed the trial court's ruling. *State v. Wise*, 178 N. C. App. 154, 630 S. E. 2d 732 (2006). However, there are indications in a Supreme Court decision that the analysis was incorrect.

In *State v. Forte*, 360 N. C. 427, 629 S. E. 2d 137 (2006), the State offered records of an SBI analyst who had left the SBI as business records. The former analyst's supervisor testified to the foundational elements for a business record. The Supreme Court noted that the records were business records and then indicated that the records had to be analyzed under Rule 803(8). Then the Supreme Court opined that "the SBI records in question also fall under the definition of public records set out in this rule and public records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6). As a result, we must determine whether these reports are admissible under Rule 803(8) before we can decide whether they are admissible as business records." In a 2008 case, the Court of Appeals followed the analysis in *Forte*. *State v. Little*, 191 N. C. App. 655, 664 S. E. 2d 432 (2008).

QUESTION NO. 16. The defendant was on trial for first degree murder. During the cross-examination of the defendant's expert psychologist, the following colloquy occurred:

Q. . . . Have you ever seen an article called, "An Expert Witness in Psychology and Psychiatry" written by David Foust and Jay Siskan?

A. No, I have not, but I've been examined about it before.

Q. Did anyone point out to you that that article contains reference that studies show that professional clinicians do not, in fact, make a more accurate clinical judgment than lay persons?

A. Yes, I think that quote was read to me yesterday.

Q. And, in fact, was the follow up to that quote read to you that professional psychologists perform no better than office secretaries in distinguishing visual motor deductions on normal versus brain damaged individuals on commonly employed screening tests?

A. No, that was not read to me.

The defendant's counsel objected and moved to strike this testimony. The trial court denied the motion. Was the trial court correct?

ANSWER: NO. This case involves the Learned Treatise Exception from Rule 803(18). Learned treatises involve "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice." The expert in this instance could not be impeached by reading a statement from an article that was not established as a learned treatise. *State v. Lovin*, 339 N. C. 695, 454 S. E. 2d 229 (1995).

QUESTION NO. 17. During the trial of a wrongful death case against a pharmacist who prescribed certain medications that allegedly lead to the plaintiff's decedent's death, the plaintiff's attorney questioned one of the plaintiff's own expert witnesses concerning the contraindications of certain medications. The witness testified that the Physician's Desk Reference or "PDR" was an accepted and reliable authority in the field of medicine. Plaintiff's counsel then moved to admit into evidence blow-ups of relevant excerpts from the PDR. The trial court sustained the defense's objection to those exhibits. Did the trial court err?

ANSWER: NO. Rule 803(18) specifically provides that "if admitted, the statements may be read into evidence but may not be received as exhibits." *Ferguson v. Williams*, 101 N. C. App. 265, 399 S. E. 2d 389 (1991).

QUESTION NO. 18. During the trial of a criminal case, the defendant's attorney called a character witness and established that the witness was familiar with the reputation of the defendant in the community in which he lived for truthfulness. Then the defendant's attorney asked "what is the defendant's reputation for truthfulness?" The Assistant District Attorney loudly objected and contended that the witness' knowledge of the defendant's reputation must be based on statements by other people and is consequently hearsay. Should the trial court sustain this objection?

ANSWER: NO. Rule 803(21) creates an exception for "reputation of a person's character among his associates or in the community."

QUESTION NO. 19. The defendant was on trial and charged with selling a counterfeit controlled substance and being a habitual felon. The following testimony was elicited by the Assistant District Attorney from a detective:

Q: For how long have you worked in that area [Martin and Freeman Streets]?

A: I rode a beat in that area for approximately a year and a half back when I was on uniformed division and that's a strong period as far as trying to work for drugs. We have--I have probably been on at least three or four searches in that area alone since I have been in drugs and vice.

MR. MANNING: Objection.

THE COURT: It's not responsive, but I will allow it. Overruled at the same time.

Q: In your experience have you found that in Raleigh, in the area of Martin and Freeman Street, that not only crack cocaine is sold, but also things that are sold as crack cocaine but turn out not to be?

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: Yes.

Q: And are you aware of why Martin and Freeman Street has been targeted on those occasions by the police department?

A: Because it is an open air market for drugs.

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: Numerous complaints from citizens, normal patrols. There is a high percentage of drug arrests made in that area.

MR. MANNING: Objection.

THE COURT: Overruled.

Did the trial court err by overruling the defendant's objections to this evidence concerning the Martin Street and Freeman Street neighborhood?

ANSWER: YES. The general rule in North Carolina is that reputation evidence of a home or neighborhood is inadmissible hearsay. *State v. Williams*, 164 N. C. App. 638, 596 S. E. 2d 313 (2004).

QUESTION NO. 20. The defendant was on trial for first degree rape. When the victim was called to testify, the following exchange occurred:

Q. Will you please tell us your name?

A. (No response)

Q. Are you able to hear my question?

A. (No response)

Q. Can you understand what I'm trying to ask you?

A. (No response)

Q. Are you Virginia Vaughn Finney?

A. (No response)

THE COURT: Sheriff, take the jury to the jury room for just a moment, please.

(JURY OUT)

THE COURT: Ms. Finney. Ms. Finney, are you able to hear me? Answer up, yes or no. The jury is out of the courtroom now, Ms. Finney. I need to know from you, are you going to testify in this case, or not.

A. I do not wish to, to testify.

MR. ELLIS [PROSECUTOR]: May I ask a few questions in an attempt, Your Honor?

THE COURT: You may try.

Q. Ms. Finney, do you not wish to testify because you have problems recalling what happened to you.

A. Yes.

Q. I have a –

A. I've been threatened by the D.A. (Inaudible)

THE COURT: You've been threatened by whom?

A. The D.A., Corey Ellis. (Crying)

THE COURT: You've been threatened by the D.A.

A. Yes.

THE COURT: How has the D.A. threatened you, Ms. Finney?

A. I was doing good.

THE COURT: Do what?

A. I was doing a lot better.

THE COURT: You're going to have to slow down here.

A. (Crying) And I don't want to talk about it no more please. I just don't want to remember anything anymore. I don't want to go through this. I've been informed by the D.A. if I did not then I would be arrested, and I've been arrested at my work; and I lost my job and everything (inaudible). I was trying to go on with my life until Corey Ellis started aggravating me and my family constantly. They put me in a room, closed the door and would not let me out. I don't want to know anymore. I just want to get out of here. I do not wish to testify and I want to leave. And if I try to leave I'm arrested. I am harassed constantly. And I want out. (Crying)

THE COURT: Well, Mr. Ellis, I believe it's time to make a decision about whether or not you're going to have a witness.

A. (Crying) He's the cause of me losing my job, sir.

Q. Ms. Finney, were you served with a subpoena at your work?

A. Yes, sir, by you.

Q. And is it your belief that you lost your job because you got a subpoena at work?

A. Yes, sir, it is.

Q. Is that one of the reasons you're angry with me?

A. Part of it, because you aggravate me all the time. I don't wish to talk to you anymore.

Q. Can I ask you to look at what I've marked as State's Exhibit 10, ma'am. I marked this piece of paper as State's 10. Can you take a look at that and tell me if you've seen that before. I've laid it there on your knee, Ms. Finney, State's Exhibit 10, will you please take a look at it.

A. (No response)

Q. Is State's Exhibit 10 a written summation of what's happened to you?

A. (No response)

Q. Was State's Exhibit 10 written by you?

A. (No response)

MR. ELLIS: Well, Judge, I don't know that there's anything more I can do with this witness.

Later during the presentation of the State's case, the prosecutor apparently realized that Mrs. Finney was present in the courtroom. At the prosecutor's request, the trial court asked Mrs. Finney to come forward. The trial court then told her, "Mrs. Finney, I'm ordering you to come to the witness stand." Mrs. Finney responded, "When my lawyer is present I will come. My lawyer's not here." The trial court asked Mrs. Finney again to take the stand and she again informed the trial court that she would not testify without her lawyer. After the trial court ascertained that Mrs. Finney's lawyer had the flu, the trial court concluded that Mrs. Finney was unavailable to testify and admitted hearsay statements that the victim made to a detective. Did the trial court correctly determine that the victim was unavailable for refusing to testify?

ANSWER: NO. Rule 804(a)(2) provides that unavailability as a witness includes situations in which the declarant.... "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." In this instance, the Supreme Court concluded that the declarant never definitively refused to testify and certainly did not persist in a refusal to testify in the manner contemplated by Rule 804. The Supreme Court concluded that the trial court did not make a sufficient inquiry to determine whether the declarant would persist in refusing to testify. *State v. Finney*, 358 N. C. 79, 591 S. E. 2d 863 (2004).

QUESTION NO. 21. The defendant was on trial for first degree murder. A witness made statements to law enforcement officers concerning the crime. The witness later moved to Philadelphia. Prior to the trial, the State filed a petition pursuant to *N. C. Gen. Stat. 15A-813* to summons this witness to testify. An officer from the local police department went to Pennsylvania and went to the address that the officers had for this witness. At that address, the witness' mother told the officers that the witness had moved and she did not know her daughter's address or phone number. The officers searched the house and did not locate the witness. The defendant objected to the introduction of the witness' statement on the ground that the State had failed to establish that the witness was unavailable. The trial court overruled the defense's objection. Did the trial court err?

ANSWER: NO. Rule 804(a)(5) provides that "unavailability as a witness includes situations in which the declarant....(5) is absent from the hearing and the proponent of the statement has been unable to procure his attendance by process or other reasonable means." In this instance, the Supreme Court concluded that the trial court could conclude that the witness was absent from the trial and that the State had been unable to procure her presence by process or other means. *State v. Bowie*, 340 N. C. 199, 456 S. E. 2d 771 (1995).

QUESTION NO. 22. The defendant was on trial a second time for first degree murder. During the first trial, a witness testified for the defense in support of the defendant's alibi claim. In particular, the defendant contended at his first trial that he was with this witness on the night of the murder. Before the defendant's second trial, this witness was indicted as a co-defendant. The defendant's trial strategy at his second trial was to avoid connecting himself to his co-defendant. At the defendant's second trial, the State called the co-defendant to testify as a witness. Outside the presence of the jury, the witness took the stand, and when asked his name, he responded, "I refuse to answer any questions based on my Fifth Amendment right and the advice of my counsel." Upon being asked several more questions, this witness responded in the same manner. The prosecution then asked that the witness be declared an unavailable witness and asked that the court reporter be allowed to read his testimony from the first trial into the record. The trial judge found the witness to be an unavailable witness and under Rule 804(b)(1) permitted his testimony from the first trial to be read into evidence. Was the trial court's ruling correct?

ANSWER: YES. This case involves the application of the Former Testimony Exception of Rule 804(b)(1) which permits the admission of "testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered ...had an opportunity and similar motive to develop the testimony." The issue in this case is whether the defendant had an opportunity and similar motive to develop the declarant's testimony in the prior proceeding. The Supreme Court concluded in this case that although the defendant's trial strategy was different in the second trial, there was no showing that the defendant's motive to seek facts favorable to the defendant regarding the defendant's whereabouts at the time was the crime was different. In this case, the defendant was deemed to have had ample opportunity to develop the declarant's testimony. *State v. Hunt*, 339 N. C. 622, 457 S. E. 2d 276 (1995).

Under this exception, the witness must be unavailable. A witness is unavailable when "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." Rule 804(a)(1).

QUESTION NO. 23. The defendant was on trial for first degree murder. The State offered the testimony of a police officer who spoke with the victim at the emergency room. The victim had just undergone a procedure to drain fluids from his chest cavity and to re-inflate his lung. The victim told the officer several times that, "the defendant shot him, I'm dying" and that the defendant was mad at him because he had been out all day. At the time that this statement was made, the victim had been examined and treated by doctors who believed that the victim would recover and was in no imminent danger of dying. In fact, doctors and nurses had assured the victim that he was going to be alright. It was the doctor's opinion at the time that this statement was made that the victim's wound was not fatal and that he would recover. The defendant later developed a massive, uncontrolled infection and died eight days after the shooting. Did the trial court properly admit the victim's statements to the law enforcement officer?

ANSWER: YES. This question arises under the Dying Declaration Exception created by Rule 804(b)(2) or a "Statement Under Belief of Impending Death." Rule 804(b)(2) provides that "a statement made by a declarant while believing that his death is imminent, concerning the cause

or circumstances of what he believed to be his impending death.” The statements of the doctors that the decedent was in no danger of dying when the statements were made were relevant. However, the mental state that is decisive in determining whether an out of court statement qualifies as a dying declaration, of course, is that of the declarant and not his doctor. The trial court in this case found as fact after a voir dire hearing that “at the time the deceased made those statements or declarations to the officers the deceased in his own mind was conscious of approaching death and believed at the time that he was dying.” *State v. White*, 63 N. C. App. 734, 306 S. E. 2d 468 (1983). The Court of Appeals observed in this case that “what renders a dying declaration worthy of belief is not that the conviction of impending death was scientifically arrived at, but that it was sincerely and steadfastly held.”

QUESTION NO. 24. The defendant, who was on trial for murder, offered the statement of his co-defendant, Umar Malik. Malik had married the defendant’s sister and absconded to Pakistan prior to the trial. Malik gave a statement to police officers after his arrest that implicated himself in the victim’s murder. In particular, Malik told the officers that the deceased was calling his spouse and being vulgar with her. According to Malik’s statement, when the defendant and Malik confronted the deceased, the deceased pulled out a firearm and Malik knocked the gun from the deceased’s hands. Malik then contended that the deceased grabbed a ball bat and swung at him. Malik admitted grabbing the bat from the deceased and beating him with it. Malik told the officers that the defendant was in a vehicle nearby when the victim was beaten to death. After Malik made the statement, police officers questioned the defendant about that statement and the defendant responded, “That’s a lie.” Only one witness testified who was present during the alleged murder and that witness indicated that he could not see what occurred. At trial, the defendant offered Malik’s statement as a statement against penal interest. Did the trial court err by sustaining the State’s objection to the admission of that statement?

ANSWER: NO. This question involves the application of the Statement against Penal Interest Exception created by Rule 804(b)(3). That rule provides that “a statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability... that a reasonable man in his position would not have made the statement unless he believed it to be true” is admissible. However, “a statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.”

Admission of evidence under the provisions of Rule 804(b)(3) requires satisfying a two prong test. First, the statement must be against the declarant’s penal interest. Second, the trial judge must find that corroborating circumstances ensure the trustworthiness of the statement. To satisfy the first prong, the statement must actually subject the declarant to criminal liability and it must be such that the declarant would understand its damaging potential. To satisfy the second prong, there must be some other independent non-hearsay indication of trustworthiness. Factors to be considered in evaluating trustworthiness include spontaneity, relationship between the declarant and the accused, existence of corroborative evidence, whether or not the statement had been subsequently repudiated and whether or not the statement was in fact against the penal interests of the declarant.

In this case, there was no other corroborative evidence. The declarant and the defendant were friends and the declarant was married to the defendant’s sister. In addition, the statement seems

to attempt to establish a claim of self-defense. The trial court correctly sustained the objection. *State v. Choudhry*, 206 N. C. App. 418, 697 S. E. 2d 504 (2010).

QUESTION NO. 25. The defendant was on trial for first degree rape and other sex offenses against minor children. The defense gave both oral and written notice of its intention to offer hearsay statements of a deceased declarant on the first day of trial. The deceased declarant was a cousin of the alleged child victims and the statement described events involving the victims that could provide an innocent explanation for the injuries described by the State. A voir dire hearing was held a day or two later and the trial court held that the defense had failed to provide sufficient notice to the State to permit the introduction of this evidence. Was the trial court correct?

ANSWER: YES. This case involves the application of Rule 804(b)(5) which is one of the two Catch-All Exceptions to the Hearsay Rule. Both Rule 803(24) and Rule 804(b)(5) require the proponent of the statement to give “written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.” The notice requirement does not require a fixed amount of time and is usually viewed somewhat flexibly, in light of the policy of providing a party with a fair opportunity to meet the proffered evidence. *State v. Carrigan*, 161 N. C. App. 256, 589 S. E. 2d 134 (2003). In some North Carolina cases, notice given on the first day of trial has been deemed sufficient when the opposing party had previously been notified of the intent to offer the evidence. In this instance, the State had no notification of the defense’s intent to use these statement and no reason to prepare to meet it.

QUESTION NO. 26. At the defendant’s trial for murder, the defense called its investigator to testify to a statement given to him by the defendant’s girlfriend. The investigator testified in a voir dire hearing that the defendant’s girlfriend told him that she had a party in her home on the date of the alleged murder. According to the girlfriend’s statement to the investigator, she picked the defendant up between 7:00 and 8:00 p.m. and brought him to her house. The defendant, according to his girlfriend, remained at her house at a party that entire evening. As such, the defendant offered this evidence in support of an alibi defense. The State and the defendant stipulated that the defendant’s girlfriend was unavailable. Did the trial court properly exclude this evidence?

ANSWER: YES. This evidence was offered under the Catch-All Exception under Rule 804(b)(5). The Court first determined that the defendant’s girlfriend was unavailable. Then the Court applied a six part inquiry set out in *State v. Triplett*, 316 N. C. 1, 340 S. E. 2d 736 (1986). Part of that inquiry requires the Court to determine that the proffered evidence is “more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts.” In this instance, the evidence was not more probative than other available evidence that the defendant could secure through reasonable efforts. Other available witnesses, including the defendant’s girlfriend’s sister and other party goers, attended the gathering and could have served as alibi witnesses for the defendant. *State v. Ryals*, 179 N. C. App. 733, 635 S. E. 2d 470 (2006).

QUESTION NO. 27. At the defendant's trial for first degree murder, the State offered testimony concerning the victim's statements to Reverend Moore. The victim had known Moore for at least eight months and during that time her church attendance had increased. The victim called Reverend Moore and indicated to him that she was upset and needed to talk. Reverend Moore came to the victim's home. The victim recounted to Reverend Moore the defendant's sexual advance towards her earlier that evening. Reverend Moore then asked the victim if the defendant had a gun and the victim went to the defendant's room, retrieved his briefcase and opened it in the presence of Reverend Moore. The briefcase did not contain the defendant's gun. The defendant objected to the victim's statements to Reverend Moore on the ground that they lacked sufficient guarantees of trustworthiness. Did the trial court err in admitting this evidence?

ANSWER: NO. A statement offered under either of the Catch-All Exceptions must have equivalent circumstantial guarantees of trustworthiness similar to other hearsay exceptions in order to be admissible. In this instance, a pastor-parishioner relationship existed between the victim and Reverend Moore. That type of relationship is recognized as one attended by trust and confidence. There was evidence that the victim's motivations for speaking with Reverend Moore were concern for her safety and the need for advice as to how to deal with the defendant. *State v. Ali*, 329 N. C. 394, 407 S. E. 2d 183 (1991). This evidence has some similarity to the exception for Statements for Purposes of Medical Diagnosis or Treatment. In this instance, the trial court correctly determined that the evidence had sufficient guarantees of trustworthiness.

QUESTION NO. 28. The defendant was charged with two counts of first degree murder. The body of one of the victims was found in the crawl space of an abandoned house after a fire had been extinguished on the premises. The State's theory of the case was that the defendant and the victim were present at the house shortly before the fire and that the defendant started the fire in an effort to conceal the victim's body. At trial, the State called a city fire inspector to read into evidence a statement made to him by a homeless person who was present at the scene of the fire. The statement recited that:

There was a fire in the living room. There was clothing found in the area of the living room. I was in the hallway asleep upstairs. The smoke woke me up. I noticed a black male and a white female there this morning about day break. I stayed all night here. I am a smoker.

The homeless man could not be located by police officers at the time the trial was held. The State gave adequate notice of its intent to offer this evidence and the trial court admitted this evidence over the defendant's objection that it lacked sufficient indicia of trustworthiness. Did the trial court properly admit this evidence?

ANSWER: YES. In order to determine whether a statement offered under the Catch-All exceptions is trustworthy, the Court should consider (1) whether the declarant had personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. The trial court determined that the homeless person's statements contained sufficient indicia of reliability to be admissible. The homeless person had personal knowledge of the events and did not have any motivation to

tell anything other than the truth. There was no evidence that the homeless person had recanted. *State v. Chapman*, 342 N. C. 330, 464 S. E. 2d 661 (1995).

I heard this case on a Motion for Appropriate Relief and the defendant's counsel located the homeless person and called him as a witness. During the evidentiary hearing, the homeless man testified that he had been shown a line-up of photographs and that he identified someone other than the defendant as the black man at the abandoned house. At this hearing, the homeless person testified that the defendant was not the person he had seen at the abandoned house. Interestingly, the detective did not inform the prosecutors or defense counsel prior to trial that the line-up had been conducted.

QUESTION NO. 29. In a murder case, the State gave notice of its intention to offer a declarant's statement into evidence under Rule 804(b)(5). At a voir dire hearing two law enforcement officers testified that the declarant told them that he met the defendant four days after the murder and that he purchased drugs for the defendant over a three day period. The declarant told the officers that the defendant spent freely and gave him \$1,200 to \$1,500 to purchase cocaine and heroin. The declarant also indicated that the defendant gave him money in small amounts and also that he paid for cabs for the declarant's use in purchasing these drugs. The declarant could not be located to appear and testify at trial. Subpoenas were issued for the declarant and officers checked at motels in the area where the declarant usually lived. The declarant had previous convictions for robbery with a dangerous weapon, common law robbery and assault. Law enforcement officials were able to corroborate or verify much of the information that the declarant provided including the location where the defendant was staying, the declarant's description of the defendant and the fact that the defendant paid the declarant's hotel bills. Based on these facts, the trial court admitted these statements concluding that they had sufficient guarantees of trustworthiness. Did the trial court err by admitting these hearsay statements?

ANSWER: NO. Under the Catch-All exceptions, the statement must possess a reasonable probability of truthfulness or circumstantial guarantees of truthfulness. In evaluating such evidence, the trial court should consider factors including (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability. That list is not exclusive and courts have considered the existence of corroborating evidence and the degree to which the proffered testimony has elements of enumerated hearsay exceptions.

In this instance, to some extent, the declarant admitted the purchase and delivery of drugs and the statement resembled a statement against penal interest. The declarant had personal knowledge of the underlying events and his motivation to speak truthfully was supported by his admissions of criminal acts. There was no indication that the declarant recanted. The Court conceded that the declarant's unavailability based on his transient lifestyle weighed against admission of the statement. The Court also relied on the corroboration of the declarant's testimony by other evidence in the case. *State v. Nichols*, 321 N. C. 616, 365 S. E. 2d 561 (1988).

QUESTION NO. 30. The defendant was on trial for trafficking in heroin. The defendant gave notice to the State of his intent to offer as evidence two letters he claimed to have received after

his arrest. The letters were written by one Patrick Babatundi and signed either “Pat” or “Patty.” The author of the letters apologized to the defendant for “whatever has happened” and stated that “such product” is “mine.” No one other than the defendant testified about Mr. Babatundi. The defendant could not locate Patrick Babatundi to testify at his trial and a subpoena issued to his last known address was returned unserved. The trial court judge refused to permit the defendant to introduce these letters into evidence. Was the trial court’s ruling correct?

ANSWER: YES. This evidence was potentially admissible either under Rule 804(b)(3) or under the Catch-All Exception of Rule 804(b)(5). *State v. Agubata*, 92 N. C. App. 651, 375 S. E. 2d 702 (1989).

The declarant was unavailable because the defense was unable to procure his attendance by process. The question under Rule 804(b)(3) is whether corroborating circumstances clearly indicate the trustworthiness of this statement against penal interest. The only indication that the declarant existed were the defendant’s statements to that effect and no evidence was offered to show that Babatundi existed or lived at the house as defendant claimed. As such, the evidence was inadmissible under Rule 804(b)(3).

In determining the circumstantial guarantees of trustworthiness under the Catch-All exception, the same four factors apply. There are other factors relevant to the determination of whether a particular statement is sufficiently trustworthy which include the presence of corroborating evidence and the degree to which the particular statement has the elements of other exceptions to the hearsay rule. Here, the determinative factor is the lack of evidence confirming the existence of the declarant. Apart from the defendant’s claim, there was no other evidence to establish his existence.

As a final note, the North Carolina Supreme Court recently held that the trial court must make findings of fact and conclusions of law when ruling on an issue involving the application of the Catch-All hearsay exceptions. *State v. Sargeant*, 365 N. C. 58, 707 S. E. 2d 192 (2011).

Admitting evidence under the catch-all hearsay exception is error when the trial court fails to make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its discretion.